

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 GABRIEL CANO,

12 Plaintiff,

13 v.

14 SMITH, et al.,

15 Defendants.

Case No. 1:14-cv-01396-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO DISMISS AMENDED COMPLAINT WITH
PREJUDICE FOR FAILURE/INABILITY TO
STATE A CLAIM**

(Doc. 13)

30-DAY DEADLINE

16
17 **I. Findings**

18 **A. Background**

19 Plaintiff, Gabriel Cano, is a prisoner in the custody of the California Department of
20 Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding *pro se* and *in forma pauperis* in
21 this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint in this action
22 on September 8, 2014. (Doc. 1.) It was screened and dismissed with leave to amend. (Docs. 9,
23 10.) On October 8, 2014, Plaintiff filed the First Amended Complaint, which is before the Court
24 for screening. (Doc. 13.)

25 **B. Screening Requirement**

26 The Court is required to screen complaints brought by prisoners seeking relief against a
27 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
28

1 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
2 frivolous, malicious, fail to state a claim upon which relief may be granted, or that seek monetary
3 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2); 28 U.S.C.
4 § 1915(e)(2)(B)(i)-(iii).

5 **C. Summary of the First Amended Complaint**

6 Plaintiff complains of incidents that occurred at California State Prison - Corcoran ("CSP-
7 Cor") in Corcoran, California. Plaintiff names the following Defendants: Doctors Conall
8 McCabe, R. Gill, Jeffrey Wang; Teresa Macias; L.D. Zamora; and the CSP-Cor Pain Committee.
9 Plaintiff seeks monetary and injunctive relief.

10 Plaintiff alleges that he has a history of lower back pain and has been given the
11 prescription pain killer "Tramadol" by numerous physicians. Plaintiff complains of acts that
12 occurred from October 14, 2012 through October of 2013 wherein he was no longer allowed to
13 receive Tramadol, but was given Ibuprofen instead for his lower back pain.

14 Despite being given the applicable legal standards, Plaintiff has not stated any cognizable
15 claims such that this action should be dismissed.

16 **II. Analysis**

17 **A. Plaintiff's Claims for Relief**

18 Plaintiff grieves his inability to obtain his medication of choice, Tramadol, to relieve his
19 chronic back pain. Apparently, Plaintiff filed an inmate appeal regarding receiving Ibuprofen
20 instead of Tramadol for his back pain. Dr. Gill was the interviewer at the first level of his appeal
21 and failed to give Plaintiff Tramadol; Dr. McCabe reviewed the first level decision; Dr. Wang
22 implemented the policy under which Tramadol was no longer given for pain; and Zamora
23 reviewed Plaintiff's appeal at the third level.

24 **1. Eighth Amendment -- Medical Care**

25 As stated in the prior screening order, to maintain an Eighth Amendment claim based on
26 medical care in prison, a plaintiff must first "show a serious medical need by demonstrating that
27 failure to treat a prisoner's condition could result in further significant injury or the unnecessary
28 and wanton infliction of pain. Second, the plaintiff must show the defendants' response to the

1 need was deliberately indifferent.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012)
2 (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quotation marks omitted)).

3 The existence of a condition or injury that a reasonable doctor would find important and
4 worthy of comment or treatment, the presence of a medical condition that significantly affects an
5 individual’s daily activities, and the existence of chronic or substantial pain are indications of a
6 serious medical need. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (citing *McGuckin v.*
7 *Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc.*
8 *v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)) (quotation marks omitted); *Doty v.*
9 *County of Lassen*, 37 F.3d 540, 546 n.3 (9th Cir. 1994). For screening purposes, Plaintiff’s lower
10 back pain is accepted as a serious medical need.

11 Deliberate indifference is “a state of mind more blameworthy than negligence” and
12 “requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’” *Farmer*, 511
13 U.S. at 835 (quoting *Whitley*, 475 U.S. at 319). “Deliberate indifference is a high legal standard.”
14 *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir.2004). “Under this standard, the prison official
15 must not only ‘be aware of the facts from which the inference could be drawn that a substantial
16 risk of serious harm exists,’ but that person ‘must also draw the inference.’” *Id.* at 1057 (quoting
17 *Farmer*, 511 U.S. at 837). “‘If a prison official should have been aware of the risk, but was not,
18 then the official has not violated the Eighth Amendment, no matter how severe the risk.’” *Id.*
19 (quoting *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

20 Plaintiff has failed to allege anything more than a difference of opinion between him and
21 the prison medical staff regarding the proper, effective pain medication for his lower back pain.
22 This is insufficient to state a cognizable Eighth Amendment violation. *See Estelle v. Gamble*, 429
23 U.S. 97, 107 (1976).

