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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GORDON D. MEADOR,
Plaintiff,
v.
M. HAMMER, et al.,
Defendants.

No. 2:11-cv-3342 KJM AC P

ORDER

Plaintiff, a state prisoner proceeding in forma pauperis and with counsel, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 16, 2015, the 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. ECF No. 86. Defendants have filed a document styled as objections to the findings and recommendations. ECF No. 88. Defendants do not actually object to any of the magistrate judge’s findings or recommendations. Instead, they request an order under Federal Rule of Civil Procedure 56(g) stating that it is an established fact in this action that plaintiff did not sustain any physical damage to his heart. ECF No. 88 at 2-3. Defendants seek to avoid addressing this issue at trial. *Id.* The findings and

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1 recommendations do not authorize a reply to objections and plaintiff therefore has not had an
2 opportunity to respond to this request.

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
4 court has conducted a de novo review of this case. Having carefully reviewed the file, the court
5 finds the findings and recommendations to be supported by the record and by proper analysis.

6 Federal Rule of Civil Procedure 56(g) authorizes but does not require the order requested
7 by defendants. It provides:

8 If the court does not grant all the relief requested by the motion [for
9 summary judgment], it may enter an order stating any material fact
10 – including an item of damages or other relief – that is not
11 genuinely in dispute and treating the fact as established in the case.

12 Fed. R. Civ. 56(g). Federal Rule of Civil Procedure 56(e) provides:

13 If a party fails to properly support an assertion of fact or fails to
14 properly address another party's assertion of fact as required by
15 Rule 56(c), the court may:

- 16 (1) give an opportunity to properly support or address the fact;
- 17 (2) consider the fact undisputed for purposes of the motion;
- 18 (3) grant summary judgment if the motion and supporting materials
19 — including the facts considered undisputed — show that the
20 movant is entitled to it; or
- 21 (4) issue any other appropriate order.

22 Fed. R. Civ. P. 56(e).

23 In support of their motion for summary judgment, defendants tendered evidence that
24 plaintiff's medical records did not indicate plaintiff "sustained any physical damage as a result
25 of" the alleged delay in treatment. Defendants' Statement of Undisputed Facts (DSUF) ¶ 28,
26 ECF No. 72-2. Plaintiff's response to this statement of undisputed fact was that he could neither
27 admit nor deny it "because based on what a doctor told him at Mercy Folsom, he believes his
28 heart was damaged as a result of the delay." ECF No. 86 at 5 n.6 (citing Response to DSUF
¶ 28). The magistrate judge properly found the alleged statements by the doctor to be hearsay and
deemed undisputed fact 28 admitted. *Id.* On this record, the court views the fact as undisputed

1 for purposes of defendants' summary judgment motion, *see* Fed. R. Civ. P. 56(e)(2), but not for
2 all purposes at this time.

3 The court recognizes that plaintiff apparently concedes that he did not suffer physical
4 injury at least for purposes of whether he is entitled to seek damages for mental and emotional
5 injury, *see* ECF No. 86 at 14, and plaintiff may concede this issue at trial. The proper time to
6 address the question is in the pretrial order, which will be prepared with the benefit of input from
7 both parties on the state of the evidence to be tendered at trial.

8 Accordingly, IT IS HEREBY ORDERED that:

9 1. The findings and recommendations filed March 16, 2015 (ECF No. 86), are adopted in
10 full;

11 2. Defendants' motion for summary judgment (ECF No. 72) is granted in part and denied
12 in part as follows:

13 a. Denied as to plaintiff's claim that defendants Asad, Hammer, and Shaw
14 violated his Eighth Amendment rights and the case proceeds on plaintiff's claim that defendants
15 were deliberately indifferent to his serious medical need when they ignored his requests for
16 medical care, resulting in a three-hour delay in treatment; and

17 b. Granted as to plaintiff's claim for damages for mental and emotional injury and
18 plaintiff's claims for mental and emotional injury are dismissed; and

19 3. Defendants' request for an order specifying that it is established that plaintiff did not
20 sustain physical damage to his heart is denied without prejudice.

21 DATED: March 31, 2015.

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24 UNITED STATES DISTRICT JUDGE
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