UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNELL BOYCE,

Plaintiff,

v.

MICHAEL FOX, et al.,

Defendants.

No. 2:14-cv-1743 KJM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding through counsel. Defendants move to dismiss this action because they contend it appears from the face of the second amended complaint and its exhibits that plaintiff failed to exhaust his administrative remedies prior to filing the instant action. Defendants also move to dismiss the action based on the following three grounds: (1) defendant Fox did not personally violate plaintiff's constitutional rights; (2) defendant Fox is entitled to qualified immunity; and (3) plaintiff failed to state a deliberate indifference claim against defendants Kim, Wong, and Ogbodo. As set forth below, the undersigned recommends that defendants' motion to dismiss be granted in part and denied in part.

I. Plaintiff's Second Amended Complaint

Plaintiff is an African American inmate housed at Deuel Vocational Institute ("DVI") in August of 2011. Plaintiff alleges he began suffering from flu-like symptoms in early January of 2012, including a fever and drastic weight loss: reducing from 207 to 130 pounds in the span of

about a week. (ECF No. 37 at 5.) Plaintiff also experienced severe back pains, which prevented him from laying down, as well as numbness in his legs, impaired mobility, and severe headaches. Plaintiff was allegedly not involved in any physical altercation or accident, slip or fall, that would have explained plaintiff's symptoms. Plaintiff began requesting medical treatment on or about January 4, 2012. In response to plaintiff's complaints, Dr. Wong prescribed acetaminophen with codeine phosphate (Tylenol), guaifenesin-dextromethorphan (Robitussin), and sunatriptan (Migraine medication). On or about January 17, 2012, plaintiff went "man down," and RN Ogbodo gave plaintiff a hydrocodone shot for his excruciating pain. The pain returned after 11 hours, and RN Ogbodo gave plaintiff two more hydrocodone shots. Plaintiff claims that the pain and previous symptoms returned almost immediately. Plaintiff alleges that his relationship with Dr. Wong was "rocky and harried," and that Dr. Wong became defensive when plaintiff demanded more rigorous testing, plaintiff arguing that his symptoms were shocking based on his prior great physical shape and his experience and training as a physical therapist. Dr. Wong explained that plaintiff's physical therapy experience could not equate to Dr. Wong's qualification as a medical doctor, and that the prescribed medication and treatment should suffice. (ECF No. 37 at 6.)

Dr. Wong allegedly did not order an x-ray of plaintiff's lumbar spine until February 24, 2012. Dr. Wong opined that the x-ray results showed plaintiff's spine was in a healthy condition, despite plaintiff's objections and pleadings. Plaintiff attempted to obtain further medical tests through the appeals process, and was provided an x-ray of his hip.

Plaintiff went "man down" again on May 1, 2012. Plaintiff states that a correctional officer and two other DVI personnel (likely staff nurses from the medical ward) approached plaintiff, but plaintiff claims the nurses refused to transport plaintiff to medical, refused to treat plaintiff in his cell because he was seen by a physician earlier that day, and claimed plaintiff was faking his injury so that he could be given more prescription drugs. (ECF No. 37 at 6.)[1] Plaintiff

[1] Plaintiff refers the reader to his Exhibit D, which is his administrative appeal in which he claimed "medical" refused to pick him up, and states that the "lady in charge in main medical thinks it's about pills." (ECF No. 37 at 55.) It is unclear who was the "lady in charge", but the appeal response identifies RN Ogbodo as the nurse who saw plaintiff "as" he went "man down"

allegedly remained on the floor of his cell, missing chow, through the night until the feeling in his legs returned.

On May 16, 2012, plaintiff was transferred to Salinas Valley State Prison ("SVSP"). On May 24, 2012, plaintiff again went "man down," and allegedly experienced five days of lower back extremity paralysis, including an inability to walk, loss of sensation from the waist down, and urinary and fecal incontinence. On May 30, 2012, plaintiff was hospitalized and provided an MRI of his lumbar spine, which showed a large epidural mass at the L5-S1 level with significant bone destruction, and significant bony destruction confirmed both on MRI and CT scanning of S1. The spine deterioration was diagnosed as advanced stages of coccidioidomycosis. On May 31, 2012, plaintiff underwent surgery at Stanford University Medical Center where his spine was treated and supported with pedicle screws. On June 28, 2012, plaintiff underwent a second surgery, involving decompression and debridement of the operated area. Medical staff at Stanford opined that plaintiff would be unable to lift more than 25 pounds, requiring the assistance of a cane for the rest of his life, and is hyper-vulnerable to paralysis if his body experiences a traumatic blow. (ECF No. 37 at 7.)

Plaintiff includes three causes of action: First, plaintiff alleges that defendants Fox and Does 1 - 5 failed to implement policies and procedures to protect plaintiff from the debilitating effects of coccidioidomycosis, also known as "Valley Fever," knowing that inmates were susceptible to the disease, and in deliberate indifference to plaintiff's health. Second, plaintiff alleges that defendant Dr. Wong, as plaintiff's primary care physician, was aware that plaintiff lost close to 80 pounds in one week, was experiencing excruciating back pain, had numbness in his legs, had a fever, and had experienced no blunt-force trauma to explain such symptoms and was historically an extremely healthy individual. Plaintiff contends that defendant Dr. Wong was deliberately indifferent to plaintiff's serious medical needs, and failed to order blood tests, an MRI, or refer plaintiff to a specialist, to determine the etiology of plaintiff's drastic weight loss,

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on May 1, 2012. (ECF No. 37 at 58.) However, in his pleading, plaintiff does not allege that defendant Ogbodo came to plaintiff's cell on May 1, 2012, or allege any other facts tying defendant Ogbodo to the events of May 1, 2012, (ECF No. 37 at 6), other than to allege Ogbodo failed to assist him on May 1, 2012 (ECF No. 37 at 10).

and continuous complaints of leg numbness and excruciating back pain. Third, plaintiff alleges that defendant Ogbodo failed to assist plaintiff when he went "man down" on May 1, 2012, despite knowing plaintiff had been suffering from excruciating back pain, immobility, fever, drastic weight loss, and numbness in his lower extremities.

