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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES L. BROOKS,

Plaintiff,

No. CIV S-03-2343 JAM EFB P

vs.

EDWARD S. ALAMEIDA, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. This action proceeds on plaintiff’s October 23, 2006 second amended complaint against defendants Roche, Alameida, Runnels, and Hubbard (“defendants”) on plaintiff’s Eighth Amendment deliberate indifference claims. Plaintiff alleges (1) Roche, Runnels, and Alameida failed to develop and implement policies that would have entitled him to a ground floor cell and prevented him from falling down the stairs; (2) Roche denied his request for physical therapy or a transfer to an institution that offered physical therapy; and (3) Roche, Runnels, Hubbard, and Alameida interfered with his recovery by failing to allow him to exercise outside of his cell during a lockdown. Defendants move for summary judgment. For the reasons stated below, it is recommended that their motion be granted.

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1 **I. Undisputed Facts**

2 From February 1998 through October 2006, plaintiff was an inmate in the custody of the
3 the California Department of Corrections and Rehabilitation (“CDCR”) at High Desert State
4 Prison (“HDSP”) in Susanville, California. Defs.’ Mot. for Summ. J. (“Defs.’ MSJ”), Stmt. of
5 Undisputed Facts in Supp. Thereof (“SUF”) 1. At all times relevant, defendants Roche, Runnels,
6 Hubbard, and Alameida were employed by CDCR. SUF 2-7. Runnels was Warden at HDSP
7 and Alameida was Director of CDCR. SUF 4-5. Roche was the Chief Physician and Surgeon at
8 HDSP between 2002 and 2003, and Chief Medical Officer of HDSP from 2003 through 2007.
9 SUF 2; Defs.’ MSJ, Decl. of Roche ¶ 3. Hubbard was an Assistant Deputy Director at CDCR
10 from 2003 to 2005, and was the Acting Associate Director of CDCR in 2005. SUF 6-7.

11 On December 6, 2002, plaintiff had surgery to correct a condition called hammer toe.
12 SUF 9. The procedure involved removing tissue from plaintiff’s second toe on his right foot,
13 and inserting a metal rod into the toe to correct the condition. SUF 10.

14 On December 7, 2002, plaintiff was evaluated by Dr. Watson, a physician at HDSP.
15 SUF 11. After examining plaintiff, Dr. Watson ordered that plaintiff have crutches and a lower
16 bunk, and cleared plaintiff to the yard. SUF 12; Defs.’ MSJ, Ex. 4. Dr. Watson did not issue
17 instructions that plaintiff be housed in a ground floor cell; nor did plaintiff request a ground floor
18 cell from any medical staff. SUF 13-14. Plaintiff did not need a ground floor cell while
19 recovering from the surgery. SUF 45-47.

20 As Chief Physician and Surgeon, Roche did not participate in deciding whether an
21 inmate’s medical condition required an accommodation chrono. SUF 51-53. Further, Alameida
22 and Runnels always deferred to the treating physician’s professional judgment regarding whether
23 an inmates’s medical condition necessitated a ground floor cell. SUF 49-50.

24 CDCR and HDSP did not implement a policy that prescribed lower tier cells for inmates
25 based on specific medical conditions because it would be impractical, as one cannot anticipate
26 every medical condition or need and prescribe a particular, static, housing accommodation

1 without evaluating the patient on an individual basis. SUF 36. The policy was, therefore, to rely
2 on primary care physicians to evaluate each patient on a case-by-case basis, and prescribe the
3 appropriate treatment based within the ordinary standards of medical care in the community.
4 SUF 37. Primary care providers were expected to exercise their professional skill and judgment
5 to determine whether and what accommodation is medically indicated for any given patient.
6 SUF 38. Treating physicians could prescribe a lower tier cell housing for an inmate if the
7 inmate's condition required it. SUF 39. Temporary lower tier chronos were always prescribed
8 on a case-by-case basis. SUF 39. And a primary care provider could not issue an
9 accommodation chrono for a lower tier cell unless such treatment was medically indicated for an
10 inmate. SUF 41.

11 From December 7 to December 19, 2002, plaintiff resided in administrative segregation
12 in an upper tier cell, where he did not complain about his cell assignment to correctional or
13 medical staff. SUF 16-17, 20. On December 19, 2002, plaintiff was transferred to an upper tier
14 cell in general population. SUF 17-18.

15 Between December 19 and December 23, 2002, plaintiff did not fall when negotiating the
16 stairs to and from his cell. SUF 21. Plaintiff did not request assistance from correctional staff
17 when using the stairs. SUF 19.

18 On December 23, 2002, plaintiff fell down a flight of stairs. SUF 22. Plaintiff had not
19 been denied any requested medical care between his hammer toe surgery and his fall. SUF 15.
20 The fall left plaintiff unconscious and briefly paralyzed. SUF 22, 24. Plaintiff was transported
21 to Lassen Community Hospital in Susanville, and then airlifted to Redding Medical Center. SUF
22 22-25.

23 Physicians at Redding Medical Center discovered that plaintiff suffered no broken bones.
24 SUF 26. Plaintiff's paralysis dissipated after 18 hours, after which he was able to walk on his
25 own. SUF 26. Plaintiff was kept in Redding for observation and administered pain medication.
26 SUF 27.

1 Once plaintiff returned to HDSP, Dr. Rohlring cleared plaintiff for housing on the yard
2 after prescribing pain medication and issuing a chrono for a ground floor cell, a lower bunk, and
3 a wheelchair.¹ SUF 28. On December 27, 2002, Dr. Rohlring examined plaintiff. SUF 29. The
4 examination revealed that plaintiff had a spasm of the cervical spine and some weakness in his
5 left quadriceps that Dr. Rohlring determined was temporary. SUF 30. Dr. Rohlring concluded
6 that plaintiff suffered from a residual muscle spasm of the cervical spine and weakness in his left
7 leg. SUF 32.

8 Following the examination, Dr. Rohlring recommended that plaintiff walk as much as
9 possible to gain strength in his back, neck, legs, and arms, and advised plaintiff to use warm
10 towel compresses to relax the muscles in his neck and back. SUF 33. In addition, Dr. Rohlring
11 recommended an exercise program for plaintiff to follow. SUF 33.

12 According to Dr. Rohlring's medical opinion, plaintiff's injuries did not require physical
13 therapy or a transfer to an institution that offered physical therapy. SUF 34.

14 HDSP was on lockdown from June 2003 to June 2005 because of violence between black
15 and white inmates. SUF 55. In January 2005, plaintiff filed an inmate grievance, requesting
16 access outside his cell to walk. SUF 57. Dr. Rohlring and Dr. Roche responded to plaintiff's
17 appeal at the first and second levels. SUF 58. Despite the lockdown, plaintiff was able to walk
18 in place, jog in place, and perform calisthenics and muscle strengthening exercises. SUF 60.
19 Plaintiff eventually received physical therapy during the lockdown. SUF 59. Plaintiff gradually
20 improved his strength by performing Dr. Rohlring's prescribed exercises in his cell. SUF 61.

21 Defendants Alameida, Hubbard, and Runnels were not aware that plaintiff required
22 exercise as part of a medically prescribed treatment plan. SUF 62. They were never aware of
23 whether the lockdown prevented plaintiff from performing medically-prescribed exercises. SUF
24 63. And they never received any complaints from plaintiff regarding a lockdown or its impact

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26 ¹ Dr. Rohlring was named as a defendant in this lawsuit, but the court granted summary
judgment in his favor on March 26, 2009. Dckt. Nos. 142, 147.

1 on plaintiff's health or safety. SUF 64.

2 **II. Summary Judgment Standards**

3 Summary judgment is appropriate when there is "no genuine dispute as to any material
4 fact and [] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

5 Summary judgment avoids unnecessary trials in cases in which the parties do not dispute the
6 facts relevant to the determination of the issues in the case, or in which there is insufficient
7 evidence for a jury to determine those facts in favor of the nonmovant. *Crawford-El v. Britton*,
8 523 U.S. 574, 600 (1998); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Nw.*
9 *Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a
10 summary judgment motion asks "whether the evidence presents a sufficient disagreement to
11 require submission to a jury or whether it is so one-sided that one party must prevail as a matter
12 of law.

13 The principal purpose of Rule 56 is to isolate and dispose of factually unsupported claims
14 or defenses. *Celotex Cop. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thus, the rule functions to
15 "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
16 trial." *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on
17 1963 amendments). Procedurally, under summary judgment practice, the moving party bears the
18 initial responsibility of presenting the basis for its motion and identifying those portions of the
19 record, together with affidavits, if any, that it believes demonstrate the absence of a genuine
20 issue of material fact. *Celotex*, 477 U.S. at 323; *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th
21 Cir. 2001) (en banc). If the moving party meets its burden with a properly supported motion, the
22 burden then shifts to the opposing party to present specific facts that show there is a genuine
23 issue for trial. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Auvil v.*
24 *CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995).

25 A clear focus on where the burden of proof lies as to the factual issue in question is
26 crucial to summary judgment procedures. Depending on which party bears that burden, the party

1 seeking summary judgment does not necessarily need to submit any evidence of its own. When
2 the opposing party would have the burden of proof on a dispositive issue at trial, the moving
3 party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National*
4 *Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters
5 which demonstrate the absence of a genuine material factual issue. *See Celotex v. Cattret*, 477
6 U.S. 317, 323-24 (1986). (“[W]here the nonmoving party will bear the burden of proof at trial on
7 a dispositive issue, a summary judgment motion may properly be made in reliance solely on the
8 ‘pleadings, depositions, answers to interrogatories, and admissions on file.’”). *Id.* at 324.
9 Indeed, summary judgment should be entered, after adequate time for discovery and upon
10 motion, against a party who fails to make a showing sufficient to establish the existence of an
11 element essential to that party's case, and on which that party will bear the burden of proof at
12 trial. *See id.* at 322. In such a circumstance, summary judgment must be granted, “so long as
13 whatever is before the district court demonstrates that the standard for entry of summary
14 judgment, as set forth in Rule 56(c), is satisfied.” *Id.* at 323.

15 To defeat summary judgment the opposing party must establish a genuine dispute as to a
16 material issue of fact. This entails two requirements. First, the dispute must be over a fact(s)
17 that is material, i.e., one that makes a difference in the outcome of the case. *Anderson v. Liberty*
18 *Lobby, Inc.*, 477 U.S. at 248 (“Only disputes over facts that might affect the outcome of the suit
19 under the governing law will properly preclude the entry of summary judgment.”). Whether a
20 factual dispute is material is determined by the substantive law, *id.*, which here involves the
21 question of whether the defendants were deliberately indifferent to serious medical needs of the
22 plaintiff. If the opposing party is unable to produce evidence sufficient to establish a required
23 element of its claim that party fails in opposing summary judgment. “[A] complete failure of
24 proof concerning an essential element of the nonmoving party's case necessarily renders all
25 other facts immaterial.” *Celotex Corp.*, 477 U.S. at 322.

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1 Second, the dispute must be genuine. In determining whether a factual dispute is genuine
2 the court must again focus on which party bears the burden of proof on the factual issue in
3 question. Where the party opposing summary judgment would bear the burden of proof at trial
4 on the factual issue in dispute, that party must produce evidence sufficient to support its factual
5 claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion.
6 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Rather, the opposing party must, by affidavit
7 or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue
8 for trial. *Anderson*, 477 U.S. at 249; *Devereaux*, 263 F.3d at 1076. More significantly, to
9 demonstrate a genuine factual dispute the evidence relied on by the opposing party must be such
10 that a fair-minded jury “could return a verdict for [him] on the evidence presented.” *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. at 248, 252. Absent any such evidence there simply is no reason
12 for trial.

13 The court does not determine witness credibility. It believes the opposing party’s
14 evidence, and draws inferences most favorably for the opposing party. *See Anderson*, 477 U.S.
15 at 249, 255; *Matsushita*, 475 U.S. at 587. Inferences, however, are not drawn out of “thin air,”
16 and the proponent must adduce evidence of a factual predicate from which to draw inferences.
17 *American Int’l Group, Inc. v. American Int’l Bank*, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski,
18 J., dissenting) (citing *Celotex*, 477 U.S. at 322). If reasonable minds could differ on material
19 facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439,
20 441 (9th Cir. 1995). On the other hand,”[w]here the record taken as a whole could not lead a
21 rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”
22 *Matsushita*, 475 U.S. at 587 (citation omitted). In that case, the court must grant summary
23 judgment.

24 Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
25 show that there is some metaphysical doubt as to the material facts Where the record taken
26 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no

1 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted). If the evidence
2 presented and any reasonable inferences that might be drawn from it could not support a
3 judgment in favor of the opposing party, there is no genuine issue. *Celotex Corp. v. Catrett*, 477
4 U.S. at 323. Thus, Rule 56 serves to screen cases lacking any genuine dispute over an issue that
5 is determinative of the outcome of the case.

6 On September 15, 2006, the court advised plaintiff of the requirements for opposing a
7 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154
8 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and *Klinge v.*
9 *Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

10 **III. Standard for Eighth Amendment Claim Pursuant to 42 U.S.C. § 1983**

11 Under 42 U.S.C. § 1983, plaintiff must show: (1) the violation of a federal constitutional
12 or statutory right; and (2) that the violation was committed by a person acting under the color of
13 state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d 930, 934 (9th
14 Cir. 2002). An individual defendant is not liable on a civil rights claim unless the facts establish
15 the defendant's personal involvement in the alleged rights deprivation, as there is no respondeat
16 superior liability under section 1983. *Jones*, 297 F.3d at 934. That is, plaintiff may not sue any
17 official on the theory that the official is liable for the unconstitutional conduct of his or her
18 subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009). Because respondeat superior
19 liability is inapplicable to § 1983 suits, "a plaintiff must plead that each Government-official
20 defendant, through the official's own individual actions, has violated the Constitution." *Id.* To
21 be held liable, "the supervisor need not be directly and personally involved in the same way as
22 are the individual officers who are on the scene inflicting constitutional injury." *Starr v. Baca*,
23 __ F.3d __, 2011 U.S. App. LEXIS 15283, at *6 (9th Cir. 2011) (quotations omitted). Rather,
24 the supervisor's participation and resulting liability could be based upon the supervisor's
25 knowledge of and acquiescence in unconstitutional conduct by others. *Id.* at *6, 13-4 (including
26 acquiescence "in a deficient policy that was a moving force behind the harm caused to the

1 plaintiff”) (internal quotation omitted); *see also Hanson v. Black*, 885 F.2d 642, 646 (9th Cir.
2 1989).

3 To state a section 1983 claim for violation of the Eighth Amendment based on inadequate
4 medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence deliberate
5 indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To prevail,
6 plaintiff must show both that his medical needs were objectively serious, and that defendant
7 possessed a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 297-99 (1991);
8 *McKinney v. Anderson*, 959 F.2d 853, 854 (9th Cir. 1992). A serious medical need is one that
9 significantly affects an individual’s daily activities, an injury or condition a reasonable doctor or
10 patient would find worthy of comment or treatment, or the existence of chronic and substantial
11 pain. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other*
12 *grounds by WMX Techs. v. Miller*, 104 F.2d 1133, 1136 (9th Cir.1997) (*en banc*).

13 Deliberate indifference may be shown by the denial, delay or intentional interference
14 with medical treatment or by the way in which medical care is provided. *Hutchinson v. United*
15 *States*, 838 F.2d 390, 394 (9th Cir. 1988). To act with deliberate indifference, a prison official
16 must both be aware of facts from which the inference could be drawn that a substantial risk of
17 serious harm exists, and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837
18 (1994). Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk of serious
19 harm and disregards that risk by failing to take reasonable measures to abate it.” *Id.* at 847. “[I]t
20 is enough that the official acted or failed to act despite his knowledge of a substantial risk of
21 serious harm.” *Id.* at 842.

22 A physician need not fail to treat an inmate altogether in order to violate that inmate’s
23 Eighth Amendment rights. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). A
24 failure to competently treat a serious medical condition, even if some treatment is prescribed,
25 may constitute deliberate indifference in a particular case. *Id.*

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1 However, it is important to differentiate common law negligence claims of malpractice
2 from claims predicated on violations of the Eighth Amendment’s prohibition of cruel and unusual
3 punishment. In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical
4 malpractice’ will not support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d
5 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06); *see also Toguchi v. Chung*, 391
6 F.3d 1051, 1057 (9th Cir. 2004).

7 Finally, it is well established that mere differences of opinion concerning the appropriate
8 treatment cannot be the basis of an Eighth Amendment violation. *Jackson v. McIntosh*, 90 F.3d
9 330, 332 (9th Cir. 1996); *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

10 **IV. Discussion**

11 Defendants advance the following arguments in support of their motion for summary
12 judgment: (1) plaintiff’s assignment to an upper tier cell did not pose an unreasonable risk of
13 harm of which defendants were aware, and CDCR and HDSP’s policy regarding medical care
14 was not constitutionally deficient because it mandated care consistent with constitutional
15 parameters; (2) Roche did not violate plaintiff’s Eighth Amendment rights when he denied
16 plaintiff’s request for physical therapy because plaintiff did not need physical therapy; (3) the
17 institutional lockdown at HDSP did not interfere with plaintiff’s medical care, and Alameida,
18 Hubbard, and Runnels were not aware that the HDSP lockdown posed a serious risk of harm to
19 plaintiff’s health; and (4) defendants are entitled to qualified immunity because they violated no
20 constitutional right and their conduct was objectively reasonable.

21 **A. Plaintiff’s Assignment to Upper Tier Cell After Hammer Toe Surgery**

22 Plaintiff claims that Roche, Runnels, and Alameida failed to develop and implement
23 policies that would have entitled him to a ground floor cell and prevented him from falling down
24 the stairs. After careful review of the record, the court finds that are no triable issues of fact with
25 respect to this claim.

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1 First, as defendants explain, there is no broad policy that would have entitled plaintiff to
2 a ground floor cell. Rather, because each patient has different medical needs and each must be
3 evaluated on an individual basis. SUF 36. Thus, the policy in place relies on primary care
4 physicians to determine the appropriate treatment for each patient based upon the ordinary
5 standards of medical care in the community. SUF 37-38. Here, plaintiff's treating physician did
6 not order that plaintiff be placed in a ground floor cell following his surgery because such
7 placement was not medically necessary. SUF 13, 45-48. Plaintiff produces no evidence that his
8 placement in an upper tier cell exposed him to a substantial risk of harm.

9 Second, Roche, Runnels, and Alameida did not participate in deciding whether an
10 inmate's medical condition required an accommodation chrono. SUF 49-53. Nor did these
11 defendants deny plaintiff any requested medical care between his surgery and his fall. SUF 13-
12 15. Plaintiff never alerted HDSP staff that he was dissatisfied with his upper tier cell
13 assignment, or that he needed either a lower tier cell or assistance using the stairs. SUF 20-21.
14 Thus, defendants could not have consciously disregarded any risk of harm to plaintiff based upon
15 his housing assignment. Additionally, there is no evidence that defendants, each of whom
16 occupied a supervisory position, SUF 2-5, acted pursuant to or acquiesced in any CDCR of
17 HDSP policy that caused others to consciously disregard an unreasonable risk of harm to
18 plaintiff.

19 Plaintiff does not submit any evidence with his opposition brief. He argues, however,
20 that Dr. Watson lacked "due care" by failing to ensure that plaintiff was housed in a lower tier
21 cell following the surgery. Pl.'s Opp'n to Defs.' MSJ ("Opp'n") at 2. But as defendants respond
22 in their reply brief, plaintiff's belief that he should have received a ground floor cell fails to
23 establish a genuine dispute of material fact to avoid summary judgment. As a threshold matter,
24 plaintiff's assertion is not supported by admissible evidence or qualified medical opinion. But
25 more importantly, plaintiff's mere disagreement with the medical treatment provided is
26 insufficient to show deliberate indifference. Thus, even if plaintiff presented a medical opinion a

1 qualified expert disagreeing with the treatment decisions in question, lack of due care, alone,
2 cannot establish deliberate indifference for purposes an Eighth Amendment claim. Finally,
3 plaintiff has not shown that defendants were aware of plaintiff’s cell assignment or of any risk of
4 harm in connection with his cell assignment—if indeed there was any such risk. Defs.’ Reply to
5 Pl.’s Opp’n (“Reply”) at 3-4 (citing *Toguchi*, 391 F.3d at 1058 and *Estelle*, 429 U.S. at 106).

6 The court finds there is no dispute as to whether plaintiff’s medical condition required a
7 ground floor cell or whether defendants knew or had reason to know that plaintiff’s assignment
8 to an upper tier cell posed an unreasonable risk of harm to him. Accordingly, this claim,
9 premised on defendants’ alleged deliberate indifference to plaintiff’s entitlement to a ground
10 floor cell, should not proceed to trial.

11 **B. Roche’s Denial of Plaintiff’s Request for Physical Therapy or Transfer to an**
12 **Institution That Offered Physical Therapy**

13 Plaintiff claims Roche was deliberately indifferent to his medical needs when he denied
14 plaintiff’s request for physical therapy or transfer to an institution that offered physical therapy.

15 The evidence establishes that plaintiff’s injuries did not require physical therapy or a
16 transfer to an institution that offered physical therapy. SUF 34. Additionally, this court
17 previously determined that Dr. Rohlfig’s failure to recommend physical therapy for the same
18 injuries did not violate plaintiff’s Eighth Amendment rights. Dckt. No. 142 at 10-11 (“Although
19 plaintiff disagrees with the choice of treatment provided, he has not show that such choice
20 amounts to deliberate indifference.”); Dckt. No. 147.

21 In his opposition, plaintiff argues that a jury could infer that the denial of physical
22 therapy amounted to deliberate indifference based upon the fact that plaintiff was eventually
23 provided with physical therapy. Opp’n at 3. As this court previously found, however, “[t]he fact
24 that other physicians later recommended physical therapy and that plaintiff found it to be helpful,
25 does not amount to a showing that [the] alternative treatment was medically unacceptable or,
26 more particularly, was chosen in conscious disregard of an excessive risk to plaintiff’s health.”

1 Dckt. No. 142 at 11.

2 As there is no genuine dispute for trial here, the court finds defendants are entitled to
3 summary judgment on this claim.

4 **C. The Lockdown and Plaintiff's Medical Needs**

5 Plaintiff claims defendants interfered with his recovery by failing to allow him to
6 exercise outside of his cell during the lockdown at HDSP. However, there is no evidence
7 presented that establishes that the lockdown prevented, delayed, or interfered with plaintiff's
8 recovery. Indeed, the evidence before the court establishes the opposite and shows that
9 defendants did not possess the requisite deliberate indifference.

10 As this court previously found, plaintiff's own deposition testimony revealed that during
11 the lockdown, "he was able to walk, jog in place, and perform calisthenics inside of his cell, and
12 that by performing these exercises, he gradually got stronger." Dckt. No. 142 at 12-13. This
13 evidence remains undisputed. SUF 33, 60-61.

14 Additionally, defendants Alameida, Hubbard and Runnels did not know about plaintiff's
15 injury, his prescribed rehabilitation program, or whether the lockdown interfered with plaintiff's
16 exercise needs. SUF 62-64.

17 In his opposition, plaintiff contends that the CDCR Operation Manual and various
18 regulations demonstrate that Alameida, Hubbard, and Runnels participated in implementing the
19 lockdown. Opp'n at 3. The materials referenced by plaintiff do not show that these defendants
20 participated in implementing the lockdown. Even if the materials did establish defendants'
21 involvement in the lockdown, the materials do not suggest that the defendants actually knew or
22 had reason to know, about plaintiff's injury, his prescribed rehabilitation program, or whether the
23 lockdown interfered with plaintiff's exercise needs. *See* Reply at 5-6.

24 Plaintiff also argues a jury could infer that Roche was deliberately indifferent because
25 Roche knew, through appeal number HDSP-C-05-00606, the extent of plaintiff's condition and
26 pain and that the course of plaintiff's treatment was largely ineffective. Opp'n at 2, 4. A copy of

1 that appeal is provided with defendants' motion for summary judgment. Defs.' MSJ, Ex. 7. In
2 partially granting the appeal at the second level of review, Roche informed plaintiff as follows:

3 Inmate Brooks, your medical complaints have been evaluated and treatment has
4 been provided. You were referred to physical therapy for strengthening exercises
5 and your pain medication was changed to Indocin. There is no request for you to
6 have knee surgery, to be issued a cane or to be allowed to walk when your yard is
7 locked down. In the past you have seen an orthopedist. You were diagnosed with
8 having tendinitis; exercise was recommended and a neoprene knee brace was
9 issued to you.

10 ...
11 Based on this information, your appeal is partially granted. You are receiving
12 therapy and medication for pain management.

13 Defs.' MSJ, Ex. 7 (Second Level Response). Roche's response notes that plaintiff had been
14 evaluated and treated for his medical complaints, that he was provided pain medication and
15 physical therapy, and that no doctor had ordered that plaintiff be allowed to walk during the
16 lockdown. While the appeal alerted Roche to plaintiff's complaints of pain and inadequate
17 treatment, a jury could not reasonably infer from the appeal alone, that Roche had knowledge of
18 a substantial risk of serious harm to plaintiff.

19 Accordingly, the court finds plaintiff has failed to demonstrate there is a genuine issue of
20 material fact regarding this claim, and defendants should be granted summary judgment.

21 **D. Qualified Immunity**

22 For the reasons discussed above, the court concludes that defendants are entitled to
23 summary judgment on each of plaintiff's claims. Therefore, the court need not address
24 defendants' argument for qualified immunity.

25 **V. Recommendation**

26 Accordingly, IT IS HEREBY RECOMMENDED that defendants' November 17, 2010
motion for summary judgment be granted and the Clerk be directed to close the case..

These findings and recommendations are submitted to the United States District Judge
assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
3 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
4 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 Dated: August 23, 2011.

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7 EDMUND F. BRENNAN
8 UNITED STATES MAGISTRATE JUDGE
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