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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTONIO CARREON,
Plaintiff,
v.
S. ABDUR-RAHMAN, et al.,
Defendants.

No. 2:17-cv-1292 TLN KJN P

ORDER AND FINDINGS &
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pursuant to the district court’s September 28, 2018 order, this action proceeds on plaintiff’s Eighth Amendment deliberate indifference claims against defendants Dr. S. Abdur-Rahman and Dr. Lee.¹ On June 17, 2019, defendants filed a motion for summary judgment. Plaintiff filed an opposition, and defendants filed a reply.

As discussed below, the undersigned recommends that defendants’ motion for summary judgment be granted in part and denied in part.

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¹ Defendants’ motion to dismiss plaintiff’s retaliation claims against Dr. Abdur-Rahman was granted, and plaintiff was granted leave to amend to pursue retaliation claims against the doctor based on medical treatment provided or not provided after July 26, 2015. (ECF No. 26 at 7-8.) Plaintiff did not file an amended complaint.

1 II. Plaintiff's Claims

2 In his verified complaint, plaintiff alleges that Dr. S. Abdur-Rahman failed to provide
3 adequate medical care for plaintiff's serious medical needs, including failures to (a) timely
4 provide a four-wheel walker, resulting in plaintiff falling and sustaining serious injuries;
5 (b) extend morphine; (c) increase Lyrica; and (d) refer plaintiff to a specialist. (ECF No. 11.)
6 Plaintiff alleges that defendant Dr. B. Lee was aware of plaintiff's serious medical needs, yet
7 failed to ensure that plaintiff received care for plaintiff's serious medical needs, including a
8 failure to provide a walker, and failure to provide adequate pain medication. (ECF No. 1 at 20-
9 24.)

10 III. Legal Standard for Summary Judgment

11 Summary judgment is appropriate when it is demonstrated that the standard set forth in
12 Federal Rule of Civil Procedure 56 is met. "The court shall grant summary judgment if the
13 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
14 judgment as a matter of law." Fed. R. Civ. P. 56(a).

15 Under summary judgment practice, the moving party always bears
16 the initial responsibility of informing the district court of the basis
17 for its motion, and identifying those portions of "the pleadings,
18 depositions, answers to interrogatories, and admissions on file,
together with the affidavits, if any," which it believes demonstrate
the absence of a genuine issue of material fact.

19 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.
20 56(c)). "Where the nonmoving party bears the burden of proof at trial, the moving party need
21 only prove that there is an absence of evidence to support the non-moving party's case." Nursing
22 Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376,
23 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory
24 committee's notes to 2010 amendments (recognizing that "a party who does not have the trial
25 burden of production may rely on a showing that a party who does have the trial burden cannot
26 produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment
27 should be entered, after adequate time for discovery and upon motion, against a party who fails to
28 make a showing sufficient to establish the existence of an element essential to that party's case,

1 and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322.
2 “[A] complete failure of proof concerning an essential element of the nonmoving party’s case
3 necessarily renders all other facts immaterial.” Id. at 323.

4 Consequently, if the moving party meets its initial responsibility, the burden then shifts to
5 the opposing party to establish that a genuine issue as to any material fact actually exists. See
6 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
7 establish the existence of such a factual dispute, the opposing party may not rely upon the
8 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the
9 form of affidavits, and/or admissible discovery material in support of its contention that such a
10 dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party
11 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
12 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
13 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
14 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return
15 a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
16 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d
17 1564, 1575 (9th Cir. 1990).

18 In the endeavor to establish the existence of a factual dispute, the opposing party need not
19 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
20 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
21 trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary judgment is to ‘pierce
22 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”
23 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963
24 amendments).

25 In resolving a summary judgment motion, the court examines the pleadings, depositions,
26 answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R.
27 Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at
28 255. All reasonable inferences that may be drawn from the facts placed before the court must be

1 drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587; Walls v. Central Costa
2 County Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011). Nevertheless, inferences are not
3 drawn out of the air, and it is the opposing party’s obligation to produce a factual predicate from
4 which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224,
5 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a
6 genuine issue, the opposing party “must do more than simply show that there is some
7 metaphysical doubt as to the material facts. . . . Where the record taken as a whole could
8 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for
9 trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

10 By contemporaneous notice provided on June 17, 2019 (ECF No. 39-2), plaintiff was
11 advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal
12 Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*);
13 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

14 IV. Undisputed Facts² (“UDF”)

15 1. Plaintiff Antonio Carreon is a prisoner in the custody of the California Department of
16 Corrections and Rehabilitation (“CDCR”), who at all relevant times was housed at High Desert
17 State Prison (“HDSP”).

18 2. Defendant Dr. Abdur-Rahman was at all relevant times employed by CDCR as a
19 Primary Care Physician (“PCP”) at HDSP.

20 3. Defendant Dr. Lee was at all relevant times employed by CDCR as the Chief Physician
21 and Surgeon at HDSP.

22 4. Plaintiff has no formal training in medicine. (Pl.’s Dep. at 59.)

23 5. On June 29, 2015, R. Reed, Physician’s Assistant, completed a primary care provider
24 progress note marked “late entry completed after entire chart review.” (ECF No. 19-1 at 12.)
25 Reed charted plaintiff’s “new arrival” with history of Parkinson’s, “uses carbidopa/levodopa with
26 some relief uses cane for stabilization.” (Id.) Reed noted plaintiff’s resting right hand tremor,

27 ² For purposes of summary judgment, the undersigned finds these facts are undisputed, unless
28 otherwise indicated.

1 and “can walk without cane has parkinson [sic] shuffle.” (Id.) In the diagnosis section, Reed
2 charted that plaintiff’s Parkinson’s was “at goal;” the plan was to “continue current treatment,
3 physical therapy to help with stability movement, use cane as needed, consider neurology
4 evaluation.” (ECF No. 19-1 at 12.) For neuropathy, continue Lyrica. (Id.)

5 6. On June 29, 2015, a health care services physician request for services form was
6 completed for plaintiff requesting physical therapy for plaintiff’s Parkinson’s “to help with
7 stability.” (ECF No. 41 at 13.) On July 1, 2015, the request was approved. (ECF No. 41 at 13.)

8 7. On July 23, 2015, plaintiff had an appointment with Dr. Abdur-Rahman, who
9 addressed plaintiff’s medical conditions, including, but not limited to, Parkinson’s disease,
10 seizure and psychiatric disorders, Hepatitis C, neuropathy of the legs, and high blood pressure.
11 (ECF No. 39-6 at 6-7.)