Plaintiff provides a patient education form, dated August 2013, that identifies the following symptoms of Valley Fever: fever, cough, tiredness, headaches, rash, joint/muscle aches, night sweats, weight loss/lack of appetite, pneumonia. (ECF No. 37 at 13.)

Plaintiff does not disclose his age, but the CDCR Inmate Locator website lists plaintiff's current age as 36. A previously-provided medical record reflects that after he was transferred to SVSP, plaintiff's age was recorded as 32 on July 4, 2012. (ECF No. 29 at 9.)

II. Rule 12(b)(6) Standards

Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89 (2007), and construe the pleading in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999). Still, to survive dismissal for failure to state a claim, a pro se complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. Attachments to a complaint are considered to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard Reiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

III. Alleged Failure to Exhaust

A. Legal Standard

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

Proper exhaustion of available remedies is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." Woodford v. Ngo, 548 U.S. 81, 95-96 (2006). For a remedy to be available, there must be the "possibility of some relief. . . ." Booth, 532 U.S. at 738. Relying on Booth, the Ninth Circuit has held:

> [A] prisoner need not press on to exhaust further levels of review once he has received all "available" remedies at an intermediate level of review or has been reliably informed by an administrator that no remedies are available.

Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

A motion asserting an affirmative defense such as failure to exhaust may be brought under Rule 12(b)(6) or Rule 56 depending on whether the factual predicate for the motion is based on the text of the pleading or instead depends upon evidence submitted with the motion. See Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (*en banc*) ("in those rare cases where a failure to exhaust is clear from the face of the complaint, a defendant may successfully move to dismiss under Rule 12(b)(6) for failure to state a claim."); Jones v. Bock, 549 U.S. 199, 215 (2007) ("A

complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief."). The administrative process is exhausted only after the inmate complies with all relevant prison grievance procedures and receives a decision from the third level. Ngo, 548 U.S. at 95-96.

Failure to exhaust is "an affirmative defense the defendant must plead and prove." Bock, 549 U.S. at 204, 216. In Albino, the Ninth Circuit agreed with the underlying panel's decision[2] "that the burdens outlined in Hilao [v. Estate of Marcos, 103 F.3d 767, 778 n.5 (9th Cir. 1996),] should provide the template for the burdens here." Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc). A defendant need only show "that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." Albino, 747 F.3d at 1172. To carry this burden,

> a defendant must demonstrate that pertinent relief remained available, whether at unexhausted levels of the grievance process or through awaiting the results of the relief already granted as a result of that process. Relevant evidence in so demonstrating would include statutes, regulations, and other official directives that explain the scope of the administrative review process; documentary or testimonial evidence from prison officials who administer the review process; and information provided to the prisoner concerning the operation of the grievance procedure in this case. . . . With regard to the latter category of evidence, information provided [to] the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, "available."

Brown, 422 F.3d at 936-37 (citations omitted).

A prisoner may be excused from complying with the PLRA's exhaustion requirement if he establishes that the existing administrative remedies were effectively unavailable to him. See Albino, 747 F.3d at 1172-73. For example, when an inmate's administrative grievance is improperly rejected on procedural grounds, exhaustion may be excused as effectively unavailable. Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). To satisfy this exception to the exhaustion requirement, a plaintiff must show "(1) that he actually filed a grievance or grievances that, if

[2] See Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The three judge panel noted that "[a] defendant's burden of establishing an inmate's failure to exhaust is very low." Id. at 1031. Relevant evidence includes statutes, regulations, and other official directives that explain the scope of the administrative review process. Id. at 1032.

pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations." Id. at 823-24; see also Nunez v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (warden's mistake rendered prisoner's administrative remedies "effectively unavailable"); Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required to proceed to third level where appeal granted at second level and no further relief was available).

Moreover, in Bock, the Supreme Court stated that the "name all defendants" requirement under the Sixth Circuit rule may promote early notice to those who might later be sued, but that has not been thought to be one of the leading purposes of the exhaustion requirement. Bock, 549 U.S. at 219 (citing Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) ("We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation.")). The Supreme Court did not determine whether the grievances filed by prisoners satisfied the requirement of "proper exhaustion," but concluded that exhaustion is not per se inadequate simply because an individual later sued was not named in the grievances. Bock, 549 U.S. at 219 (citation omitted).

