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

JOHNNY L. FRANKLIN, JR.

Plaintiff,

No. CIV S-10-3277 MCE GGH P

vs.

JAMES WEDELL,

Defendant.

FINDINGS AND RECOMMENDATIONS

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Introduction

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant’s September 7, 2011, motion to dismiss for failure to exhaust administrative remedies. Plaintiff filed a reply on September 23, 2011, and defendant filed a reply on September 28, 2011.

This case is currently proceeding on the second amended complaint filed on June 8, 2011, with allegations that the sole defendant, Dr. Wedell, was deliberately indifferent in his treatment of plaintiff’s intestinal disorder. Doc 16. Plaintiff alleged that he suffered from an intestinal disorder called H-Pylori and hemorrhoids. Dr. Wedell allegedly violated the Eighth Amendment by failing to earlier diagnosis these ailments.

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1 Motion to Dismiss

2 Legal Standard

3 The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to
4 provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. §
5 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
6 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
7 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.
8 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding the conditions of
9 their confinement, whether they involve general circumstances or particular episodes, and
10 whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

11 Exhaustion of all “available” remedies is mandatory; those remedies need not
12 meet federal standards, nor must they be “plain, speedy and effective.” Id. at 524; Booth v.
13 Churner, 532 U.S. 731, 740, n. 5 (2001). Even when the prisoner seeks relief not available in
14 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532
15 U.S. at 741. A prisoner “seeking only money damages must complete a prison administrative
16 process that could provide some sort of relief on the complaint stated, but no money.” Id. at
17 734.¹

18 A prisoner need not exhaust further levels of review once he has either received
19 all the remedies that are “available” at an intermediate level of review, or has been reliably
20 informed by an administrator that no more remedies are available. Brown v. Valoff, 422 F.3d
21 926, 934-35 (9th Cir. 2005). As there can be no absence of exhaustion unless some relief
22 remains available, a movant claiming lack of exhaustion must demonstrate that pertinent relief
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24 ¹ That the administrative procedure cannot result in the particular form of relief requested
25 by the prisoner does not excuse exhaustion because some sort of relief or responsive action may
26 result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes
of exhaustion requirement include allowing prison to take responsive action, filtering out
frivolous cases, and creating administrative records).

1 remained available, whether at unexhausted levels or through awaiting the results of the relief
2 already granted as a result of that process. Brown, 422 F.3d at 936-37.

3 The PLRA requires proper exhaustion of administrative remedies. Woodford v.
4 Ngo, 548 U.S. 81, 83-84 (2006). “Proper exhaustion demands compliance with an agency’s
5 deadlines and other critical procedural rules because no adjudicative system can function
6 effectively without imposing some orderly structure on the course of its proceedings.” Id. at
7 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to properly
8 exhaust. Id. The PLRA’s exhaustion requirement cannot be satisfied “by filing an untimely or
9 otherwise procedurally defective administrative grievance or appeal.” Id. at 83-84.

10 At the time relevant to this action, the State of California provided its prisoners
11 the right to appeal administratively “any departmental decision, action, condition or policy which
12 they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15, §
13 3084.1(a). It also provides them the right to file appeals alleging misconduct by correctional
14 officers and officials. Id. § 3084.1(e). In order to exhaust available administrative remedies
15 within this system, a prisoner must proceed through several levels of appeal: (1) informal
16 resolution, (2) formal written appeal on a 602 inmate appeal form, (3) second level appeal to the
17 institution head or designee, and (4) third level appeal to the Director of the CDCR. Barry v.
18 Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A
19 final decision from the Director’s level of review satisfies the exhaustion requirement under §
20 1997e(a). Id. at 1237-38.

