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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNIS WAYNE MIZE, SR.,
Plaintiff,
v.
SCOTT KIERNAN, et al.,
Defendants.

No. 2:16-0699 TLN CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On June 27, 2016, the court screened plaintiff’s complaint pursuant to 28 U.S.C. § 1915A and found the allegations therein sufficient for plaintiff to proceed on Eighth Amendment claims against defendants Horowitz, Saipher, and Soltanian for their deliberate indifference to his serious medical need for pain medication. Defendants have filed a motion to dismiss contending that: 1) plaintiff has not pled facts stating a claim under the Eighth Amendment; 2) defendants are immune from suit under the “qualified immunity” doctrine; 3) the Eleventh Amendment bars plaintiff’s claims for monetary damages and prospective injunctive relief; and, 4) plaintiff’s request for injunctive relief is barred by the Prison Litigation Reform Act (“PLRA”). Plaintiff has filed an opposition, ECF No. 32, and defendants Horowitz and Saipher have filed a reply, ECF No. 33. Plaintiff does not oppose the dismissal of defendant Soltanian and has abandoned his request for injunctive relief so the court will not address these undisputed

1 portions of the pending motions to dismiss. ECF Nos. 31, 32 at 11.

2 **I. Allegations of the Complaint**

3 After reviewing plaintiff's complaint, and any documents incorporated by reference
4 therein, the court construes the facts material to defendants' motion to dismiss to be based on a
5 failure to provide him with narcotic pain medication while an inmate at Mule Creek State Prison.
6 Defendant E. Horowitz was plaintiff's treating physician and defendant Marshall Saipher was a
7 nurse practitioner at Mule Creek State Prison.¹

8 Plaintiff sustained several injuries before arriving at Mule Creek. These included three
9 liver surgeries following a motorcycle accident; a left elbow fracture with resulting osteoarthritis;
10 and multiple facial and nasal bone fractures as a result of two prison fights. ECF No. 1 at 17,
11 ECF No. 32 at 14, 16, 19, 30. Before arriving at Mule Creek, plaintiff had a long history of being
12 provided pain medication, including narcotics, for these various injuries. Plaintiff's medical
13 history also indicated side effects from non-steroidal anti-inflammatory drugs ("NSAIDS") such
14 as ibuprofen, naproxen, motrin, and advil. ECF No. 1 at 17.

15 On January 13, 2015 plaintiff was examined by defendant Saipher based on his request to
16 be treated for his chronic pain. ECF No. 1 at 6. This examination revealed that plaintiff
17 complained of pain to his abdomen when it was pressed and had limited range of motion of his
18 neck with "clicks" or popping sounds heard on rotation. ECF No. 1 at 6. Defendant Saipher also
19 noted that plaintiff was unable to straighten his left arm. Id. A review by defendant Saipher of
20 plaintiff's past diagnostic studies indicated a diagnosis of moderate degenerative arthrosis of the
21 left elbow and shoulder. Id. Plaintiff further expressed to defendant Saipher that he was
22 experiencing left elbow and shoulder pain as well as neck pain. Id. Defendant Saipher told
23 plaintiff that he wanted to prescribe him morphine for his injuries because his medical record
24 indicated that it had worked in the past, but he was afraid that Dr. Horowitz or Dr. Smith would
25 confiscate it before plaintiff even received it. Id. At this visit, defendant Saipher ordered an
26 orthopedic consultation for plaintiff's left elbow pain. ECF No. 23-2 at 21.

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28 ¹ Based on plaintiff's stipulation to dismissing defendant Soltanian, ECF No. 31, the allegations
are limited to the remaining defendants.

1 Plaintiff was once again treated by defendant Saipher on February 10, 2015. ECF No. 1 at
2 7. During this visit, defendant Saipher indicated that he could see that plaintiff's physical
3 condition was deteriorating since his 2013 transfer to Mule Creek. Id. Defendant Saipher
4 ordered an X-ray of plaintiff's neck and told him that he would prescribe him with MS Contin
5 two times per day once the X-ray study was obtained. Id.

6 Even after the X-ray of plaintiff's neck revealed bone spurring of plaintiff's C5 and C6
7 cervical vertebrae, defendant Saipher refused to prescribe adequate pain medication or medication
8 that "did not cause side effects so bad it made it unusable to treat plaintiff's numerous painful
9 medical conditions." Id. at 6-7.

