

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

SHANNON SORRELLS,)	Case No. 1:16-cv-00081-DAD-SAB (PC)
)	
Plaintiff,)	
)	
v.)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DEFENDANTS' MOTION FOR
HORTON, et. al.,)	SUMMARY JUDGMENT FOR FAILURE TO
Defendants.)	EXHAUST THE ADMINISTRATIVE REMEDIES
)	
)	[ECF No. 52]
)	
)	

Plaintiff Shannon Sorrells is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff declined magistrate judge jurisdiction, and this matter was therefore referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(1)(B) and Local Rule 302.

Currently before the Court is Defendants' motion for summary judgment based on Plaintiff's alleged failure to exhaust the administrative remedies, filed on July 14, 2017.

**I.
RELEVANT BACKGROUND**

This action is proceeding against Defendants Horton and Mehloff for deliberate indifference to a serious medical need in violation of the Fourteenth Amendment.

On March 13, 2017, Defendant Mehloff waived filing an answer.

On March 14, 2017, the Court issued the discovery and scheduling order.

1 On May 23, 2017, Defendant Horton filed an answer to the complaint.

2 On May 26, 2017, the Court extended the deadline to file an exhaustion motion for summary
3 judgment to July 14, 2017, and extended all other deadlines and provisions to both Defendants.

4 **II.**

5 **LEGAL STANDARD**

6 **A. Statutory Exhaustion Requirement**

7 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such
8 administrative remedies as are available” before commencing a suit challenging prison conditions.”
9 42 U.S.C. § 1997e(a); see Ross v. Blake, ___ U.S. ___ 136 S.Ct. 1850 (June 6, 2016) (“An inmate need
10 exhaust only such administrative remedies that are ‘available.’”). Exhaustion is mandatory unless
11 unavailable. “The obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains
12 ‘available.’ Once that is no longer the case, then there are no ‘remedies ... available,’ and the prisoner
13 need not further pursue the grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis
14 in original) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

15 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter v.
16 Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by the
17 prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and
18 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing
19 Porter, 534 U.S. at 524).

20 The failure to exhaust is an affirmative defense, and the defendants bear the burden of raising
21 and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino, 747 F.3d at 1166. “In the rare
22 event that a failure to exhaust is clear from the face of the complaint, a defendant may move for
23 dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the defendants must produce
24 evidence proving the failure to exhaust, and they are entitled to summary judgment under Rule 56 only
25 if the undisputed evidence, viewed in the light most favorable to the plaintiff, shows he failed to
26 exhaust. Id.

27 ///

28 ///

1 “An inmate is required to exhaust only available remedies.” Albino, 747 F.3d at 1171 (citing
2 Booth v. Churner, 532 U.S. 731, 736 (2001)). “To be available, a remedy must be available ‘as a
3 practical matter’; it must be ‘capable of use; at hand.’” Albino, 747 F.3d at 1171 (quoting Brown v.
4 Valoff, 422 F.3d 926, 937 (9th Cir. 2005)). In Ross v. Blake, the Court set forth the following three
5 examples of when the administrative remedies are not available: (1) the “administrative procedure ...
6 operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to
7 aggrieved inmates;” (2) the “administrative scheme ... [is] so opaque that it becomes, practically
8 speaking, incapable of use ... to that no ordinary prisoner can make sense of what it demands; and (3)
9 “prison administrators thwart inmates from taking advantage of a grievance process through
10 machination, misrepresentation, or intimidation.” Ross v. Blake, 136 S.Ct. 1850, 1859-60 (2006)
11 (citations omitted). In addition, when an inmate’s administrative grievance is improperly rejected on
12 procedural grounds, exhaustion may be excused as effectively unavailable. Sapp v. Kimbrell, 623
13 F.3d 813, 823 (9th Cir. 2010); see also Nunez v. Duncan, 591 F.3d 1217, 1224-1226 (9th Cir. 2010)
14 (warden’s mistake rendered prisoner’s administrative remedies “effectively unavailable”); Brown v.
15 Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required to proceed to third level where appeal
16 granted at second level and no further relief was available).

17 **B. Summary Judgment Standard**

18 Any party may move for summary judgment, and the Court shall grant summary judgment if
19 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
20 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Albino, 747 F.3d at
21 1166; Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position,
22 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of
23 materials in the record, including but not limited to depositions, documents, declarations, or discovery;
24 or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or
25 that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.
26 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to
27 by the parties, although it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco

28 ///

1 Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609
2 F.3d 1011, 1017 (9th Cir. 2010).