Recently, the Ninth Circuit clarified that "a prisoner exhausts such administrative remedies as are available under the PLRA despite failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process." Reyes v. Smith, 810 F.3d 654, 658 (9th Cir. 2016). "Under the decision in Reyes, prisoners do not now have the right to ignore the procedural requirements of the CDCR's grievance process; rather, the state now has the ability to waive -- whether purposefully or inadvertently -- certain procedural defaults based upon their own regulations. This ability to waive a procedural default ripens only if "prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process." Reyes, 810 F.3d at 658." Bulkin v. Ochoa, 2016 WL 1267265, at *2 (E.D. Cal. Apr. 1, 2016). Thus, "when prison officials address the merits of a

prisoner's grievance instead of enforcing a procedural bar, the state's interest in administrative exhaustion have been served." Reyes, 810 F.3d at 657. This conclusion is because "[t]he grievance process is only required to 'alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued.'" Id., quoting Bock, 549 U.S. at 219.

B. Administrative Appeal Process

The California Department of Corrections and Rehabilitation ("CDCR") provides inmates the right to appeal administratively "any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." Cal. Code Regs. tit. 15, § 3084.1(a). Following amendments that took effect January 28, 2011, California prisoners are required to proceed through three levels of appeal to exhaust the administrative appeal process: (1) formal written appeal on a CDC 602 inmate appeal form, (2) second level appeal to the institution head or designee, and (3) third level appeal to the Director of the CDCR. See 15 Cal. Code Regs. § 3084.1-3084.9.[3] A final decision from the Director's level of review satisfies the exhaustion requirement under 42 U.S.C. § 1997e(a). See Lira v. Herrera, 427 F.3d 1164, 1166-67 (9th Cir. 2005); see also Cal. Code Regs. tit. 15, § 3084.7(d)(3) (as amended Dec. 13, 2010).

To initiate an appeal, the inmate must submit a CDCR Form 602 describing the issue to be appealed and the relief requested to the appeals coordinator's office at the institution. Id. § 3084.2(a)-(c). An inmate must submit the appeal within 30 calendar days of: (1) the occurrence of the event or decision being appealed; or (2) first having knowledge of the action or decision being appealed; or (3) receiving an unsatisfactory departmental response to an appeal. Id. § 3084.8(b). Specific time limits apply to the processing of each administrative appeal. See Cal. Code Regs. tit. 15, § 3084.8. Absent any specific exceptions, the first and second level administrative responses are required to be completed "within 30 working days from [the] date of receipt by the appeals coordinator," and a third level response is due within 60 working days from the date the appeal is received by the appeals chief. Id.

[3] The informal resolution level was eliminated. See Cal. Code Regs. tit. 15, § 3084.7 (as amended Dec. 13, 2010).

C. Plaintiff's Administrative Appeal DVI HC 12040415

With the second amended complaint, plaintiff provided only his first level appeal and the first level response to appeal DVI HC 12040415. (ECF No. 37 at 55-58.) Plaintiff stated that he went man down, and medical refused to pick him up. Plaintiff claimed to have a pinched nerve in his lower back, and that his right leg went out on him after using the bathroom. (ECF No. 37 at 55.) Plaintiff claimed that the "lady in charge" "thinks it's about pills," but plaintiff could "care less [sic] about meds, I want my back fixed." (ECF No. 37 at 55.)

Plaintiff was interviewed by his primary care physician, Dr. Wong, and his first level appeal was reviewed by Chief Medical Officer Kim, on behalf of Dr. Michael Fox. (ECF No. 37 at 55.) Dr. Kim noted that before plaintiff was transferred to SVSP on May 16, 2012, his Unit Health Record ("UHR"), and all relevant departmental policies and procedures were reviewed. (ECF No. 37 at 57.) In addition, plaintiff was evaluated by Dr. Wong on May 15, 2012.

Plaintiff's request to receive proper medical care/treatment for his back, and not to simply receive medication, was "partially granted." (ECF No. 37 at 58.) It was determined that plaintiff was seen on May 1, 2012, by A. Ogbodo, R.N., as plaintiff went "man down," stating pain medications were not working, he could not move, and wanted to be seen by a doctor. RN Ogbodo documented her observation that plaintiff was "alert, oriented, in no acute distress." (ECF No. 37 at 58.) Ogbodo informed plaintiff that he was last seen on April 25, 2012, by Dr. Wong, who prescribed Motrin for pain, and ordered a follow-up evaluation. On May 15, 2012, plaintiff was seen by Dr. Wong, who observed plaintiff walking around and moving with no difficulty. (ECF No. 37 at 58.) Dr. Wong also documented that the x-rays of plaintiff's hip and lumbar spine were within normal limits. Dr. Wong instructed plaintiff to continue taking the prescribed pain medication, perform self-directed physical therapy, and follow up with medical at SVSP in four to six weeks.

Based on the above, Dr. Kim found "no evidence" that plaintiff's "medical issues were not appropriately addressed" or "that proper departmental policy or procedures were not followed." (ECF No. 37 at 58.) Because plaintiff had been transferred to SVSP, Dr. Kim encouraged plaintiff to pursue any further medical concerns or issues at SVSP. (Id.)

D. Discussion

Defendants first contend that based on plaintiff's failure to provide a copy of a third level decision, "it can be properly inferred that he did not appeal his health-care appeal to the third level of review as required for proper exhaustion." (ECF No. 38-1 at 14.) Defendants are mistaken. As set forth above, failure to exhaust under the PLRA is "an affirmative defense" that defendants "must plead and prove." Bock, 549 U.S. at 216. Thus, it would be improper for this court to "infer" that plaintiff failed to file a third level appeal, simply based on his failure to append one to his pleading, which he is not required to do.[4]

Second, defendants contend that the appeal demonstrates that plaintiff did not properly appeal his claims because appeal DVI HC 12040415 does not allege any issues with defendants Fox, Kim, Wong, or any other medical doctor at DVI, and did not raise a conditions of confinement claim related to being exposed to and contracting Valley Fever. However, as noted above, the court cannot presume or infer that plaintiff filed no other appeal concerning his claims. In addition, at the time plaintiff filed appeal DVI HC 12040415, it appears no one was aware, including plaintiff, that he had Valley Fever. However, plaintiff did articulate that he was not drug seeking but wanted his back fixed. In addition, the review of plaintiff's UHR would reveal plaintiff's complaints of ongoing excruciating back pain, headaches, and leg numbness, as well as an alleged drastic weight loss: from 207 to 130 pounds in about a one week period.

Moreover, the court cannot reach the issue of whether or not plaintiff may be excused from exhausting administrative remedies because his alleged failure to exhaust is not apparent from the face of the operative pleading and its exhibits. In addition, whether or not plaintiff may be excused from exhausting his administrative remedies through the third level of review is more appropriately addressed on summary judgment inasmuch as the parties would likely be required to file additional documents, including declarations by the parties. In addition, it is unclear whether plaintiff may be excused from exhaustion based on his medical condition, including his

[4] Indeed, plaintiff provided another appeal, DVI HC 12040144, with his opposition to the motion to dismiss, which this court may not consider on a motion to dismiss because it was not appended to plaintiff's pleading.

alleged paralysis after transfer, and subsequent hospitalizations at Stanford. See Marella v. Terhune, 568 F.3d 1024 (9th Cir. 2009) (prisoner's injuries requiring hospitalization and placement in the infirmary impeded his ability to obtain the necessary grievance forms to timely file his grievance). In any event, whether plaintiff is entitled to be excused from the exhaustion requirement involves fact-intensive determinations more properly raised on summary judgment.[5]

Because the undersigned cannot find that plaintiff failed to exhaust his administrative remedies by reviewing the face of the second amended complaint or the appended exhibits, defendants' motion to dismiss is denied without prejudice to renewal upon a properly supported motion for summary judgment.

VI. Failure to State a Claim

A. Deliberate Indifference to Medical Needs

Federal law establishes that deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976)). To prove that the response of prison officials to a prisoner's medical needs was constitutionally deficient, the prisoner must establish (1) a serious medical need and (2) deliberate indifference to that need by prison officials. McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*).

A medical need is defined as "serious" if the failure to treat the prisoner's condition could result in further significant injury or the "'[u]nnecessary and wanton infliction of pain.'" Id. at 1059 (quoting Estelle, 429 U.S. at 104). A prison official is deemed "deliberately indifferent" if the official knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. Farmer v. Brennan, 511 U.S. 825, 847 (1994). In order for deliberate indifference to be established, therefore, there must be a purposeful act or failure to act on the part of the defendant and resulting harm. See McGuckin, 974 F.2d at 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985).

[5] The undersigned expresses no opinion as to whether plaintiff may be excused from the exhaustion requirement.

Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a plaintiff must show that the delay was harmful. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th Cir. 2002); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Shapley, 766 F.2d at 407. In this regard, "[a] prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d at 1060. In addition, a physician need not fail to treat an inmate altogether in order to violate that inmate's Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir. 1989) (per curiam). A failure to competently treat a serious medical condition, even if some treatment is prescribed, may constitute deliberate indifference in a particular case. Id.

Finally, a claim of medical malpractice or negligence is insufficient to make out a violation of the Eighth Amendment. McGuckin, 974 F.2d at 1059. A difference of opinion between a prisoner and prison medical staff as to the proper course of medical treatment does not give rise to a § 1983 claim. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) ("Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights."); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

B. Defendants Fox and Does 1 - 5

Defendants contend that plaintiff's allegations against defendant Fox do not demonstrate that defendant Fox personally violated plaintiff's constitutional rights in connection with his conditions of confinement claim, and argue that defendant Fox is entitled to qualified immunity.

Plaintiff alleges that defendants Fox and Does 1 - 5 failed to implement policies and procedures to protect plaintiff from the debilitating effects of Valley Fever, knowing the inmates were susceptible to the disease. In support of such claims, plaintiff provides a patient education form that identifies eight prisons where the fungus is more common, none of which include DVI. (ECF No. 37 at 13.) Plaintiff provides the November 20, 2007 memorandum ("memo") from Director Hubbard and Dr. Winslow, Statewide Medical Director, identifying eight institutions

located in a high risk (hyperendemic) area for Valley Fever: Avenal State Prison, California Correctional Institution, California State Prison-Corcoran, California Substance Abuse Treatment Facility and State Prison at Corcoran, Kern Valley State Prison, North Kern Valley State Prison, Pleasant Valley State Prison, and Wasco State Prison. (ECF No. 37 at 48.) The memo informs wardens, health care managers/Chief Medical Officers, Directors of Nursing, and other correctional staff that certain susceptible inmates cannot be housed at institutions within the identified hyperendemic areas, if the inmate has any of the following conditions: (a) identified HIV infected inmate-patients; (b) history of lymphoma; (c) status post solid organ transplant; (d) chronic immunosuppressive therapy (e.g. severe rheumatoid arthritis); (e) moderate to severe Chronic Obstructive Pulmonary Disease (COPD) requiring ongoing intermittent or continuous oxygen therapy; and (f) inmate-patients with cancer undergoing chemotherapy. (ECF No. 37 at 49.)

The Civil Rights Act under which this action was filed provides as follows:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See Monell v. Department of Social Servs., 436 U.S. 658 (1978) ("Congress did not intend § 1983 liability to attach where . . . causation [is] absent."); Rizzo v. Goode, 423 U.S. 362 (1976) (no affirmative link between the incidents of police misconduct and the adoption of any plan or policy demonstrating their authorization or approval of such misconduct). "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Although supervisory government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior, Ashcroft v. Iqbal, 556 U.S.

662, 676 (2009), they may be individually liable under Section 1983 if there exists "either (1) [the supervisor's] personal involvement in the constitutional deprivation; or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989). The requisite causal connection between a supervisor's wrongful conduct and the violation of the prisoner's constitutional rights can be established in a number of ways, including by demonstrating that a supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates was a cause of plaintiff's injury. Starr v. Baca, 652 F.3d 1202, 1208 (9th Cir. 2011); Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991). A plaintiff must also show that the supervisor had the requisite state of mind to establish liability, which turns on the requirement of the particular claim -- and, more specifically, on the state of mind required by the particular claim -- not on a generally applicable concept of supervisory liability. Oregon State University Student Alliance v. Ray, 699 F.3d 1053, 1071 (9th Cir. 2012).

Here, the undersigned is persuaded that plaintiff has not alleged facts demonstrating that defendant Fox was the moving force in the alleged violation of plaintiff's Eighth Amendment rights when plaintiff was housed at DVI. Although plaintiff alleges that Dr. Fox was knowledgeable that inmates at every institution were susceptible to Valley Fever, the appended exhibits contradict such a generalized statement. Even if the court infers that Dr. Fox was a chief medical officer who received the November 20, 2007 memo, the memo confirms that DVI was not listed as one of the institutions located in the highest risk (hyperendemic) areas at risk of Valley Fever. (ECF No. 37 at 48.) In addition, African American inmates were not included as a group of inmates to be excluded from the state prisons located in hyperendemic areas. (ECF No. 37 at 49-53.) Rather, the memo defined susceptible inmates as those suffering other diseases. (ECF No. 37 at 49.) In addition, by 2013, such information had not changed. The August 2013 patient education form still does not list DVI as located in a hyperendemic area, or include African Americans as an at-risk group. (ECF No. 37 at 13.) Therefore, even assuming Dr. Fox received the November 20, 2007 memo, the memo would not put Dr. Fox on notice that he should implement Valley Fever policies or procedures at DVI when plaintiff was transferred to DVI in

2011. Similarly, Does 1 - 5 would not have been put on such notice. Finally, such defendants could not be put on notice by findings in the "Analysis of 2011 Inmate Death Reviews in the California Prison Healthcare System," because it was dated May 12, 2012, long after plaintiff was placed at DVI in 2011, and shortly before he was transferred to SVSP on May 16, 2012. (ECF No. 37 at 16.)

In light of the evidence appended to plaintiff's pleading, it does not appear that plaintiff can amend to state a cognizable claim based on an alleged failure to implement policies or procedures based on an alleged risk of Valley Fever for African American inmates, including plaintiff, housed at DVI in 2011 or 2012. Therefore, defendant Fox and Does 1 - 5 should be dismissed from this action, and plaintiff should not be granted leave to amend as to such claims.

Qualified Immunity

Legal Standard

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests -- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson, 555 U.S. at 231. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Id. (quoting Groh v. Ramirez, 540 U.S. 551, 567, (2004) (Kennedy, J., dissenting)).

In determining whether an officer is entitled to qualified immunity, the court must decide (1) whether facts alleged or shown by plaintiff make out a violation of constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct. Pearson, 555 U.S. at 232 (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at

hand." Id. at 236. In resolving these issues, the court must view the evidence in the light most favorable to plaintiff and resolve all material factual disputes in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003).

The measuring rod for determining whether an official's conduct violates a plaintiff's constitutional right was set forth by the Supreme Court in Ashcroft v. al-Kidd, 131 S. Ct. 2075, 2083 (2011): "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Lal v. California, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation omitted). As the Supreme Court explained:

> "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." Al-Kidd, supra, at 742, 131 S. Ct. 2074. The dispositive question is "whether the violative nature of particular conduct is clearly established." Ibid. (emphasis added). This inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001)).

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

Discussion

Defendants argue that plaintiff had no clearly established right not to be housed in the endemic region or otherwise be protected from the environmental risk of Valley Fever in August of 2011. (ECF No. 42 at 7.) Because the complaint describes an emerging public health issue that public officials were seeking to understand and address, even assuming Dr. Fox had personal involvement in plaintiff's housing at DVI, defendants argue that a reasonable person in Dr. Fox's position would not have fair notice that relying on the Valley Fever exclusion criteria adopted by the CDCR in consultation with the Receiver's office was clearly unlawful. Plaintiff counters that Dr. Fox is not entitled to qualified immunity because he violated plaintiff's clearly established right to receive constitutionally adequate medical care. (ECF No. 41 at 16.)

"[I]t would be impossible to conclude that a disease [like Valley Fever] that, in its severe form, could lead to death does not present a risk of serious harm." Plata v. Brown, 2013 WL

3200587, *10 (N.D. Cal. June 24, 2013). "[A]n inmate's mere exposure to a dangerous condition may provide grounds for an Eighth Amendment claim." Beagle v. Schwarzenegger, 107 F.Supp.3d 1056, 1068 (E.D. Cal. July 25, 2014) (discussing how, under Farmer and other Ninth Circuit cases, the correct issue is whether prison officials were subjectively aware of a serious *risk* of substantial harm.). But as another district court recently pointed out:

> Defendants are entitled to qualified immunity because it was not "beyond debate" that there was a clearly established right on March 10, 2014, for Plaintiff not to be housed in either DVI or CCI, areas with a prevalence of Valley Fever spores. Carroll, 135 S. Ct. at 350. There was no published Supreme Court or Ninth Circuit case law that addressed whether an inmate's exposure to Valley Fever would be a violation of the Eighth Amendment. See Brown v. Oregon Dep't of Corr., 751 F.3d 983, 990 (9th Cir. 2014) (defendants are not liable for violation of a right that was not clearly established at the time the violation occurred). Based upon the weight of authority, the Court finds that a reasonable official would not have had notice prior to March 10, 2014, that making a decision to house inmates in a location where Valley Fever was prevalent would violate an inmate's civil rights. Accordingly, Defendants are entitled to qualified immunity, and their motion to dismiss is GRANTED on that ground.

Franklin v. Giurbino, 2017 WL 24862, at *6 (N.D. Cal. Jan. 3, 2017).[6] See also Harvey v. Gonzalez, 2011 WL 4625710, at *3 (C.D. Cal. July 27, 2011) (Even if the prisoner alleged that defendants knew that the prisoner had a "far greater risk" of contracting Valley Fever because of his ethnicity, "that still would be insufficient to state a claim that defendants deliberately exposed the prisoner to an excessive risk of harm by housing him at [PVSP], i.e., a region at high risk for Valley Fever exposure]."); James v. Yates, 2010 WL 2465407, at *2-4 (E.D. Cal. June 15, 2010) (finding that failure to screen before transfer to PVSP, to warn of the risks of contracting Valley Fever, to clean up, or move inmates away from, contaminated soil, or to approve transfer from PVSP could not state an Eighth Amendment claim, and stating that "[e]ven assuming Plaintiff is more susceptible to contracting Valley Fever [because of asthma and bronchitis], exposure in this

[6] In Franklin, the prisoner alleged, *inter alia*, "that he "had a high risk medical hold on him since 2012 up to and including April 2014 in which for health reasons transferring or placing him in prisons with a high risk of valley fever infection such as [DVI] and CCI, was prohibited." [Dkt. 1] at 7-8." Franklin, 2017 WL 24862 at *1. The prisoner did not allege that he contracted Valley Fever while incarcerated at either DVI or CCI. Franklin, 2017 WL 24862 at *2.

instance is not sufficient by itself to establish a deliberate indifference claim"). The district court in Franklin found that

> judges have disagreed as to whether allegations that an inmate's ethnicity increases the risk of contracting Valley Fever and developing disseminating Valley Fever states an Eighth Amendment claim. [FN 3 omitted]. Judges also have disagreed as to whether an inmate's allegations that medical conditions increase the risk of contracting Valley Fever and developing disseminated Valley Fever states an Eighth Amendment claim. [FN 4 omitted]. Numerous district court decisions filed after the date at issue, March 10, 2014, have concluded that the aforementioned disagreement among the district courts establishes that officials would not have had fair warning that the policy of housing inmates in the endemic region without taking special precautions was unlawful. See Smith v. Schwarzenegger, Lead Case No. 1:14-cv-60-LJO-SAB, 2015 WL 5915353, at *13 (E.D. Cal. Oct. 7, 2015) (granting defendants' motion to dismiss plaintiffs' Eighth Amendment claim upon finding defendants entitled to qualified immunity because no authority has "fleshed out 'at what point the risk of harm from [Valley Fever] becomes sufficiently substantial for Eighth Amendment purposes'");[7] Nawabi v. Cates, Case. No. 1:13-cv-272-LJO-SAB, 2015 WL 5915269, at *14 (E.D. Cal. Oct. 7, 2015) (same); Gregge v. Yates, Case No. 1:15-cv-00176-LJO-SAB, 2015 U.S. Dist. LEXIS 157616, at *38 (E.D. Cal. Oct. 7, 2015) (same); Jackson v. Brown, Case No. 1:13-cv-01055-LJO-SAB, 2015 WL 5732826, at *1 (E.D. Cal. Sept. 28, 2015) (granting judgment on the pleadings on qualified immunity grounds for same reasons); Lua v. Smith, No. 1:14-cv-00019-LJO-MJS, 2014 WL 1308605, at *2 (E.D. Cal. Mar. 31, 2014) ("[T]o the extent that Plaintiff is attempting to pursue an Eighth Amendment claim for the mere fact that he was confined in a location where Valley Fever spores existed which caused him to contract Valley Fever, he is advised that no courts have held that exposure to Valley Fever spores presents an excessive risk to inmate health.").

Franklin, 2017 WL 24862, at *5.

Here, plaintiff points to no authority finding that plaintiff had a clearly established right in August of 2011 not to be housed in DVI, located in an area with a prevalence of Valley Fever spores. Moreover, the November 20, 2007 memo authored by Suzan L. Hubbard, Director of the CDCR Division of Adult Institutions, and Dwight Winslow, M.D., Statewide Medical Director, Plata Support Division, confirms that DVI was not listed as one of the institutions located in the

[7] The prisoners in Smith have filed an appeal, which remains pending in the Ninth Circuit. Smith v. Schwarzenegger, No. 15-17155 (9th Cir. Dec. 21, 2016) (being considered for the April 2017 San Francisco oral argument calendar).

highest risk (hyperendemic) areas at risk of Valley Fever. (ECF No. 37 at 48.) In addition, African American inmates were not included as a group of inmates susceptible to Valley Fever, or to be excluded from state prisons located in hyperendemic areas due to other diseases. (ECF No. 37 at 49-53.) Rather, the memo defined susceptible inmates as those suffering from specific diseases. (ECF No. 37 at 49.) Plaintiff does not allege that he suffered from one of the specific diseases identified as placing inmates at high risk of contracting Valley Fever.

In Smith v. Brown, the prisoner who contracted Valley Fever in 2009, while incarcerated at PVSP, alleged as follows:

> Smith contends that "black inmates in general are highly susceptible to Valley Fever." He also claims that each of the defendants was aware that Plaintiff was being sent to a "hyperendemic" area institution, but refused to warn him of such a risk. Plaintiff alleges that defendants failed to follow directions set forth in a November 20, 2007 Memorandum regarding "Exclusion of Inmate -- Patients Susceptible to Coccidioidomycosis from Highest Risk Area Institutions" that would have prevent[ed] him from acquiring Valley Fever. Plaintiff claims Defendants' actions and failures to act violated the Eighth Amendment.

Smith v. Brown, 2012 WL 1574651, at *3. Observing that "[c]ourts have found that claims like plaintiff's which allege Eighth Amendment violations for contracting Valley Fever are insufficient to establish an Eighth Amendment violation," the court held that "[d]efendants cannot, therefore, be held liable for housing plaintiff in an area where there is a potential to be exposed to Valley Fever spores." Id. at *4.

This court is persuaded by the above authorities. Because it was not clearly established in 2014 that housing African American prisoners at hyperendemic institutions violated their Eighth Amendment rights, defendants Fox and Does 1 - 5 are entitled to qualified immunity based on allegations that in 2011, plaintiff, an African American inmate, was housed at DVI, which was not identified as an institution located within the hyperendemic area, even by 2013. Thus, defendant Fox and Does 1 - 5 are entitled to qualified immunity based on their alleged failure to set up policies and procedures to warn him about, screen for, or protect plaintiff from Valley Fever upon his placement and housing at DVI in 2011 to 2012. Defendants' motion to dismiss such claims on qualified immunity grounds should be granted.

V. Defendant Kim

As noted by defendants, plaintiff's second amended complaint includes no charging allegations as to defendant Kim. Thus, defendant Kim is entitled to dismissal.

VI. Defendant Ogbodo

Plaintiff identifies defendant Ogbodo as a Registered Nurse, "responsible for evaluating inmates and recommending them to the primary caregiver." (ECF No. 37 at 3.) Plaintiff includes no factual allegations supporting his claim that Ogbodo "failed to assist" plaintiff when he went "man down" on May 1, 2012. (ECF No. 37 at 10.) Rather, he claims that a correctional officer and two other personnel responded to plaintiff's cell on May 1, 2012. Plaintiff parenthetically identifies the "personnel" as "likely staff-nurses from the medical ward," and alleges "the nurses refused to transport" plaintiff to medical. (ECF No. 37 at 6.) But plaintiff does not identify Ogbodo as one of these "likely staff nurses," and he does not allege that on May 1, 2012, Ogbodo responded to plaintiff's cell, refused to transport plaintiff to medical, or instructed the staff nurses not to transport plaintiff to medical. (ECF No. 37 at 6-7.) The court and defendants are not required to review the appended administrative appeal to determine plaintiff's charging allegations as to defendant Ogbodo. Plaintiff fails to allege sufficient facts demonstrating that Ogbodo was aware of a substantial risk of harm to plaintiff yet failed to take steps to abate the harm based on her alleged "failure to assist" plaintiff on May 1, 2012. Absent clarifying factual allegations not present here, the undersigned cannot find that plaintiff states a cognizable Eighth Amendment claim as to defendant Ogbodo.

Moreover, it is unclear whether plaintiff can amend to state a cognizable Eighth Amendment claim against RN Ogbodo. Plaintiff does not identify RN Ogbodo as a "Director of Nursing," so the undersigned is unable to infer that Ogbodo received the November 20, 2007 memo. In addition, as explained above, the exhibits demonstrate that prison personnel were not warned of a threat of Valley Fever at DVI, and African American inmates were not identified as particularly susceptible in the 2007 memo. Moreover, plaintiff does not allege that defendant Ogbodo was the "lady in charge" who allegedly believed plaintiff was drug-seeking, despite the reference to Ogbodo in the appeal response. In addition, plaintiff's allegation that Ogbodo "failed

to assist" plaintiff is contradicted by the appeal response in which it was determined that on May 1, 2012, plaintiff was seen by Ogbodo, who noted that plaintiff was "observed to be alert, oriented, in no acute distress," and "a follow-up evaluation was ordered." (ECF No. 37 at 58.)

In an effort to determine whether plaintiff may be able to amend his pleading to state a cognizable claim against defendant Ogbodo, the undersigned reviewed plaintiff's previous factual allegations against her. In his original complaint, plaintiff stated that on May 1, 2012, he submitted a second appeal alleging improper medical care/treatment for his serious medical condition "after being seen by Ogbodo who determined that she observed plaintiff to be alert, oriented, in no acute distress[,] and informed him that he would be seen by defendant Wong." (ECF No. 1 at 7.) In his pro se amended complaint, plaintiff included no factual allegations concerning Ogbodo on May 1, 2012. (ECF No. 15.) However, he alleged that although Ogbodo gave him a hydrocodone shot on January 17, 2012, Ogbodo alleged plaintiff was "faking his illness just to get some drugs." (ECF No. 15 at 4.) In his May 1, 2012 administrative appeal, plaintiff claimed that the "lady in charge in main medical thinks it's about pills." (ECF No. 37 at 55.) In the operative second amended complaint, plaintiff now alleges that Ogbodo "failed to assist" plaintiff on May 1, 2012, but does not allege that Ogbodo responded or treated plaintiff on May 1, 2012. Rather, he now claims that the unidentified nurses refused to transport or treat plaintiff on May 1, 2012, because plaintiff "was seen by a physician earlier that day and that he was faking his injury so that he could be given more prescribed drugs." (ECF No. 37 at 6.) Thus, plaintiff's prior factual allegations do not assist the court in determining whether plaintiff can state a cognizable claim against defendant Ogbodo.

Although plaintiff filed his first two pleadings in propria persona, plaintiff is now represented by counsel, who prepared the operative second amended complaint. Because it is unclear whether plaintiff can amend to state a cognizable Eighth Amendment claim against defendant Ogbodo, the undersigned will not grant plaintiff leave to amend at this time. However, plaintiff's claims are dismissed without prejudice, should plaintiff discover facts that would support filing a motion to amend under Rule 15 of the Federal Rules of Civil Procedure.

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VII. Defendant Dr. Wong

Defendants argue that plaintiff failed to demonstrate that Dr. Wong knew, or should have known, that plaintiff faced a substantial risk of serious harm, and then chose to disregard such risk. Rather, defendants contend plaintiff seeks to impose constitutional liability based solely on a subsequent discovery of an abscess on his spinal cord and a Valley Fever diagnosis several months after his appointment with Dr. Wong at DVI. Defendants argue that the extent or severity of plaintiff's injury does not determine the subjective component of the deliberate indifference standard. Defendants further contend that at worst, plaintiff's allegations might show Dr. Wong misdiagnosed or erred in evaluating plaintiff's illness, or that the illness was undetectable when Dr. Wong treated plaintiff, constituting negligence or medical malpractice, not rising to the level of an Eighth Amendment violation.

However, plaintiff has alleged facts suggesting that the medical treatment provided was medically unacceptable under the circumstances, and that Dr. Wong, plaintiff's primary care physician, delayed plaintiff adequate medical care from January through May of 2012, allegedly subjecting plaintiff to substantial and permanent harm. Dr. Wong last saw plaintiff on May 15, 2012, the day before plaintiff's transfer to SVSP, in connection with plaintiff's administrative appeal seeking further medical treatment. (ECF No. 37 at 58.) Based upon the claims that Dr. Wong knew plaintiff suffered from excruciating back pain, leg numbness, fever, headaches, and drastic weight loss (from 207 to 130 pounds in about a one week period), plaintiff states a cognizable claim alleging that Dr. Wong should have earlier pursued other diagnostic tests given plaintiff's prior good health, with no history of trauma that would explain his excruciating back pain or drastic weight loss. Indeed, plaintiff provides an exhibit that reflects that "progressive weight loss" is "one of the most frequently mishandled 'red flags'" in type 1 lapses of care: "failure to recognize, identify or adequately evaluate important symptoms or signs." (ECF No. 37 at 26, 45.) Moreover, it can be argued that x-rays reflecting results "within normal limits," in the face of such debilitating symptoms in an otherwise healthy man in his early thirties, should alert a doctor to the need for more diagnostic tests to determine the etiology of plaintiff's excruciating back pain, drastic weight loss, and other recurring symptoms. Similarly, the provision of three

separate shots of hydrocodone in the span of two days, demonstrates that plaintiff was suffering excruciating back pain as early as January 17, 2012.

While defendant Dr. Wong may be able to prove at summary judgment that his actions were not deliberately indifferent, but were merely based on the latency of the illness, a misdiagnosis of plaintiff's symptoms, negligence, or medical malpractice, plaintiff's allegations, taken as true, are sufficient to state a cognizable deliberate indifference claim at this juncture.

VII. Conclusion

Accordingly, IT IS HEREBY RECOMMENDED that defendants' motion to dismiss be granted in part and denied in part, as follows:

1. Defendants' motion to dismiss plaintiff's claims as unexhausted be denied without prejudice;

2. Plaintiff's claims that defendants Fox and Does 1 - 5 failed to implement policies and procedures to warn him about, screen for, or protect plaintiff from Valley Fever upon his placement and housing at DVI in 2011 to 2012 be dismissed, and, in the alternative, defendants Fox and Does 1 - 5 be granted qualified immunity as to such claims;

3. Defendant Kim be dismissed from this action based on plaintiff's failure to include any charging allegations against defendant Kim;

4. Plaintiff's claims against defendant Ogbodo should be dismissed without prejudice; and

5. Defendant Dr. Wong's motion to dismiss be denied, and Dr. Wong be required to file an answer within fourteen days of any district court order adopting these findings and recommendations.

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)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The

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

Dated: January 27, 2017

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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