10 During a follow-up visit to discuss the results of plaintiff's neck X-ray, plaintiff was seen
11 by defendant Dr. Horowitz.² ECF No. 1 at 3. After noting that plaintiff's past diagnostic studies
12 indicated moderate to severe osteoarthritis of the left elbow, moderate degenerative arthrosis of
13 the left elbow and shoulder, and anterior bone spurring of plaintiff's C5 and C6 cervical
14 vertebrae, defendant Dr. Horowitz refused to prescribe adequate pain medication. ECF No. 1 at
15 3-4. Plaintiff then explained to Dr. Horowitz that "eleven other CDCR Physician's and
16 Physician's Assistant's prescribed MS Contin Morphine approximately forty-five [sic] (45)
17 times in sixty (60) to ninety (90) day prescription lengths, just prior to Plaintiff's transfer to
18 MCSP from CTF Soledad." Id. at 4. Plaintiff also informed Dr. Horowitz that this medication
19 had been discontinued within 10 days of his arrival at Mule Creek due to suspicions that he had
20 "cheeked" or diverted his medication. Id. Plaintiff detailed to Dr. Horowitz his most recent
21 facial fractures and his recent participation in the CDCR Chronic Care Pain Management
22 Program which included narcotic and/or opiate pain therapy. Id. at 5. Additionally, plaintiff
23 indicated that he had to sleep sitting up because of the pain he experienced on both sides of his

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25 ² The complaint alleges that this visit occurred on August 12, 2015. ECF No. 1 at 3. However,
26 the medical records attached to plaintiff's opposition to the motion to dismiss indicate that Dr.
27 Horowitz completed a Physician Request for Services on March 12, 2015 for plaintiff to be
28 evaluated for physical therapy. ECF No. 32 at 38. Additionally, the court notes that plaintiff's
inmate health care appeal form submitted on March 12, 2015 complains about Dr. Horowitz's
treatment decisions regarding plaintiff's chronic pain. ECF No. 19-2 at 5. This date discrepancy
does not affect the court's recommendation on the motion to dismiss.

1 body and neck. Id. Dr. Horowitz refused to prescribe adequate pain medication or a pain
2 medication that plaintiff's medical file demonstrated had worked in the past. Id. Instead,
3 defendant Dr. Horowitz ordered a physical therapy consultation for plaintiff's left elbow,
4 shoulder, and neck pain. ECF No. 32 at 18.

5 The Pain Management Committee at Mule Creek evaluated plaintiff's case on April 14,
6 2015.³ ECF No. 23-2 at 15. They determined that narcotics were not indicated for plaintiff's
7 chronic pain. ECF No. 23-2 at 15. Instead, they recommended continued use of NSAID
8 medications, an orthopedic evaluation of plaintiff's left elbow that had been previously ordered
9 by defendant Saipher, and an additional X-ray of plaintiff's cervical spine. Id.

10 **II. Applicable Legal Standards**

11 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), "a
12 complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
13 plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S.
14 at 570). In considering a motion to dismiss, the court must accept as true the allegations of the
15 complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976),
16 construe the pleading in the light most favorable to the party opposing the motion, and resolve all
17 doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S.
18 869 (1969). The court may consider facts established by exhibits attached to the complaint.
19 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider
20 facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d 1385,
21 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other papers
22 filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986).

23 A prisoner states a claim under the Eighth Amendment for inadequate medical care if the
24 prisoner points to facts suggesting they were caused injury by a prison official who was
25 deliberately indifferent to the prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97,

26 ³ To the extent that plaintiff continues to allege that defendant Saipher falsified his electronic unit
27 health record which was utilized by the Pain Management Committee, plaintiff is reminded that
28 this entirely conclusory allegation was screened out in the court's June 27, 2016 order. See ECF
No. 10 at 3, n. 1.

1 104-05 (1976). A serious medical need exists if the failure to treat a prisoner’s condition could
2 result in the “unnecessary and wanton infliction of pain.” Id. at 104. A difference of opinion
3 between an inmate and prison medical personnel—or between medical professionals—regarding
4 appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference
5 claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Toguchi v. Chung, 391 F.3d 1051,
6 1058 (9th Cir. 2004). To establish a difference of opinion rising to the level of deliberate
7 indifference, plaintiff “must show that the course of treatment the doctors chose was medically
8 unacceptable under the circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

9 **III. Analysis**

10 Plaintiff fails to state a cognizable claim for deliberate indifference to serious medical
11 needs against Dr. Horowitz or Nurse Practitioner Saipher. Plaintiff’s allegations that defendants
12 failed in their duties to provide adequate treatment for plaintiff’s pain because their treatment
13 differed from that of his prior physicians reflect nothing more than “ ‘a difference of medical
14 opinion’ as to the need to pursue one course of treatment over another[, which is] ... insufficient,
15 as a matter of law, to establish deliberate indifference.” Jackson v. McIntosh, 90 F.3d 330, 332
16 (9th Cir.1996); see Estelle, 429 U.S. at 107–08 (“[T]he question whether a [] ... form[] of
17 treatment is indicated is a classic example of a matter for medical judgment” and “[a] medical
18 decision not to order [a form of treatment] ... does not represent cruel and unusual punishment.”);
19 Toguchi, 391 F.3d at 1058 (“[A] mere ‘difference of medical opinion ... [is] insufficient, as a
20 matter of law, to establish deliberate indifference.’ ”) (citation omitted); Sanchez v. Vild, 891
21 F.2d 240, 242 (9th Cir.1989).

22 Furthermore, the Pain Management Committee’s conclusion that narcotics were not
23 clinically indicated for plaintiff’s chronic pain demonstrates that defendants’ treatment was not
24 medically unacceptable under the circumstances. See Moreno v. Medina, 2013 WL 3350819, at *
25 4 (E.D. Cal.2013) (fact that the same course of treatment was recommended by multiple
26 physicians suggests that the treatment was not medically unacceptable under the circumstances).
27 Defendants Saipher and Horowitz both declined to prescribe narcotic pain medication to plaintiff
28 pending additional information from an orthopedist as well as a physical therapist. They did not

1 simply refuse to treat plaintiff's chronic pain. Here the record demonstrates that both defendants
2 fully examined plaintiff, ordered alternative therapies, and provided non-prescription analgesic
3 medication for the treatment of plaintiff's chronic conditions. Accordingly, plaintiff's allegations
4 against defendants Saipher and Horowitz fail to state a cognizable Eighth Amendment claim of
5 deliberate indifference. The undersigned recommends granting defendants' motion to dismiss.⁴

6 **IV. No Leave to Amend**

7 If the court finds that a complaint should be dismissed for failure to state a claim, the court
8 has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-
9 30 (9th Cir. 2000) (en banc). Leave to amend should be granted if it appears possible that the
10 defects in the complaint could be corrected, especially if a plaintiff is pro se. Id. at 1130-31; see
11 also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se litigant must be given
12 leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely
13 clear that the deficiencies of the complaint could not be cured by amendment.") (citing Noll v.
14 Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)). However, if, after careful consideration, it is clear
15 that a complaint cannot be cured by amendment, the Court may dismiss without leave to amend.
16 Cato, 70 F.3d at 1005-06. The undersigned finds that, as set forth above, plaintiff's Eighth
17 Amendment allegations against all defendants cannot establish a cognizable claim as a matter of
18 law and amendment would be futile.

19 **V. Plain Language Summary for Pro Se Party**

20 Since you are acting as your own attorney in this case, the court wants to make sure that
21 you understand this order. The following information is meant to explain this order in plain
22 English and is not intended as legal advice.

23 The court has reviewed your complaint and the medical records mentioned in it and has
24 concluded that your complaints against Dr. Horowitz and Nurse Practitioner Saipher do not
25 establish an Eighth Amendment violation as a matter of law because their treatment
26 recommendations were not medically unacceptable even though they did not give you the pain

27 ⁴ Based on this conclusion, the court finds it unnecessary to discuss defendants' alternative
28 argument that they are entitled to qualified immunity.

1 medication that you wanted. This problem is not fixable by filing an amended complaint.

2 You have fourteen days to explain to the court why this is not the correct outcome in your
3 case. If you choose to do this you should label your explanation as “Objections to Magistrate
4 Judge’s Findings and Recommendations.”

5 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendants’ motions to dismiss (ECF Nos. 23, 24) be granted; and,
- 7 2. This case be closed.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
10 after being served with these findings and recommendations, any party may file written
11 objections with the court and serve a copy on all parties. Such a document should be captioned
12 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
13 objections shall be served and filed within fourteen days after service of the objections. The
14 parties are advised that failure to file objections within the specified time may waive the right to
15 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: July 24, 2017



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18 CAROLYN K. DELANEY
19 UNITED STATES MAGISTRATE JUDGE

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