3 Defendant bears the burden of proof in moving for summary judgment for failure to exhaust,
4 Albino, 747 F.3d at 1166, and they must “prove that there was an available administrative remedy, and
5 that the prisoner did not exhaust that available remedy,” id. at 1172. If the defendants carry their
6 burden, the burden of production shifts to the plaintiff “to come forward with evidence showing that
7 there is something in his particular case that made the existing and generally available administrative
8 remedies effectively unavailable to him.” Id. “If the undisputed evidence viewed in the light most
9 favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment
10 under Rule 56.” Id. at 1166. However, “[i]f material facts are disputed, summary judgment should be
11 denied, and the district judge rather than a jury should determine the facts.” Id.

12 III.

13 DISCUSSION

14 A. Fresno County Exhaustion Statutory Requirement

15 Fresno County Jail inmate may submit a grievance within 14 calendar days after the event or
16 decision or other condition of confinement they wish to challenge. Porter Decl. ¶ 3(a). Following
17 submission of a grievance, an investigating staff member responds to the grievance. Porter Decl. ¶
18 3(b). The inmate may appeal the initial grievance by submitting an “Inmate Grievance Appeal Form”
19 within 5 calendar days after receiving the grievance response. Porter Decl. ¶ 3(c). Once the bureau
20 commander issues a decision on the appeal, the grievance process has been exhausted. Porter Decl. ¶
21 3(d).

22 B. Allegations of First Amended Complaint

23 Plaintiff contends that contrary to the reports and knowledge of Captain Horton and Melhoff,
24 there was a lapse in his seizure medication from July 17, 2015 to July 21, 2015, resulting in a seizure
25 on July 21, 2015.

26 ///

27 ///

28 ///

1 **C. Statement of Undisputed Facts**

2 1. Plaintiff was incarcerated in the Fresno County Jail when he filed this lawsuit on April
3 6, 2016. (Compl. at p. 1, ECF No. 1; App. Application Proceed In Forma Pauperis, at p. 1, ECF No.
4 2.)

5 2. Plaintiff’s sole claim is a Fourteenth Amendment claim of deliberate indifference
6 against Defendants Horton and Melhoff based on allegations that there was a lapse in Plaintiff’s
7 seizure medication from July 17, 2015 to July 21, 2015, resulting in a seizure on July 21, 2015.
8 (Order, ECF No. 22 at 4:24-26, 5:1-5, 7:16-18); Order Adopting Findings and Recommendations
9 (ECF No. 33 at 2:19-23.)

10 3. Fresno County Jail inmates like Plaintiff had during 2015 an administrative review
11 process available to them pursuant to which they could submit a grievance within 14 calendar days of
12 the event, decision, or incident they wished to grieve. (1st Amd. Compl. at p. 4; Porter Decl., ¶¶ 4-5.)

13 **D. Findings on Defendants’ Motion**

14 As an initial matter, Plaintiff admits that an administrative remedy process exists at Fresno
15 County Jail based on his contention that he grieved all of the facts set forth in the complaint.

16 Defendants submit evidence that during July-August 2015, Plaintiff submitted five separate
17 grievances. (Porter Decl., ¶ 6.) However, Defendants argue that none of the grievances presented
18 challenged the fact that Nurse Mehloff and Captain Horton were responsible for a lapse in his
19 medication from July 17, 2015 to July 21, 2015, which resulted in a seizure on July 21, 2015. (Porter
20 Decl., ¶ 6.)

21 In opposition, Plaintiff argues that the exhibits attached to his complaint clearly demonstrate
22 that he exhausted the administrative remedies by filing several grievances relating to the denial of
23 adequate medical treatment. Plaintiff also seeks a stay of the action in order to pursue an attorney to
24 assist him with this case.

25 Lieutenant Porter declares that he had “conducted a search of grievances by [Plaintiff]. During
26 July-August 2015, he submitted five grievances – on July 17 and August 6, 11, 24, and 30. He did not
27 allege in any of those grievances that he experienced a seizure on July 21, 2015 due to a lack of
28 seizure medications during July 17-21, 2015. He also did not properly exhaust the administrative

1 review process with respect to his August 30 grievance because he did not appeal the denial of that
2 grievance.” (Porter Decl. ¶ 6.) Notwithstanding Lieutenant Porter’s declaration, Defendants submit
3 no documentation of any inmate grievances filed by Plaintiff.

4 In his first amended complaint, Plaintiff contends that the reports by Defendants Melhoff and
5 Horton “reflect that from 07/23/15 to 07/29/15 there was a lapse” in medication which is a lie because
6 the lapse was from 07/17/15 to 07/21/15, which resulted in a seizure and fall on 07/21/15. (1st Amd.
7 Compl. at 13.) In his opposition, Plaintiff references several inmate grievances attached as exhibits to
8 his first amended complaint and argues that he has exhausted the administrative remedies. In his
9 opposition, Plaintiff submits that the original inmate grievances were submitted for review but not
10 returned to him. (Opp’n at 2; ECF No. 53.)

