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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8
9 JESSE JOHNSON,

10 Plaintiff,

11 v.

12 DR. SHEHATA, M.D., et al.,

13 Defendants.

) CASE NO. 1:10-cv-02216 GSA PC

) ORDER DISMISSING THIS ACTION FOR
) FAILURE TO STATE A CLAIM UPON
) WHICH RELIEF COULD BE GRANTED

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15 **I. Procedural History**

16 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action
17 pursuant to 42 U.S.C. § 1983. Plaintiff has consented to magistrate judge jurisdiction pursuant to
18 28 U.S.C. § 636(c)(1). Pending before the Court is the April 11, 2011, first amended complaint filed
19 in response to the March 19, 2011, order dismissing the original complaint and granting Plaintiff
20 leave to file an amended complaint.

21 **II. Screening Requirement**

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

claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

III. Plaintiff’s Claims

Plaintiff, an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR) at Avenal State Prison, brings this civil rights action against defendant Dr. Shehata, M.D., the Chief Medical Officer North Kern State Prison (NKSP), and J. Clark Kelso, the federally appointed receiver for the CDCR medical system. The conduct at issue in this lawsuit occurred while Plaintiff was housed at NKSP. Plaintiff’s statement of claim relates to his medical care.

In the original complaint, Plaintiff alleged that he hurt his knee while housed at NKSP on July 31, 2008. Plaintiff was seen by Dr. Shehata, and asked Dr. Shehata for pain medication. Dr. Shehata told Plaintiff he would get the medication the next day. Dr. Shehata denied Plaintiff’s request for an “H-bandage.” Plaintiff alleges that his medication “never came.” On August 2, 2008, Plaintiff submitted a medical request and on August 26, 2008, Plaintiff received his medication.

In the order dismissing the original complaint, Plaintiff was advised that “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by demonstrating that

1 ‘failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and
2 wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately
3 indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir.
4 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997)
5 (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a purposeful act or
6 failure to respond to a prisoner’s pain or possible medical need, and harm caused by the
7 indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Where a prisoner is alleging a delay in
8 receiving medical treatment, the delay must have led to further harm in order for the prisoner to
9 make a claim of deliberate indifference to serious medical needs. McGuckin at 1060 (citing Shapely
10 v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)).

11 As to Dr. Shehata, the Court noted that although Plaintiff alleged that his medical treatment
12 was delayed, he failed to allege any specific conduct as to Dr. Shehata. The only conduct charged
13 to Dr. Shehata was that he treated Plaintiff. Plaintiff was advised that in order to state a claim
14 against Dr. Shehata, he must allege facts indicating that Dr. Shehata knew of and disregarded a
15 serious risk to Plaintiff’s health. Although Plaintiff alleged that his medication was delayed, he
16 failed to allege any facts indicating that Dr. Shehata was responsible for the delay.

17 In the first amended complaint, the Court finds that Plaintiff has failed to cure the defects
18 identified in the earlier order. Plaintiff alleges that in July of 2008, he suffered a serious knee injury
19 while at KVSP. (Am. Comp. ¶ IV.) On July 31, 2008, Plaintiff was seen by Dr. Shehata. Plaintiff
20 alleges that Dr. Shehata “failed to properly diagnose my condition and treat it accordingly.” (Id.)
21 Plaintiff alleges that “after several attempts at a second opinion,” Dr. Shehata conceded to an exam
22 by a staff radiologist.” The radiologist concluded that Plaintiff had a “narrowing of the
23 patellofemoral compartment and mild spruing of the tibial spines.” In Plaintiff’s view, this
24 constitutes “a clear indication that I did in fact injury my knee and I was never given any type of
25 support (knee brace, ace bandage medication, etc.) It is clear that the medical staff deliberately
26 ignored my numerous request although having the authority and the means to treat me in a
27 reasonable time.” (Id.) Plaintiff was subsequently transferred to another institution “where the
28 obvious lack of proper attention continued.” Plaintiff alleges that the failure to treat the condition

1 has resulted in further injury.

2 In sum, Plaintiff's allegations indicate that he was seen by Dr. Shehata once, on July 31,
3 2008. Dr. Shehata prescribed pain medication. Plaintiff did not receive his medication immediately
4 and on August 2, 2008, Plaintiff submitted a medical request. Plaintiff received his medication on
5 August 26, 2008. Dr. Shehata also referred Plaintiff to a radiologist. Plaintiff fails to allege any
6 facts indicating that any delay in seeing a radiologist was the fault of Dr. Shehata. Plaintiff fails to
7 allege facts indicating that Dr. Shehata's conduct injured Plaintiff. The facts alleged indicate that
8 Dr. Shehata prescribed pain medication and referred Plaintiff to a radiologist. Although Plaintiff
9 alleges that there was a delay in receiving his pain medication, there are no allegations indicating that
10 any such delay was the result of any conduct by Dr. Shehata. The gravamen of Plaintiff's complaint
11 is the quality of medical care in general that he has received since his injury in July of 2008. Plaintiff
12 alleges that he has been subjected to inadequate medical care in general, but fails to charge Dr.
13 Shehata with any conduct that states a colorable claim for deliberate indifference. The only specific
14 conduct charged to Dr. Shehata is that he saw Plaintiff on July 31, 2008, that he prescribed pain
15 medication, and that he referred Plaintiff to a radiologist. There is no other conduct charged to Dr.
16 Shehata. Plaintiff's claims regarding Dr. Shehata should therefore be dismissed.¹

17 **IV. Conclusion and Order**

18 The Court finds that Plaintiff's first amended complaint states claims under section 1983
19 against Defendants Shehata and Kelso for deliberate indifference to his serious medical needs in
20 violation of the Eighth Amendment. Plaintiff has filed a first amended complaint, but has not cured
21 the deficiencies previously identified by the Court. Accordingly, the Court orders that further leave
22 to amend not be granted, and this action be dismissed for failure to state a claim upon which relief
23 could be granted. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (pro se litigant must be given
24 leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint
25 could not be cured by amendment). See Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.
26 1992)(dismissal with prejudice upheld where court had instructed plaintiff regarding deficiencies in
27

28 ¹As to Defendant J. Clark Kelso, Plaintiff fails to allege any conduct, and fails to refer to him in his
statement of claim. Defendant Kelso should therefore be dismissed.

1 prior order dismissing claim with leave to amend).

2 Accordingly, IT IS HEREBY ORDERED that this action is dismissed for failure to state a
3 claim upon which relief can be granted, and that this action count as a strike under 28 U.S.C. §
4 1915(g). The Clerk is directed to close this case.

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6 IT IS SO ORDERED.

7 **Dated: April 14, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE