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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEITH BRIDGEWATER,
Plaintiff,
v.
MATTHEW CATE, et al.,
Defendants.

No. 2:10-cv-2971 TLN DAD P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 9, 2013, the assigned magistrate judge filed findings and recommendations which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to those findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. At the time the magistrate judge issued the findings and recommendations, plaintiff had not filed an opposition to defendants' motion to dismiss. In his objections to the findings and recommendations, plaintiff avers that he timely submitted a written opposition to the court and has attached a copy of his opposition to his

1 objections. (See Pl.'s Objs. Ex. A.) Although the court has not received plaintiff's opposition
2 until now, it would be an abuse of discretion not to consider plaintiff's submission that is now
3 offered with his objections. See Jones v. Blanas, 393 F.3d 918, 935 (9th Cir. 2004).

4 Accordingly, having carefully reviewed the entire file, the court makes the following findings and
5 orders.

6 First, the court finds that the magistrate judge's findings and recommendations with
7 respect to plaintiff's Eighth Amendment claims against the defendants Warden Virga and former-
8 Secretary Hickman are supported by the record and by proper analysis. Accordingly, defendants'
9 motion to dismiss plaintiff's claims against defendants Warden Virga and former-Secretary
10 Hickman for failing to equip bunk beds with ladders or other safety apparatuses will be granted.¹

11 However, as to the magistrate judge's findings and recommendations addressing
12 plaintiff's alleged failure to exhaust his claims against defendant Turner, the court finds that
13 plaintiff should be excused from the exhaustion requirement. In his objections to the findings and
14 recommendations pending before the court, plaintiff declares that he signed, dated, and submitted
15 an inmate appeal against defendant Turner for ignoring his medical needs after his fall, but he
16 never received a log number or response from prison officials related to the appeal. Plaintiff also
17 declares that he wrote to prison officials several times inquiring about the status of that inmate
18 appeal, but never received a response from them. (See Pl.'s Objs. Ex. A.)

19 It is well established that a prisoner may be excused from complying with the exhaustion
20 requirement when prison officials make administrative remedies effectively unavailable. See
21 Albino v. Baca, 697 F.3d 1023, 1034 (9th Cir. 2012). The Ninth Circuit has cited with approval
22 the Seventh Circuit's holding that exhaustion is excused when prison officials fail to respond to a
23

24 ¹ Although plaintiff's amended complaint does not state a cognizable claim against the named
25 defendants for their alleged failure to equip bunk beds with ladders or other safety apparatuses,
26 liberally construed, his complaint appears to state a cognizable claim against defendants Warden
27 Virga and former-Secretary Hickman (as well as defendant Officer Turner) for their failure to
28 provide him with adequate medical care. Specifically, plaintiff alleges in his complaint that he
had a medical chrono for a lower bunk bed, but defendants knowingly assigned him to an upper
bunk bed. Defendants did not move to dismiss this latter claim. Accordingly, this action will
proceed on plaintiff's medical care claim as well as the other surviving claims described herein.

1 properly-filed grievance. See id. at 1034 n.7. Here, plaintiff has presented evidence that he
2 submitted an inmate appeal complaining about defendant Officer Turner’s failure to provide him
3 with adequate medical care after his fall. Moreover, plaintiff has presented evidence that when he
4 did not receive a response from prison officials, he filed subsequent inquiries to no avail. Under
5 these circumstances, the court finds that plaintiff took all “reasonable and appropriate steps” and
6 engaged “a good faith effort” to exhaust administrative remedies, but administrative remedies
7 were effectively unavailable to him. See id. at 1035.

8 In light of plaintiff’s evidence, the court finds that defendants have not carried their
9 burden of raising and proving the affirmative defense of failure to exhaust administrative
10 remedies. See Wyatt v. Terhune, 315 F.3d 1108, 1117-19 (9th Cir. 2003). Defendants had an
11 opportunity to file a reply to plaintiff’s objections to refute his contentions and evidence, but they
12 have not done so. Accordingly, defendants’ motion to dismiss plaintiff’s claim against defendant
13 Officer Turner for failing to provide him with adequate medical care after his fall will be denied.

14 Finally, as to the magistrate judge’s findings and recommendations with respect to
15 plaintiff’s state law negligence claims, the magistrate judge determined that those claims had to
16 be dismissed because plaintiff had failed to allege compliance with the Government Claims Act.
17 In his objections, plaintiff has included evidence that appears to show that he did comply with the
18 Government Claims Act. (Pl.’s Objs. Ex. J.) That is, he presented a claim to the Board, and the
19 Board acted on it. See Cal. Gov’t Code §§ 905, 905.2, 945.4 & 950.2. Again, the defendants had
20 an opportunity to file a reply to plaintiff’s objections to refute plaintiff’s contentions and
21 evidence, but they have not done so. Accordingly, defendants’ motion to dismiss plaintiff’s state
22 law negligence claim due to plaintiff’s alleged failure to comply with the Government Claims Act
23 will also be denied.

24 Accordingly, IT IS HEREBY ORDERED that:

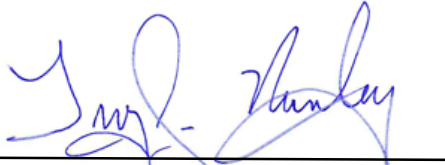
- 25 1. The findings and recommendations filed August 9, 2013, are adopted in part and
26 rejected in part;
- 27 2. Defendants’ motion to dismiss (Doc. No. 25) is granted in part and denied in part as
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- a. Defendants’ motion to dismiss plaintiff’s Eighth Amendment claim against defendants Warden Virga and former-Secretary Hickman based on their alleged failure to equip bunk beds with ladders or other safety apparatuses is granted;
 - b. Defendants’ motion to dismiss plaintiff’s claim against defendant Officer Turner for failing to provide him with adequate medical care after his fall is denied;
 - c. Defendants’ motion to dismiss plaintiff’s state law claims for negligence based on plaintiff’s alleged failure to comply with the Government Claims Act is denied;
- and

3. Within thirty days of the date of this order, defendants Officer Turner, Warden Virga, and former-Secretary Hickman shall file an answer to plaintiff’s Eighth Amendment inadequate medical care claims and state law claims for negligence.

Dated: December 11, 2013



Troy L. Nunley
United States District Judge

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