11 The exhaustion requirement was enacted “to reduce the quantity and improve the quality of
12 prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address
13 complaints internally before allowing the initiation of a federal case.” Porter, 534 U.S. at 524-25;
14 Cano v. Taylor, 739 F.3d 1214, 1219 (9th Cir. 2014); McKinney v. Carey, 311 F.3d 1198, 1200-1201
15 (9th Cir. 2002) (per curiam). Thus, “[t]he primary purpose of a grievance is to alert the prison to a
16 problem and facilitate its resolution, not to lay groundwork for litigation.” Griffin, 557 F.3d at 1120;
17 see also Jones, 549 U.S. at 219 (promotion of early notice to those who might later be sued not thought
18 to be one of the leading purposes of exhaustion requirement) (citing Johnson v. Johnson, 385 F.3d
19 503, 522 (5th Cir. 2004)). Thus, to satisfy the PLRA exhaustion requirement, a prisoner’s grievance
20 must “alert[] the prison to the nature of the wrong ... and provide sufficient information to allow
21 prison officials to take appropriate responsive measures. Reyes v. Smith, 810 F.3d 654, 658 (9th Cir.
22 2016) (citation and internal quotation omitted).

23 Here, on October 9, 2015, Defendant Captain J. Horton responded to grievance appeal
24 numbers 2015080221, 2015080063, and 201509125, which sustained in part the grievances based on
25 the following reasoning, in pertinent part:

26 ///

27 ///

28 ///

1 Your grievance is sustained in part and not sustained in part. I have reviewed your medical file
2 with H. Mehloff, SRN of Corizon Health.

3 On 7/2/15 you were prescribed Tylenol #3 by PA C. Horton (you have spondylosis). On
4 7/22/15 you were prescribed Tylenol #4 for an additional 15 days. On 7/23/15 you were
prescribed Gabapentin by Dr. Eldridge.

5 Your Gabapentin lapsed from July 23-29th, 2015 (6 day lapse). The reason for the lapse was
6 due to an approval process for shipment of the medication. This issue was rectified and should
7 not affect you/another inmate again according to Corizon Health. The lapse in medication did
not have any serious medical outcomes according to the review by H. Mehloff, SRN.

8 You were seen on 7/22/15 by a doctor and again on 7/23/15 by a doctor on the second floor
9 infirmary. You were seen on 8/17/15 at sick call by a RN. Pain medication and epileptic
10 medication can be one medication for both (dual purpose). You can be further education on
this issue via your next appointment/schedule with the nurse and/or doctor.

11 I inquired with Corizon Health as to a possible neurology appointment/referral as you indicated
12 that Dr. Eldridge indicated that he was going to refer you. We could find no record of the
13 referral and I have asked that it be reviewed by the medical director for his opinion (Dr.
Rounds). You should be seen next week (week of 10/12/15).

14 The reason for the delay in the appeals was due to multiple issues associated to my duties. I
15 have been working through some of your grievances during this time period as time allows. I
16 will strive to get you/others a better turnaround of your grievance appeals. Your appeals are
emailed to medical as well when we receive them so they can also start to address/view them
as they come in. . . .

17 (1st Amd. Compl. at 62.)

18 By the response to grievance appeal numbers 2015080221, 2015080063, and 201509125,
19 Defendant Horton clearly acknowledged that there was a lapse in Plaintiff's prescription for
20 Gabapentin from July 23-29, 2015 (6 days), due to an approval process for shipment of the
21 medication. (1st Amd. Compl. at 62.) Although the dates do not reflect the lapse in medication from
22 July 17-21, 2015, Plaintiff submits that the time frame reflected in the response is incorrect. (1st Amd.
23 Compl. at 13.) Accordingly, based on the response to grievance appeal numbers 2015080221,
24 2015080063, and 201509125, Defendants cannot argue that the facility was not on notice of Plaintiff's
25 claim that there was a lapse in his medication which led to medical injury. While the response noted
26 that the lapse in medication did not have any serious medical outcomes according to the review by
27 Defendant H. Mehloff- that is the issue to be determined on the merits in this case. Indeed, the
28

1 purportedly contradictory facts contained in appeal response are Defendants’ own reports of events,
2 and those “facts” cannot provide a basis for disregarding Plaintiff’s allegations because they are
3 contested as opposed to “established.” Sumner Peck Ranch, Inc. v. Bureau of Reclamation, 823
4 F.Supp. 715, 720 (E.D.Cal. 1993). Therefore, Defendants’ motion for summary judgment for failure
5 to exhaust the administrative remedies should be denied.

6 **IV.**

7 **RECOMMENDATION**

8 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants’ motion for
9 summary judgment for failure to exhaust the administrative remedies be denied.

10 This Findings and Recommendation will be submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
12 being served with this Findings and Recommendation, the parties may file written objections with the
13 Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
14 Recommendation.” The parties are advised that failure to file objections within the specified time may
15 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
16 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

17
18 IT IS SO ORDERED.

19 Dated: November 13, 2017



UNITED STATES MAGISTRATE JUDGE