12 8. Dr. Abdur-Rahman noted plaintiff’s Parkinson’s disease was stable and that plaintiff
13 had been referred through physical therapy to consider a possible neurology evaluation at a later
14 date.

15 9. Dr. Abdur-Rahman noted plaintiff’s neuropathy of the legs was stable and that plaintiff
16 should continue with the current regimen of Lyrica. Dr. Abdur-Rahman noted that plaintiff
17 wanted to have the dose increased, but there was no medical indication at that time for such an
18 increase. Dr. Abdur-Rahman noted plaintiff’s disagreement with the doctor’s decision, but
19 plaintiff was informed of the availability of the administrative appeal process.

20 10. According to plaintiff, Dr. Abdur-Rahman denied plaintiff’s request for a walker,
21 stating, “Well, we’ll see in the future maybe, you know. When you get your physical therapy
22 appointment scheduled we’ll see how that goes.” (Pl.’s Dep. at 53.)

23 11. Dr. Abdur-Rahman does not recall, and his notes do not indicate, whether plaintiff
24 requested a walker during the July 23, 2015 appointment. But Dr. Abdur-Rahman noted that
25 plaintiff self-reported he had been using a cane for one and a half to two years, and that he was
26 recommended to possibly go to a walker. Dr. Abdur-Rahman understood that the possibility of
27 switching to a walker would be addressed at a later date, after plaintiff’s physical therapy
28 appointment. (ECF No. 39-4 at 2.)

1 12. Dr. Abdur-Rahman does not recall, and his notes do not indicate, any discussion
2 during the July 23, 2015 appointment regarding Morphine or other pain medication. The list of
3 “current medications” does not indicate that plaintiff was prescribed or taking Morphine or other
4 pain medication at that time. Further, nothing in Dr. Abdur-Rahman’s notes from such
5 appointment indicate that plaintiff complained of pain or requested Morphine or other pain
6 medication. (ECF No. 39-6 at 6-7.)

7 13. Dr. Abdur-Rahman does not recall, and his notes do not indicate, any discussion
8 regarding referral to a specialist. But Dr. Abdur-Rahman did note that plaintiff had already been
9 referred through physical therapy to consider a possible neurology (specialist) evaluation at a later
10 date. Dr. Abdur-Rahman understood that the need for a specialist referral would be addressed at
11 a later date, after plaintiff’s physical therapy appointment. (ECF No. 39-4 at 2.)

12 14. During the July 23, 2015 appointment with plaintiff, Dr. Abdur-Rahman also looked
13 at plaintiff’s blood results and x-rays, and addressed plaintiff’s seizure disorder, Hepatitis C
14 diagnosis, and high blood pressure. (Pl.’s Dep. at 52, 64, 65.)

15 15. On July 29, 2015, plaintiff saw a physical therapist who recommended plaintiff have
16 six physical therapy visits for his lumbar pain and Parkinson’s, and a neurological consult for his
17 Parkinson’s. (ECF No. 41 at 13; Pl.’s Dep. at 60.) The physical therapist noted plaintiff’s
18 “Tennetti [sic] Balance was 15/26.”³ (ECF No. 41 at 13.)

19 16. On August 3, 2015, plaintiff completed a health care services request form, requesting
20 to be seen because he was in pain from his back and neck, he gets no pain medication, and for his
21 Parkinson’s. (ECF No. 41 at 11.) “Balance starting to get bad.” (Id.)

22 17. On August 5, 2015, plaintiff was seen by RN Garbutt, who assessed plaintiff as
23 follows: “Alt. in mobility R/T Parkinson’s ds., used cane -- unsteady gait.” (ECF No. 41 at 11.)
24 The RN’s plan was follow-up with plaintiff’s PCP “as soon as possible -- fall risk.” (Id.) The RN
25 wrote she would refer plaintiff to his PCP for “mobility evaluation.” (Id.) In the appended
26 musculoskeletal complaint form, the RN wrote that plaintiff “says has not fallen but has stumbled

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28 ³ Tinetti Balance is the “Measurement of the degree of impairment in balance. . . .” List of
medical rating scales, 2 Attorneys Medical Deskbook § 18:8.

1 & caught himself. Has obvious marked tremors with erratic head bobbing. Referred to see PCP
2 as soon as possible R/T fall risk. Evaluate current cane use versus walker need.” (ECF No. 41 at
3 12.)

4 18. Plaintiff saw a physical therapist again on August 12, 2015. (Pl.’s Dep. at 60.)⁴

5 19. On August 18, 2015, plaintiff submitted a CDCR 1824 Reasonable Accommodation
6 Request, requesting a wheeled walker to help him balance. (ECF No. 41 at 14.) Plaintiff stated
7 he has Parkinson’s and was “having trouble balancing with just a cane,” and “having trouble
8 walking.” (Id.)

9 20. On August 19, 2015, plaintiff fell in his cell at 16:30. (ECF No. 41 at 17.) The RN
10 progress note states plaintiff arrived in “B Clinic in full c-spine precaution” complaining that he
11 fell in his cell. The RN charted that plaintiff reported he “was turning around and I felt my leg
12 start to give out I fell and hit the cement.” (Id.) Plaintiff denied having loss of consciousness or
13 having a seizure.

14 21. After the fall, plaintiff was transported to Banner Lassen Medical Center and found to
15 have a nondisplaced T1 fracture. (ECF No. 39-4 at ¶ 9; 19-1 at 29.) Upon his return to prison,
16 plaintiff was provided a two week lay-in where his pills and meals were delivered to him in his
17 cell. (Pl.’s Dep. At 68.)

18 22. On August 25, 2015, Dr. Abdur-Rahman saw plaintiff again. Dr. Abdur-Rahman
19 noted plaintiff appeared for a follow-up visit after sustaining a fall and suffering injuries to his
20 neck and back. (ECF No. 39-4 at ¶ 9.) Dr. Abdur-Rahman charted that plaintiff “states he
21 believes the morphine ER is about to expire” (ECF No. 39-6 at 9), and requested that the
22 morphine be extended a little longer for his back pain (ECF No. 39-4 at 3). Dr. Abdur-Rahman
23 informed plaintiff that the morphine prescription was written for fifteen days, beginning August
24 20, 2015, so the prescription would not expire until September 4, 2015, another ten days. Dr.
25 Abdur-Rahman did not extend the prescription further. (ECF No. 39-4 at ¶¶ 9-10.)

26 23. During the August 25, 2015 appointment, plaintiff also raised questions about the use

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28 ⁴ No party provided a copy of the medical record from the August 12, 2015 physical therapy
session.

1 of a cane with Parkinson's. Dr. Abdur-Rahman noted that plaintiff had been seen twice so far by
2 Physical Therapy for his lower back pain. Dr. Abdur-Rahman recommended to plaintiff that he
3 discuss with his physical therapist whether a cane or a walker would be more suitable with his
4 Parkinson's, and plaintiff agreed with this plan. (ECF No. 39-4 at ¶ 11.)

5 24. The Reasonable Accommodation Panel ("RAP"), consisting of defendant Lee and
6 other nonparties, met on August 26, 2015. (ECF No. 41 at 16.)⁵ T. Robertson, ADA
7 Coordinator/Designee, reported that there was no medical indication for a walker or a wheelchair
8 at this time; plaintiff was scheduled for six sessions with a physical therapist; pursuant to
9 plaintiff's medical evaluation a wheelchair may be considered in the future; plaintiff was
10 provided with a cane, a vest, and ability to access all programs, services and activities safely; and
11 plaintiff could request the assistance of IDA workers for daily activities as needed. (ECF No. 41
12 at 16.) The RAP response was sent to plaintiff on September 11, 2015. (ECF No. 41 at 16.)

13 25. Dr. Abdur-Rahman saw plaintiff again on September 30, 2015, regarding an
14 administrative appeal in which plaintiff requested to receive a wheeled walker with handbrakes
15 and a seat. Dr. Abdur-Rahman informed plaintiff that the wheeled walker with seat and
16 handbrakes had already been received and therefore his appeal had been partially granted. Dr.
17 Abdur-Rahman further noted that plaintiff was awaiting a neurology evaluation regarding his
18 Parkinson's disease. (ECF Nos. 39-4 at ¶ 12; No. 39-6 at 12-13 (Ex. C).)

19 26. During the September 30, 2015 appointment, Dr. Abdur-Rahman also addressed
20 plaintiff's request to extend his Morphine prescription. Plaintiff had been prescribed morphine
21 about six weeks after he fell. Dr. Abdur-Rahman denied plaintiff's request to refill his morphine
22 prescription, as Dr. Abdur-Rahman did not feel there was a medical indication to continue the
23 morphine. (ECF No. 39-4 at ¶ 13; No. 39-6 at 12-13.)

24 27. Finally, Dr. Abdur-Rahman noted plans for a follow-up, including a neurology

25 ⁵ The RAP response notes that on August 19, 2015, plaintiff was sent to the medical clinic where
26 he was evaluated by unidentified medical staff who determined no accommodation was required.
27 (ECF No. 41 at 16.) However, "[s]taff cell fed as an interim accommodation[, and] IAP workers
28 are available to assist with daily activities as needed." (ECF No. 41 at 16.) On August 20, 2015,
plaintiff was interviewed by Correctional Officer Barton. (ECF No. 41 at 16.) On August 25,
2015, plaintiff was evaluated again. (ECF No. 41 at 16.)

1 assessment, but that there was no medical indication at that time for a neurosurgical evaluation, as
2 plaintiff did not have any disease process that would warrant surgery. However, Dr. Abdur-
3 Rahman noted “will order plan for x-ray cervical, lumbar, and thoracic plain films, to compare to
4 the previous films that were obtained on cervical and lumbar spine.” Plaintiff agreed with this
5 plan. (ECF No. 39-4 at ¶ 14; No. 39-6 at 12-13.)

6 28. Plaintiff received a walker by September 30, 2015. (Pl.’s Dep 60:19-20.)

7 2016 Claims

8 29. On January 19, 2016, Dr. Griffith prescribed morphine ER 15 mg, once daily for three
9 days, tapering the dose over the three-day period. (ECF No. 41 at 20.) Dr. Griffith noted plaintiff
10 had an appointment with Dr. Abdur-Rahman on January 22, 2016.

11 30. On January 22, 2016, plaintiff was seen in the Triage and Treatment Area due to a
12 fall.⁶ (ECF No. 41 at 22.) The progress note states that plaintiff reported he “fell out of his
13 wheeled walker and avoided hitting his head.” (*Id.*) At the time, plaintiff was taking Morphine
14 ER 15 mg tablet every day for 3 days (expires January 23, 2016), and Lyrica 75 mg capsules, one
15 capsule twice daily for 90 days (non-formulary approved through May 7, 2016). (ECF No. 41 at
16 22.) Plaintiff was discharged back to yard. (*Id.*)

17 31. On January 27, 2016, Dr. Griffith noted “Ibuprofen 400 mg . . . prn pain . . . 20 tabs,
18 10 days.” (ECF No. 41 at 21.)

19 Plaintiff’s Administrative Appeals

20 32. On or about July 26, 2015, plaintiff submitted inmate appeal Log No. HDSP HC
21 15029346. (ECF No. 39-5 at 3, ¶ 9 (Gates Decl.); ECF No. 39-5 at 10-16.) In the appeal,
22 plaintiff complained about Dr. Abdur-Rahman’s treatment of him on July 23, 2015, and requested
23 proper pain medication, to be referred to a specialist, and to be seen by a different doctor.
24 Plaintiff was interviewed for the first level review by L. Christensen, Nurse Practitioner on
25 August 7, 2015. (ECF No. 39-5 at 12, 16.) The appeal was partially granted at the first level of
26 review in that plaintiff was seen by a different provider for his appeal, his Lyrica prescription was

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28 ⁶ If there is a second page of this progress note, plaintiff did not provide one. There is no
indication on the first page who wrote the progress note. (ECF No. 41 at 22.)

1 increased to 75 mg, and plaintiff was referred to neurology to evaluate plaintiff's Parkinson's
2 disease, seizure disorder, and neuropathy. Plaintiff was interviewed for the second level review
3 by L. Harrison, Nurse Practitioner, on July 28, 2015. (ECF No. 39-5 at 10.) The appeal was
4 partially granted at the second level of review. The first and second level responses were signed
5 by Defendant Chief Physician and Surgeon Dr. Lee.

6 33. On or about September 15, 2015, plaintiff submitted inmate grievance log number
7 HDSP HC 15029462. (ECF No. 39-5 at 3, ¶ 10; ECF No. 39-5 at 19-22.) In this appeal, plaintiff
8 requested to be issued a walker with four wheels, handbrakes, and a seat. The appeal was granted
9 at the first level of review on October 21, 2015, and the appeal response was signed by defendant
10 Dr. Lee.

11 34. After September 29, 2015, plaintiff submitted the following six Health Care Appeals:
12 HDSP HC 16029822, SATF HC 16063013, SATF HC 16063278, SATF HC 16063628,
13 SATF HC 16063572, and HDSP HC 16031095. However, none of these grievances concerned
14 defendant Lee's review of plaintiff's other grievances. (ECF No. 39-5 at 3-4, ¶¶ 11-17; ECF No.
15 39-5 at 28-131 (Exs. D-I.)

16 35. In his deposition, plaintiff confirmed that the sole basis for his claims against
17 defendant Dr. Lee is "her role in denying [plaintiff's] 602 appeal." (Pl.'s Dep. At 67.)

18 V. Alleged Failure to Exhaust – Defendant Lee

19 A. Exhaustion Standards

20 The Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a), requires a
21 prisoner challenging prison conditions to exhaust available administrative remedies before filing
22 suit. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); 42 U.S.C. § 1997e(a) ("No action
23 shall be brought with respect to prison conditions under section 1983 of this title, or any other
24 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
25 administrative remedies as are available are exhausted."). Exhaustion is a precondition to suit;
26 exhaustion during the pendency of the litigation is insufficient. McKinney, 311 F.3d at 1199-200.
27 This requirement promotes the PLRA's goal of efficiency by: "(1) 'giv[ing] prisoners an
28 effective incentive to make full use of the prison grievance process'; (2) reducing prisoner suits as

1 some prisoners are ‘persuaded by the proceedings not to file an action in federal court’; and
2 (3) improving the quality of any remaining prisoner suits ‘because proper exhaustion often results
3 in the creation of an administrative record that is helpful to the court.’” Nunez v. Duncan, 591
4 F.3d 1217, 1226 (9th Cir. 2010) (quoting Woodford v. Ngo, 548 U.S. 81, 94-95 (2006)).

5 “Proper exhaustion demands compliance with an agency’s deadlines and other critical
6 procedural rules.” Woodford, 548 U.S. at 90. These rules are defined by the prison grievance
7 process itself, not by the PLRA. Jones v. Bock, 549 U.S. 199, 218 (2007). “[A] prisoner must
8 ‘complete the administrative review process in accordance with the applicable procedural rules,
9 including deadlines, as a precondition to bringing suit in federal court.’” Harvey v. Jordan, 605
10 F.3d 681, 683 (9th Cir. 2010) (quoting Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009)).
11 In California, a grievance must be timely appealed through the third level of review to complete
12 the administrative review process. Harvey, 605 F.3d at 683; Cal. Code Regs. tit. 15, § 3084.1(b).
13 The State of California provides its inmates and parolees the right to administratively appeal
14 “any policy, decision, action, condition, or omission by the department or its staff that the inmate
15 or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or
16 welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative
17 remedies, a prisoner must proceed through three formal levels of appeal and receive a decision
18 from the Secretary of the CDCR or his designee. Id. § 3084.1(b), § 3084.7(d)(3).

19 The amount of detail in an administrative grievance necessary to properly exhaust a claim
20 is determined by the prison’s applicable grievance procedures. Jones, 549 U.S. at 218. California
21 prisoners are required to lodge their administrative complaint on a CDCR-602 form (or a CDCR-
22 602 HC form for a health-care matter). The level of specificity required in the appeal is described
23 in a regulation:

24 The inmate or parolee shall list all staff member(s) involved and shall
25 describe their involvement in the issue. To assist in the identification
26 of staff members, the inmate or parolee shall include the staff
27 member’s last name, first initial, title or position, if known, and the
28 dates of the staff member’s involvement in the issue under appeal. If
the inmate or parolee does not have the requested identifying
information about the staff member(s), he or she shall provide any
other available information that would assist the appeals coordinator
in making a reasonable attempt to identify the staff member(s) in

1 question. [¶] The inmate or parolee shall state all facts known and
2 available to him/her regarding the issue being appealed at the time of
3 submitting the Inmate/Parolee Appeal form, and if needed, the
4 Inmate/Parolee Appeal Form Attachment.

5 Cal. Code Regs. tit. 15, § 3084.2(a)(3-4). An inmate has thirty calendar days to submit his or her
6 appeal from the occurrence of the event or decision being appealed, or “upon first having
7 knowledge of the action or decision being appealed.” Cal. Code Regs. tit. 15, § 3084.8(b).

8 However, the Ninth Circuit has held that “a prisoner exhausts such administrative
9 remedies as are available . . . under the PLRA despite failing to comply with a procedural rule if
10 prison officials ignore the procedural problem and render a decision on the merits of the
11 grievance at each available step of the administrative process.” Reyes v. Smith, 810 F.3d 654,
12 658 (9th Cir. 2016); see also Franklin v. Foulk, 2017 WL 784894, at *4-5 (E.D. Cal. Mar. 1,
13 2017); Franklin v. Lewis, 2016 WL 4761081, at *6 (N.D. Cal. Sept. 13, 2016). Thus, a prisoner’s
14 failure to list all staff members involved in an incident in his inmate grievance, or to fully
15 describe the involvement of staff members in the incident, will not necessarily preclude his
16 exhaustion of administrative remedies. Reyes, 810 F.3d at 658; Foulk, 2017 WL 784894, at *4
17 (“[T]he court in Reyes found that even though the plaintiff’s grievance failed to name two
18 physicians on the prison’s three-person pain committee, prison officials were put on notice of the
19 nature of the wrong alleged in the suit -- that the plaintiff was wrongfully denied pain
20 medication.”); Lewis, 2016 WL 4761081, at *6 (“[T]o the extent Defendants argue that Plaintiff
21 failed to comply with a procedural requirement by not naming Defendants in [his appeal], this
22 deficiency is not necessarily fatal to Plaintiff’s claim pursuant to Reyes”); Grigsby v. Munguia,
23 2016 WL 900197, at *11-12 (E.D. Cal. Mar. 9, 2016) (appeal pursued through all three levels of
24 review challenged the excessive force incident, and prison officials aware of defendant Baker’s
25 involvement).

26 Nonetheless, for administrative remedies to be exhausted by California prisoners as to
27 defendants who were not identified in the inmate grievance, there must be a “sufficient
28 connection” between the claim in the appeal and the unidentified defendants such that prison
officials can be said to have had “notice of the alleged deprivation” and an “opportunity to

1 resolve it.” Reyes, 810 F.3d at 659 (PLRA exhaustion requirements satisfied as to two prison
2 doctors despite not being named in the appeal because there was a sufficient connection between
3 Reyes’ appeal based on inadequate pain management, and the two doctors, who served on the
4 prison committee that denied Reyes medication); McClure v. Chen, 246 F.Supp 3d 1286, 1293-94
5 (E.D. Cal. March 28, 2017) (remedies exhausted even though doctors not named in appeal; prison
6 was placed on notice)).

7 An inmate must exhaust available remedies but is not required to exhaust unavailable
8 remedies. Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014) (*en banc*). “To be available, a
9 remedy must be available ‘as a practical matter’; it must be ‘capable of use; at hand.’” Id.
10 (quoting Brown v. Valoff, 422 F.3d 926, 936-37 (9th Cir. 2005)). “Accordingly, an inmate is
11 required to exhaust those, but only those, grievance procedures that are ‘capable of use’ to obtain
12 ‘some relief for the action complained of.’” Ross v. Blake, 136 S. Ct. 1850, 1858 (2016) (quoting
13 Booth v. Churner, 532 U.S. 731, 738 (2001)).

14 Failure to exhaust under the PLRA is “an affirmative defense the defendant must plead
15 and prove.” Jones, 549 U.S. at 204. It is the defendant’s burden to prove that there was an
16 available administrative remedy, and that the prisoner failed to exhaust that remedy. Albino, 747
17 F.3d at 1172. “Once the defendant has carried that burden, the prisoner has the burden of
18 production. That is, the burden shifts to the prisoner to come forward with evidence showing that
19 there is something in his particular case that made the existing and generally available
20 administrative remedies effectively unavailable to him.” Id. If the court concludes that the
21 prisoner failed to exhaust available administrative remedies, the proper remedy is dismissal
22 without prejudice. See Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th
23 Cir. 2005).

24 B. Discussion

25 In his complaint, plaintiff alleges that defendant Lee had actual knowledge of plaintiff’s
26 medical issues based on her review of appeals HDSP-HC-15029346 and HDSP-HC-029462, as
27 well as her role in CDC 1824 Log # B-15-02207. It is undisputed that plaintiff filed no grievance
28 specifically challenging the acts or omissions of defendant Lee.

1 Defendants argue that in order to exhaust plaintiff's claim against defendant Lee, plaintiff
2 was required to submit and exhaust an appeal about defendant Lee's alleged improper review of
3 plaintiff's administrative appeals. However, defendants provide no legal authority requiring a
4 prisoner to separately appeal an appeal reviewer's alleged failure to investigate or appropriately
5 address the medical claims raised in the underlying appeal. Here, two of plaintiff's administrative
6 appeals challenging his medical care are relevant to this case, and defendant Lee reviewed both
7 appeals. Plaintiff named defendant Lee as a defendant based on her alleged failure to take
8 appropriate action on the medical claims brought to her attention through the medical appeals -
9 Dr. Lee had an opportunity to address plaintiff's underlying medical claims during the
10 administrative review process. While it is clear that plaintiff is required to exhaust claims
11 concerning his medical care, the undersigned is unaware of any authority requiring a prisoner to
12 then file another administrative appeal challenging an appeal reviewer's alleged failure to take
13 additional steps to address the same medical care challenged in the underlying administrative
14 appeal. Indeed, requiring prisoners to do so would result in a circular filing of appeals, and would
15 appear to risk having such appeal rejected as raising the same medical claims raised in the initial
16 appeal. The undersigned finds that defendant Lee's role in reviewing the underlying claims is a
17 sufficient connection between the claim in the appeal and the unidentified Dr. Lee such that
18 prison officials can be said to have had notice of the alleged deprivation and had an opportunity to
19 resolve it through the appeals process. Defendants' motion should be denied as to those claims
20 raised in the two administrative appeals addressed by defendant Dr. Lee.

21 However, as to plaintiff's challenge based on Dr. Lee's role on the September 2015 RAP,
22 plaintiff must exhaust administrative appeals raising such challenge. As noted on the RAP form,
23 plaintiff was required to complete a CDCR 602-HC if he disagreed with "a health care decision
24 made prior to or during the CDCR 1824 process." (ECF No. 41 at 16.) Plaintiff did not file an
25 administrative appeal challenging the September 2015 decision by the RAP. (ECF No. 39-5 at 3-
26 124.) Thus, defendant Lee is entitled to summary judgment on this claim.

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1 VI. Alleged Deliberate Indifference - Medical Claims

2 A. Eighth Amendment

3 While the Eighth Amendment of the United States Constitution entitles plaintiff to
4 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
5 indifference to an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th
6 Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th
7 Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d
8 1091, 1096 (9th Cir. 2006). Plaintiff "must show (1) a serious medical need by demonstrating
9 that failure to treat [his] condition could result in further significant injury or the unnecessary and
10 wanton infliction of pain," and (2) that "the defendant's response to the need was deliberately
11 indifferent." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096); McGuckin v. Smith, 974
12 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104
13 F.3d 1133 (9th Cir. 1997) (*en banc*).

14 To establish "deliberate indifference" to such a need, the prisoner must demonstrate: "(a)
15 a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm
16 caused by the indifference." Jett, 439 F.3d at 1096. Deliberate indifference "may appear when
17 prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown
18 by the way in which prison physicians provide medical care." Id. (citations omitted). To
19 establish a claim of deliberate indifference arising from delay in providing care, a plaintiff must
20 show that the delay was harmful. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994);
21 McGuckin, 974 F.2d at 1059. "A prisoner need not show his harm was substantial; however,
22 such would provide additional support for the inmate's claim that the defendant was deliberately
23 indifferent to his needs." Jett, 439 F.3d at 1096; see also McGuckin, 974 F.2d at 1060. The
24 defendant must have been subjectively aware of a serious risk of harm and must have consciously
25 disregarded that risk. See Farmer v. Brennan, 511 U.S. 825, 845 (1994).

26 An "isolated exception" to the defendant's "overall treatment" of the prisoner does not
27 state a deliberate indifference claim. Jett, 439 F.3d at 1096. Similarly, "mere malpractice, or
28 even gross negligence" in the provision of medical care does not establish a constitutional

1 violation. Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990); see also Farmer, 511 U.S.
2 at 835 (deliberate indifference is “a state of mind more blameworthy than negligence” and
3 “requires ‘more than ordinary lack of due care for the prisoner’s interests or safety’”) (quoting
4 Whitley v. Albers, 475 U.S. 312, 319 (1986)); Wilhelm, 680 F.3d at 1123 (a “negligent
5 misdiagnosis” does not state a claim for deliberate indifference).

6 In addition, “[a] difference of opinion between a physician and the prisoner -- or between
7 medical professionals -- concerning what medical care is appropriate does not amount to
8 deliberate indifference.” Snow, 681 F.3d at 987 (citation omitted); Wilhelm, 680 F.3d at 1122-23
9 (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)). Rather, plaintiff “must show that
10 the course of treatment the doctors chose was medically unacceptable under the circumstances
11 and that the defendants chose this course in conscious disregard of an excessive risk to [his]
12 health.” Snow, 681 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal quotation marks
13 omitted). In other words, so long as a defendant decides on a medically acceptable course of
14 treatment, his actions will not be considered deliberately indifferent even if an alternative course
15 of treatment was available. Jackson, 90 F.3d at 332.

16 B. Discussion

17 1. Serious Medical Need

18 Defendants do not appear to dispute that plaintiff suffers from serious medical needs.
19 Medical records demonstrate plaintiff suffers from serious medical conditions, including
20 Parkinson’s disease, seizure disorder, psychiatric disorder, Hepatitis C, neuropathy of the legs,
21 and high blood pressure.

22 2. Deliberate Indifference

23 *Was defendant Dr. Abdur-Rahman deliberately indifferent?*

24 As set forth above, plaintiff alleges that Dr. Abdur-Rahman failed to timely provide a
25 walker; (b) extend morphine; (c) increase Lyrica; and (d) refer plaintiff to a specialist.

26 (a) Failure to timely provide a four-wheel walker

27 Plaintiff alleges that Dr. Abdur-Rahman’s failure to provide a four-wheel walker resulted
28 in plaintiff falling and sustaining serious injuries. In his opposition, plaintiff argues that physical

1 therapy recommended plaintiff receive a walker on the first visit “on July 29, 2015 via E-mail.”
2 (ECF No. 41 at 2.) Plaintiff claims that on August 12, 2015, the physical therapist explained
3 “[Tinetti] balance of 15/26 high risk fall” but Dr. Abdur-Rahman did not act on it until after
4 plaintiff fell. Plaintiff argues such delay demonstrates the doctor’s deliberate indifference to an
5 impending risk of harm that was “easily preventable.” (ECF No. 41 at 2.)

6 The record confirms that plaintiff did not see physical therapy until July 29, 2015; thus,
7 Dr. Abdur-Rahman did not have benefit of such report at plaintiff’s July 23, 2015 medical visit.
8 In his deposition, plaintiff claims Dr. Abdur-Rahman denied plaintiff’s request for a walker,
9 stating “Well, we’ll see in the future maybe, you know. When you get your physical therapy
10 appointment scheduled we’ll see how that goes.” (Pl.’s Dep. at 53.) The doctor’s medical record
11 confirms that plaintiff told Dr. Abdur-Rahman that plaintiff had used a cane for a few years and
12 was recommended to possibly go to a walker. (ECF No. 39-6 at 6.) Even assuming, arguendo,
13 that Dr. Abdur-Rahman denied plaintiff a walker on July 23, 2015, plaintiff’s recollection of the
14 doctor’s statement comports with Dr. Abdur-Rahman’s understanding that the possibility of
15 switching to a walker would be addressed at a later time, after plaintiff’s physical therapy
16 appointment. Plaintiff adduces no competent medical evidence demonstrating that not providing
17 plaintiff a walker on July 23, 2015, when plaintiff was going to be evaluated by physical therapy,
18 was medically unacceptable under the circumstances. Plaintiff’s personal disagreement with the
19 doctor’s decision constitutes a difference of opinion not rising to the level of deliberate
20 indifference.

21 In his deposition, plaintiff claims that at both the July 29 and August 12 sessions of
22 physical therapy, the physical therapist said he “emailed the doctor about me getting a walker.”
23 (Pl.’s Dep. at 60.) In his opposition, plaintiff refers to an e-mail “explaining [Tinetti] balance of
24 15/26 high risk fall.” (ECF No. 41 at 2.) However, plaintiff did not provide a copy of any email,
25 a declaration from the physical therapist, or a copy of the August 12, 2015 physical therapy
26 report. Moreover, the medical record from the July 29, 2015 session does not mention a walker
27 or state that plaintiff was at high risk of falling. (ECF No. 41 at 13.) Such record notes plaintiff’s
28 Tinetti balance was 15/26, but plaintiff provides no competent medical evidence explaining what

1 a Tinetti balance assessment is, or what the score of 15/26 means from either the physical
2 therapist's or other medical expert's perspective. Thus, the court cannot credit plaintiff's claim
3 that physical therapy put Dr. Abdur-Rahman on notice that plaintiff was at high risk of falling
4 prior to plaintiff's August 19, 2015 fall because it is not supported by competent medical
5 evidence.

6 Dr. Abdur-Rahman did not see plaintiff again until August 25, 2015. It is undisputed that
7 during this visit, plaintiff raised questions about the use of his cane with Parkinson's. The doctor
8 noted plaintiff had already been seen twice by physical therapy for plaintiff's lower back pain,
9 and recommended plaintiff discuss with the physical therapist whether a cane or walker would be
10 more suitable with plaintiff's Parkinson's, and plaintiff "agreed with this plan." (ECF Nos. 39-4
11 at 3; 39-6 at 9-10.) There is no notation on the medical record that plaintiff objected that physical
12 therapy had already recommended plaintiff receive a walker; rather, the medical record states that
13 plaintiff agreed with the plan. Plaintiff points to no deposition testimony attesting to such
14 objection. As noted above, plaintiff submitted no competent medical evidence demonstrating that
15 physical therapy recommended plaintiff receive a walker.⁷

16 The record does not reflect who ordered the walker or on what date. But it is undisputed
17 that plaintiff received the walker by September 30, 2015.

18 On this record, the undersigned cannot conclude that Dr. Abdur-Rahman was deliberately
19 indifferent by failing to earlier provide plaintiff with a walker. Rather, the record reflects that the
20 doctor recommended plaintiff discuss such mobility issues with his physical therapist. Plaintiff
21 proffers no competent medical evidence that deferring the question of a walker versus a cane to
22 physical therapy was a medically unacceptable course of treatment.⁸

23 ⁷ Plaintiff submitted a September 23, 2015 memo from Steve Fama, a lawyer with the Prison
24 Law Office, who claimed that a physical therapist on September 14, 2015 concluded plaintiff
25 presented a "high fall risk," and had discussed plaintiff's need for a walker with an unidentified
26 physician as documented on August 31, 2015. (ECF No. 41 at 19.) However, because Mr. Fama
27 is not a doctor, the court cannot credit his memo in evaluating plaintiff's deliberate indifference
claim. Moreover, plaintiff did not provide a copy of the September 14, 2015 physical therapy
report, or any document from August 31, 2015.

28 ⁸ Later, plaintiff fell out of his walker. (ECF No. 41 at 22.) Thus, as defendants argue (ECF No.

1 (b) & (c) Failure to increase or extend medications

2 The record demonstrates that plaintiff was prescribed Lyrica for his neuropathic pain and
3 was later prescribed morphine to treat pain following his fall.

4 July 23, 2015 Visit

5 At the time of the July 23, 2015 visit with defendant Dr. Abdur-Rahman, plaintiff was
6 prescribed 25 mg capsule of Lyrica twice a day for pain.⁹ (ECF No. 39-6 at 6.) Plaintiff
7 requested that the Lyrica prescription be increased. Dr. Abdur-Rahman charted that there was no
8 medical indication to increase the dose, noting that the “[m]edication was apparently started not
9 that long ago.” (ECF No. 39-6 at 7.) The doctor also charted that plaintiff’s seizure disorder,
10 Parkinson’s disease, and neuropathy of the lower extremities were all “stable” conditions. (Id.)
11 The doctor opined that there was no medical indication to increase the Lyrica at that time. (ECF
12 No. 39-4 at 2.)

13 Dr. Abdur-Rahman does not recall any request for morphine or other pain medication.
14 (ECF No. 39-4 at 2.) The medical record from the July 23, 2015 visit notes that plaintiff was
15 being seen for a “cross-coverage sick call followup visit on B Yard,” and does not reflect that
16 plaintiff requested morphine or complained of pain, other than his request to increase his dose of
17 Lyrica. (ECF No. 39-6 at 6.) In his verified pleading, plaintiff declares the doctor “refused” to
18 “extend morphine,” and left plaintiff with “futile pain medication (Tylenol).” (ECF No. 1 at 7.)
19 In his opposition, plaintiff does not address the July 23, 2015 visit. (ECF No. 41, *passim.*)

20 Plaintiff provided no competent medical evidence demonstrating that he should have been
21 prescribed more pain medication. Even assuming the doctor refused to prescribe morphine, Dr.
22 Abdur-Rahman continued plaintiff’s Lyrica prescription and provided Tylenol. Thus, defendant
23 Dr. Abdur-Rahman did not act with deliberate indifference simply by refusing to increase
24 plaintiff’s medication at that time. See McGuckin v. Smith, 974 F.2d 1050 (9th Cir.1992) (a
25 defendant “must purposefully ignore or fail to respond to a prisoner’s pain or possible medical
26 _____
27 39-1 at 12), the lack of a walker was not the cause of plaintiff’s fall in his cell on August 19,
28 2015.

⁹ The medical record reflects plaintiff was not prescribed morphine on July 23, 2015.

1 need in order for deliberate indifference to be established.”). Dr. Abdur-Rahman’s conservative
2 approach to plaintiff’s medical treatment on July 23, 2015, fails to demonstrate deliberate
3 indifference.

4 August 25, 2015 Visit

5 By August 25, 2015, plaintiff had been prescribed morphine after he fell, and his Lyrica
6 prescription had increased to 75 mg twice a day. Contrary to plaintiff’s contention that his
7 morphine prescription was “about to expire,” the medical record confirms that the prescription
8 would not expire until September 4, 2015. (ECF No. 39-6 at 9.) Thus, any failure to renew the
9 morphine on August 25, 2015, was not deliberate indifference.

10 September 30, 2015 Visit

11 Plaintiff saw Dr. Abdur-Rahman again on September 30, 2015, in connection with an
12 appeal, and addressed plaintiff’s request to extend the morphine prescription prescribed after
13 plaintiff fell on August 19, 2015. In his pleading, plaintiff complains that the doctor did not
14 extend the morphine prescription or increase plaintiff’s Lyrica prescription. (ECF No. 1 at 11.)
15 The medical record from this visit shows that plaintiff was already prescribed 75 mg. of Lyrica
16 twice a day, and that he was prescribed morphine ER 15 mg tablet twice a day for 14 days. (ECF
17 No. 39-6 at 12.) It is unclear when the 14-day period expired. But plaintiff had received the
18 morphine for six weeks following his fall, and Dr. Abdur-Rahman opined that he denied
19 plaintiff’s request to refill the prescription because he “did not feel there was a medical indication
20 to continue it.” (ECF No. 39-4 at 3.) Plaintiff adduced no competent medical evidence to the
21 contrary; thus, his disagreement with Dr. Abdur-Rahman’s decision does not rise to the level of
22 deliberate indifference.

23 January 2016

24 As argued by defendants, plaintiff’s verified pleading only raises allegations through
25 September 2015, but in his opposition to the motion, plaintiff raises new claims concerning the
26 provision of morphine in January of 2016. The addition of such new claims at this stage of the
27 proceedings is improper, inasmuch as the gravamen of his pleading is the failure of Dr. Abdur-
28 Rahman to timely provide a walker and provide adequate medical care following plaintiff’s fall

1 on August 19, 2015.¹⁰

2 For all of the above reasons, the undersigned finds that there is no material dispute of fact
3 precluding summary judgment on plaintiff's claims concerning medication.

4 (d) Failure to refer plaintiff to a specialist

5 It is undisputed that plaintiff was referred for six sessions of physical therapy. At the July
6 23, 2015 visit, Dr. Abdur-Rahman noted that a possible neurology evaluation would be
7 considered following physical therapy. On August 25, 2015, Dr. Abdur-Rahman noted plaintiff's
8 appointment with a telemedicine neurologist was pending. (ECF No. 39-6 at 10.) By September
9 30, 2015, plaintiff's neurology consult was still pending. (ECF No. 39-6 at 13.) Because plaintiff
10 had no disease process requiring surgery, "there was no medical indication for a neurosurgical
11 evaluation." (ECF No. 39-6 at 13.) The doctor also planned to order cervical, lumbar and
12 thoracic x-rays for comparison purposes. At each visit, Dr. Abdur-Rahman charted that
13 plaintiff's Parkinson's and seizure disorder were stable. (ECF No. 39-6 at 6-13.) Plaintiff argues
14 that his Parkinson's was not stable, but he filed no competent medical evidence demonstrating
15 that his medical conditions were not stable, or that plaintiff should have earlier seen a neurologist.
16 Plaintiff's disagreement with Dr. Abdur-Rahman's evaluation and treatment, without more, does
17 not evidence deliberate indifference.

18 ¹⁰ Moreover, plaintiff's 2016 claims are vague and conclusory. Plaintiff appears to argue that Dr.
19 Abdur-Rahman stripped plaintiff of morphine he was granted through the appeals process by Dr.
20 Lee. (ECF No. 41 at 4.) However, even if plaintiff was granted morphine through the appeals
21 process, plaintiff's pain management is subject to change based on his medical conditions and
22 each treating physician's diagnosis and treatment options. This is evidenced by the treating
23 doctors' morphine prescriptions of limited duration and tapering doses. Also, plaintiff claims that
24 Dr. Abdur-Rahman did not renew the morphine on January 6, 2016, but also claims the doctor
25 took it away on January 16, 2016. (ECF No. 41 at 4.) But plaintiff provided a copy of Dr.
26 Griffith's medical record prescribing morphine ER 15 mg tablet once a day for three days,
27 "tapering dose for only 3 days." (*Id.*) On January 22, 2016, plaintiff was seen after falling from
28 his walker; an unidentified medical professional's progress note states plaintiff was receiving
Lyrica, 75 mg. twice a day, and morphine ER 15 mg tablet once a day for three days, expiring
January 23, 2016. (ECF No. 41 at 22.) On January 27, 2016, Dr. Griffith prescribed plaintiff
Ibuprofen, 400 mg. once a day as needed for pain, for ten days. (ECF No. 41 at 21.) Such
medical records suggest a mere difference of opinion between plaintiff and his treating medical
professionals as to the appropriate pain medication he should receive. Accordingly, the
undersigned declines to recommend granting plaintiff leave to amend to raise claims based on the
January 2016 incidents.

1 With regards to your back, you have minimal chronic wedge
2 compression and minimal degenerative changes. With regards to
3 your neck, there was no misalignment (the bones are in place) and
4 degenerative disc disease (DDD). . . .

5 Be advised that gradual deterioration of the disc between the
6 vertebrae is known as degenerative disc disease (DDD). As we age,
7 the water and protein content of the cartilage in the body changes,
8 which results in more fragile and thin cartilage. Both the discs and
9 joints that stack the vertebrae are composed of cartilage and subject
10 to “wear and tear” over time. Hence degenerative disc disease is not
11 truly a disease; it is a term used to describe the normal changes in
12 your spinal discs as you age. DDD is treated using a number of
13 different modalities. It is a process that cannot be cured. Surgery is
14 a treatment of last resorts due to the extreme risk and limited benefits.

15 No pain management regimen can be expected to provide you with
16 no pain without inordinate side effects, either short or long term, and
17 “no pain” is therefore not a reasonable goal. Rather, your goal should
18 be to achieve a level of pain control that allows you to function in
19 your activities of daily living. This is the safest and most appropriate
20 approach to pain management. Your treatment has been appropriate
21 to date as the most highly recommended medication for this
22 condition is Tylenol. Ibuprofen is a second-step medication. You
23 are currently receiving significant medication for your condition as
24 you are receiving extended release morphine 15 mg twice a day at
25 this time and Lyrica 75 mg twice a day. No change is indicated at
26 this time.

27 (ECF No. 39-5 at 11.)

28 In his opposition, plaintiff points to no additional investigation or action Dr. Lee should
have taken in response to Appeal No. HDSP HC 15029346. Plaintiff adduces no competent
medical evidence demonstrating that Dr. Lee’s medical opinion in denying plaintiff’s pain
management request “was medically unacceptable under the circumstances” and was chosen “in
conscious disregard of an excessive risk to plaintiff’s health.” Jackson, 90 F.3d at 332. Rather,
plaintiff’s challenge to Dr. Lee’s responses to plaintiff’s appeal constitutes a mere difference of
opinion that does not rise to the level of deliberate indifference. Snow, 681 F.3d at 987 (citation
omitted); Wilhelm, 680 F.3d at 1122-23 (citing Jackson, 90 F.3d at 332).

(b) Appeal No. HDSP HC 15029462

In Appeal No. HDSP HC 15029462, plaintiff sought a wheeled walker with handbrakes
and a seat. (ECF No. 39-5 at 19-22.) However, by the time Dr. Lee prepared the first level
response on October 21, 2015, plaintiff had already received the walker on September 30, 2015.

1 (ECF No. 39-5 at 19.) Thus, there was no further investigation or action to be taken in connection
2 with plaintiff's need for a walker at that time. Thus, plaintiff's claim against defendant Dr. Lee in
3 connection with her review of plaintiff's appeal seeking the walker should be denied.

4 Conclusion

5 For all of the above reasons, defendant Dr. Lee is entitled to summary judgment on
6 plaintiff's Eighth Amendment claims related to Dr. Lee's review of plaintiff's administrative
7 appeals.

8 VII. Unauthorized Sur-Reply

9 On August 26, 2019, plaintiff filed an unauthorized sur-reply to defendants' reply. The
10 Local Rules do not authorize the routine filing of a sur-reply. Nevertheless, a district court may
11 allow a sur-reply "where a valid reason for such additional briefing exists, such as where the
12 movant raises new arguments in its reply brief." Hill v. England, 2005 WL 3031136, at *1 (E.D.
13 Cal. 2005); accord Norwood v. Byers, 2013 WL 3330643, at *3 (E.D. Cal. 2013) (granting the
14 motion to strike the sur-reply because "defendants did not raise new arguments in their reply that
15 necessitated additional argument from plaintiff, plaintiff did not seek leave to file a sur-reply
16 before actually filing it, and the arguments in the sur-reply do not alter the analysis below"),
17 adopted, 2013 WL 5156572 (E.D. Cal. 2013). In the present case, defendants did not raise new
18 arguments in the reply brief, plaintiff did not seek leave to file a sur-reply, and his arguments
19 therein do not impact the court's analysis. For these reasons, the court strikes plaintiff's sur-
20 reply.

21 VIII. Conclusion

22 For the foregoing reasons, IT IS HEREBY ORDERED that the Clerk of the Court is
23 directed to strike plaintiff's unauthorized sur-reply (ECF No. 43).

24 Further, IT IS RECOMMENDED that:

25 1. Plaintiff's Eighth Amendment claims against defendant Lee based on her role in the
26 2015 RAP be dismissed based on plaintiff's failure to exhaust such claim; in all other respects,
27 the motion on exhaustion grounds (ECF No. 39) be denied; and


28 ///

1 2. Defendants' motion for summary judgment (ECF No. 39) on plaintiff's remaining
2 Eighth Amendment claims against defendant Dr. Lee, and all of plaintiff's Eighth Amendment
3 claims against defendant Dr. Abdur-Rahman, be granted; and

4 3. The Clerk of the Court be directed to enter judgment and terminate this action.

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

13 Dated: December 30, 2019

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15 _____
16 KENDALL J. NEWMAN
17 UNITED STATES MAGISTRATE JUDGE

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