24 **2. Inmate Appeals**

25 It appears that Plaintiff intends to grieve the actions of Dr. Gill, Dr. McCabe, Dr. Wang,
26 and L. Zamora for their involvement in the processing and reviewing of his 602 inmate appeals
27 related to his inability to receive Tramadol, or similar medication other than Ibuprofen for his
28 lower back pain.

1 As stated in the prior screening order, "[a prison] grievance procedure is a procedural right
2 only, it does not confer any substantive right upon the inmates." *Buckley v. Barlow*, 997 F.2d
3 494, 495 (8th Cir. 1993) (citing *Azeez v. DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982)); *see also*
4 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals
5 because no entitlement to a specific grievance procedure); *Massey v. Helman*, 259 F.3d 641, 647
6 (7th Cir. 2001) (existence of grievance procedure confers no liberty interest on prisoner); *Mann v.*
7 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988). "Hence, it does not give rise to a protected liberty
8 interest requiring the procedural protections envisioned by the Fourteenth Amendment." *Azeez v.*
9 *DeRobertis*, 568 F. Supp. at 10; *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986).

10 Actions in reviewing prisoner's administrative appeal generally cannot serve as the basis
11 for liability under a § 1983 action. *Buckley*, 997 F.2d at 495. Thus, since he has neither a liberty
12 interest, nor a substantive right in inmate appeals, Plaintiff fails, and is unable to prove the
13 elements of a constitutional violation purely for the processing and/or reviewing of his inmate
14 appeals.

15 However, as also stated in the prior screening order, Plaintiff might be able to state the
16 elements for a claim under the Eight Amendment for deliberate indifference to his serious
17 medical needs against those medical personnel who were involved in reviewing his inmate
18 appeals if Plaintiff was also able to state a claim against a defendant for deliberate indifference to
19 his serious medical needs in an appeal regarding that issue. The distinction in this case, as
20 discussed above, is that Plaintiff does not and cannot state a cognizable claim based on denial of
21 his medication of choice, Tramadol. Without a cognizable underlying Eighth Amendment claim,
22 the actions of reviewers of inmate appeals thereon are also not cognizable.

23 **3. Supervisory Liability**

24 Plaintiff alleges that both Defendants Dr. Wong and Zamora implemented the policy of
25 "no Tramadol for pain."

26 As also stated in the prior screening order, to state a claim for relief under section 1983
27 based on a theory of supervisory liability, Plaintiff must allege facts that would support a claim
28 that supervisory defendants either: personally participated in the alleged deprivation of

1 constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or
2 "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional rights'
3 and is 'the moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th
4 Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). While
5 Plaintiff alleges that both Dr. Wang and Zamora implemented the policy of "no Tramadol for
6 pain," this policy, as discussed above, does not amount to a violation of Plaintiff's Eighth
7 Amendment rights to support a claim of supervisory liability for its implementation.

8 Further, even if it amounted to an Eighth Amendment violation, Plaintiff's allegations that
9 Dr. Wang and Zamora implemented the policy are nothing more than "bare assertions . . .
10 amount[ing] to nothing more than a "formulaic recitation of the elements" of a constitutional
11 discrimination claim,' for the purposes of ruling on a motion to dismiss [and thus also for
12 screening purposes], are not entitled to an assumption of truth." *Moss*, 572 F.3d at 969 (quoting
13 *Iqbal*, 556 U.S. at 1951 (quoting *Twombly*, 550 U.S. at 555)). "Such allegations are not to be
14 discounted because they are 'unrealistic or nonsensical,' but rather because they do nothing more
15 than state a legal conclusion – even if that conclusion is cast in the form of a factual allegation."
16 *Id.* Thus, Plaintiff fails to state a cognizable claim against Dr. Wang or Zamora for the
17 implementation of the policy of "no Tramadol for pain."

18 **III. CONCLUSION**

19 Plaintiff's First Amended Complaint fails to state a cognizable claim against any of the
20 named Defendants. Given Plaintiff's persistence in attempting to state a causes of action that he
21 as previously been advised are not actionable, it appears futile to allow further amendment.

22 Accordingly, it is HEREBY RECOMMENDED that this entire action be dismissed with
23 prejudice and this dismissal should count as a strike for purposes of 28 U.S.C. §1915(g).

24 These Findings and Recommendations will be submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 30**
26 **days** after being served with these Findings and Recommendations, Plaintiff may file written
27 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
28 Findings and Recommendations." Plaintiff is advised that failure to file objections within the

1 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, __ F.3d __, __,
2 No. 11-17911, 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing *Baxter v. Sullivan*, 923
3 F.2d 1391, 1394 (9th Cir. 1991)).

4
5 IT IS SO ORDERED.

6 Dated: **December 11, 2014**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE