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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH PEARSON,

Plaintiff,

v.

JAMES A. YATES, et al.,

Defendants.

CASE NO. 1:11-CV-00072-DLB PC

ORDER DISMISSING ACTION FOR
FAILURE TO STATE A CLAIM

(DOC. 6)

Screening Order

I. Background

Plaintiff Kenneth Pearson (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initiated this action by filing his complaint on January 13, 2011. Doc. 1. On August 3, 2011, the Court screened Plaintiff’s complaint and dismissed it for failure to state a claim with leave to amend. Doc. 4. On September 2, 2011, Plaintiff filed his first amended complaint. Doc. 6.

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

1 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
2 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
3 1915(e)(2)(B)(ii).

4 A complaint must contain “a short and plain statement of the claim showing that the
5 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
6 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
7 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
8 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
9 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
10 *Twombly*, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are
11 not. *Id.*

12 **II. Summary of First Amended Complaint**

13 Plaintiff is currently incarcerated at the Correctional Training Facility in Soledad,
14 California. The events giving rise to this action occurred while Plaintiff was incarcerated at
15 Pleasant Valley State Prison (“PVSP”) in Coalinga, California. Plaintiff names the following as
16 Defendants: warden James A. Yates; chief medical officer Felix Igbiosa; physician’s assistant
17 Randolph Wilson; registered nurse M. Griffith; health care appeals coordinators Nesbitt and
18 Martinez; John Doe 1, a medical doctor; and John Does 2 through 5, primary care office
19 assistants.

20 Plaintiff alleges the following: In August 2008, Plaintiff was diagnosed with a cocci
21 infection (valley fever). Between November 2009 and March 2010, Plaintiff suffered numerous
22 complications from the cocci infection, including pneumonia and bronchitis. Plaintiff claims that
23 more than 900 prisoners and 30 staff members have contracted valley fever at PVSP and that
24 over a dozen prisoners and one staff member have died from the disease.

25 On March 5, 2010, Plaintiff began suffering pain and swelling in his lower back. Plaintiff
26 met with Defendant Wilson on March 15, 2010, for a regularly scheduled follow-up visit
27 regarding his cocci infection. Plaintiff complained of his back pain, which had become severe
28 and disabling. He also complained of the swelling. Defendant Wilson did not diagnose the

1 pain or swelling. Defendant Wilson noted occasional back pain and promised to refer Plaintiff to
2 Correctional Treatment Center (CTC), and prescribe pain medication. Defendant Wilson did not
3 refer Plaintiff or prescribe medication.

4 On March 26, 2010, Plaintiff submitted a Health Care Services Request Form CDC 7362,
5 complaining of back pain. On March 29, 2010, Plaintiff submitted a second CDC 7362,
6 complaining of extreme pain that inhibited his ability to sleep, eat or walk. Plaintiff had been
7 referred to CTC for x-rays by Defendant Wilson, but Plaintiff had not been seen by anyone.

8 On March 29, 2010, Defendant Griffith received the first CDC 7362. On March 30,
9 2010, Defendant Griffith responded to the second CDC 7362 by scheduling Plaintiff for the MD
10 line that same day. That evening, Plaintiff was seen by Defendants Wilson and Doe 1, who
11 ordered an x-ray, prescribed capsaicin, a topical cream for arthritis, and methcarbamol, a sedative
12 for musculoskeletal pain. They also referred Plaintiff to the MD line in 30 days. Plaintiff
13 received no pain relief from the cream or medication.

14 Plaintiff filed a CDC 602 inmate appeal on April 5, 2010, and a third CDC 7362 on April
15 8, 2010. On April 12, 2010, Defendant Griffith saw Plaintiff, noted a 15 by 10 centimeter
16 growth over Plaintiff's spinal column, and scheduled an urgent MD line appointment within 24
17 hours. Plaintiff never received the appointment.

18 On April 18, 2010, Plaintiff filed a second CDC 602, complaining of never receiving his
19 MD line appointment. He also filed another CDC 7362, complaining that the swelling had
20 grown larger and that he had not seen the doctor. On April 19, 2010, Plaintiff was seen by
21 Defendant Griffith who noted a 4 by 5 inch swollen area on his back, and sharp pain. Defendant
22 Griffith scheduled Plaintiff for a MD line appointment within 24 hours. Plaintiff did not receive
23 it.

24 On April 21, 2010, Plaintiff filed a third CDC 602 inmate appeal and another CDC 7362
25 form. Plaintiff also wrote letters to the Prison Law Office and to Clark Kelso asking for
26 assistance.

27 On April 23, 2010, Defendant Griffith saw Plaintiff and scheduled an urgent MD line
28 appointment. Plaintiff did not receive the appointment. Plaintiff filed another CDC 602 inmate

1 appeal complaining that he had not received the appointment.

2 On April 26, 2010, the Prison Law Office contacted a deputy attorney general asking that
3 Plaintiff's condition be reviewed. Plaintiff was seen on April 29, 2010, by Defendant Wilson,
4 who examined Plaintiff, prescribed Tylenol 3 for the pain, and transferred Plaintiff to Mercy
5 Medical Center. Plaintiff was treated at Mercy Medical Center for two and a half months for
6 disseminated cocci and related abscess.

7 Plaintiff contends a violation of the Eighth Amendment. Plaintiff seeks compensatory
8 and punitive damages, full medical coverage for life, injunctive relief and fees and costs of suit.

9 **III. Analysis**

10 The Eighth Amendment prohibits cruel and unusual punishment. "The Constitution does
11 not mandate comfortable prisons." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation and
12 citation omitted). A prisoner's claim of inadequate medical care does not rise to the level of an
13 Eighth Amendment violation unless (1) "the prison official deprived the prisoner of the 'minimal
14 civilized measure of life's necessities,'" and (2) "the prison official 'acted with deliberate
15 indifference in doing so.'" *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting
16 *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). The deliberate
17 indifference standard involves an objective and a subjective prong. First, the alleged deprivation
18 must be, in objective terms, "sufficiently serious . . ." *Farmer*, 511 U.S. at 834 (citing *Wilson v.*
19 *Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and disregard[]
20 an excessive risk to inmate health or safety . . ." *Id.* at 837.

21 "Deliberate indifference is a high legal standard." *Toguchi*, 391 F.3d at 1060. "Under
22 this standard, the prison official must not only 'be aware of the facts from which the inference
23 could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the
24 inference.'" *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). "If a prison official should have
25 been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no
26 matter how severe the risk.'" *Id.* (quoting *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175,
27 1188 (9th Cir. 2002)).

28 As with his original complaint, Plaintiff contends that Defendants Wilson and Doe 1

1 showed deliberate indifference by failing to adequately examine him and conduct tests. Amend.
2 Compl. 11.¹ Plaintiff fails to state a § 1983 claim. Plaintiff’s claims of an inadequate
3 examination amount to negligence and do not rise to the level of deliberate indifference. “[A]
4 complaint that a physician has been negligent in diagnosing or treating a medical condition does
5 not state a valid claim of medical mistreatment under the Eighth Amendment.” *Estelle v.*
6 *Gamble*, 429 U.S. 97, 106 (1976) (“Medical malpractice does not become a constitutional
7 violation merely because the victim is a prisoner.”); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
8 2006) (holding that isolated occurrences of neglect do not constitute deliberate indifference to
9 serious medical needs).

10 Plaintiff again contends that Defendants Wilson and Doe 1 were deliberately indifferent
11 for failing to provide any pain medication between March 15 to March 30, and April 10 to April
12 29, 2010, and for failing to provide adequate pain medication between March 30 and April 9,
13 2010. Amend. Compl. 12. Plaintiff fails to state a § 1983 claim. Based on Plaintiff’s allegations,
14 Plaintiff was referred for an x-ray and prescribed medications. Although the medications were
15 allegedly inadequate for his pain, Plaintiff’s allegations do not demonstrate that Defendants
16 Wilson and Doe 1 were deliberately indifferent. Again, Plaintiff’s claims amount to negligence,
17 not deliberate indifference.

18 Plaintiff next contends that Defendants Griffith and Does 2 through 5 demonstrated
19 deliberate indifference by failing to schedule him for the MD line on four occasions. Amend.
20 Compl. 12. As with his original complaint, Plaintiff fails to state a § 1983 claim. According to
21 Plaintiff’s amended claims, Defendant Griffith scheduled Plaintiff to be seen by a medical doctor
22 on four separate occasions. On one of those occasions, Plaintiff was seen by a medical doctor the
23 same day as the referral by Defendant Griffith. Defendant Griffith’s actions were reasonable
24 under the circumstances. Accordingly, Plaintiff fails to demonstrate that Defendant Griffith
25 disregarded an excessive risk of serious harm to Plaintiff. *Farmer*, 511 U.S. at 844-45.
26 Plaintiff’s amended pleading does not include any allegations against Defendants Does 2 through
27

28 ¹The Court uses the page numbering from the court docket.

1 5. As such, Plaintiff does not state a § 1983 claim against them.

2 Plaintiff further contends that Defendants Nesbitt and Martinez were deliberately
3 indifferent because they failed to implement and enforce an inmate medical appeals procedure
4 that would have made it possible to review Plaintiff's appeals in a timely manner. Amend.
5 Compl. 12. As with his original complaint, Plaintiff fails to state a § 1983 claim. "[A prison]
6 grievance procedure is a procedural right only, it does not confer any substantive right upon the
7 inmates." *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993) (citing *Azeez v. DeRobertis*, 568
8 F. Supp. 8, 10 (N.D. Ill. 1982)); *see also Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003)
9 (no liberty interest in processing of appeals because no entitlement to a specific grievance
10 procedure); *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001) (existence of grievance
11 procedure confers no liberty interest on prisoner); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.
12 1988). "Hence, it does not give rise to a protected liberty interest requiring the procedural
13 protections envisioned by the fourteenth amendment." *Azeez*, 568 F. Supp. at 10; *Spencer v.*
14 *Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986). Actions in reviewing a prisoner's administrative
15 appeal cannot serve as the basis for liability under a section 1983 action. Plaintiff's only
16 allegations against Defendants Nesbitt and Martinez relate to the administrative grievance
17 process and do not state a § 1983 claim. There are no other allegations that demonstrate these
18 Defendants knew of and disregarded an excessive risk of serious harm to Plaintiff.

19 Plaintiff claims that Defendants Igbinsa and Yates were deliberately indifferent by
20 failing to provide adequate health care, failing to hire and supervise adequate medical staff,
21 failing to implement adequate procedures for health care and failing to correct systemic
22 deficiencies in the medical care at PVSP. Amend. Compl. P. 13-14. Plaintiff again fails to state
23 a § 1983 complaint against Defendants Igbinsa and Yates based on their supervisory roles. The
24 term "supervisory liability," loosely and commonly used by both courts and litigants alike, is a
25 misnomer. *Iqbal*, 129 S. Ct. at 1949. "Government officials may not be held liable for the
26 unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Id.* at
27 1948. Rather, each government official, regardless of his or her title, is only liable for his or her
28 own misconduct.