21 Failure to exhaust administrative remedies is an affirmative defense properly
22 raised by a defendant in an unenumerated Fed. R. Civ. P. Rule 12(b) motion. Jones v. Bock, 549
23 U.S. 199, 216 (2007). If the court concludes the prisoner has not exhausted non-judicial
24 remedies, the proper remedy is dismissal of the claim without prejudice. Wyatt v. Terhune, 315
25 F.3d 1108, 1119-1120 (9th Cir. 2003). Defendants bear the burden of raising and proving
26 non-exhaustion. Id. at 1119. The court may resolve any disputed material facts on the

1 exhaustion issue by looking beyond the pleadings in deciding a motion to dismiss for failure to
2 exhaust. Id. at 1119-20. No presumption of truthfulness attaches to a plaintiff's assertions
3 associated with the exhaustion requirement. See Ritza v. Int'l Longshoremen's and
4 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988).

5 Discussion

6 Defendant states that while plaintiff filed several appeals concerning his medical
7 treatment, there was only one appeal related to this case. In Appeal No. SAC 10-10-10762, filed
8 on March 22, 2010, plaintiff alleged that defendant Dr. Wedell is rude to black inmates and
9 failed to properly treat plaintiff's chest pain, heart issue, thyroid issue, 'throat diverticuli' and
10 pain, and a "diet which I have no diet." MTD, Exh. A. In no part of this grievance is there any
11 reference to any intestinal problems, H-Pylori or hemorrhoids.

12 Plaintiff does cite to any other grievances related to this case but seems to argue
13 that his 'throat diverticuli' is sufficiently related to intestinal problems to demonstrate proper
14 exhaustion. Assuming plaintiff is referring to esophageal diverticula, this condition occurs when
15 a small pouch or pocket of stretched tissue develops in the throat that can cause inflammation of
16 the esophagus, food regurgitation, difficulty swallowing, chest pain and the feeling of needing to
17 clear one's throat. See [http://uwmedicine.washington.edu/Patient-Care/Our-Services/
18 Medical-Services/Esophageal-Gastric-Diseases/Pages/ArticleView.aspx?subId=69](http://uwmedicine.washington.edu/Patient-Care/Our-Services/Medical-Services/Esophageal-Gastric-Diseases/Pages/ArticleView.aspx?subId=69).

19 The undersigned notes that a diverticula can also form in the colon which could
20 lead to the symptoms plaintiff alleges in the complaint. See
21 http://www.johnshopkinshealthalerts.com/symptoms_remedies/diverticular_disorders/90-1.html.
22 However, it is clear from the grievance that plaintiff is referring to medical problems with his
23 throat and throat pain as there is no mention of any intestinal ailments.

24 In Griffin v. Arpaio, 557 F.3d 1117 (9th Cir. 2009), the Ninth Circuit noted that
25 "the primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution,
26 not to lay groundwork for litigation." Id. at 1120 (citations omitted). In Griffin, the plaintiff

1 failed to mention in his grievance that the remedy to his problem that had been ordered by a
2 prison nurse had been ignored by the prison staff. As a result, the prison officials who were
3 aware of the nurse's order, reasonably believed that the order solved the problem. In view of
4 these facts, the Ninth Circuit concluded that the plaintiff failed to properly exhaust his
5 administrative remedies because he did not provide notice of the prison staff's alleged disregard
6 of the nurse's order and the prison was never alerted "to the nature of his problem." See id. at
7 1121.

8 In the instant case, there was no way for prison officials to understand from
9 plaintiff's grievance that the nature of his problem concerned an intestinal disorder. While
10 plaintiff would not need to state the exact diagnosis, such as a colon diverticulosis, he needed to
11 cite to health issues involving intestinal distress. As the grievance only described chest pain, a
12 heart issue, a thyroid issue, 'throat diveticulti' and pain, plaintiff failed to alert prison officials of
13 the problem he now seeks to litigate. Therefore, plaintiff has failed to exhaust administrative
14 remedies and defendant's motion to dismiss should be granted.

15 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion to
16 dismiss, filed on September 7, 2011, (Doc. 25), be granted and this case be dismissed.

17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
19 days after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
22 shall be served and filed within seven days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: October 13, 2011

4 /s/ Gregory G. Hollows
5 UNITED STATES MAGISTRATE JUDGE

6 GGH: AB
7 fran3227.mtd

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