



1 Having reviewed the file, except as discussed below, the court finds the findings and  
2 recommendations to be supported by the record and by the proper analysis.

3 The magistrate judge finds that both plaintiff's administrative Appeal No. MCSP HC  
4 15047179 and Appeal No. MCSP HC 15047222 "sought the rescheduling of plaintiff's surgery"  
5 and that "[p]laintiff sought an emergency rescheduling of plaintiff's surgery, but also sought  
6 information concerning treatment of his other health issues, such as his hernia, suggesting  
7 plaintiff was seeking additional information in order to make an informed decision whether to  
8 consent to such a radical surgery." ECF No. 56 at 17-18. The magistrate judge also finds neither  
9 appeal "specifically challenged a delay in surgery." *Id.* at 18. After review of the two  
10 administrative appeals, the court declines to adopt these findings as it does not agree with the  
11 magistrate judge's interpretation. The magistrate judge notes he "considered whether the court  
12 should liberally construe such appeals as at least challenging the delay from August 8, 2015 until  
13 October 22, 2015, when plaintiff finally received the surgery," ECF No. 56, and concluded the  
14 court should not. However, after review, this court finds the liberal construction discussed by the  
15 magistrate judge appropriate and, indeed, fully supported by the assertions in the two  
16 administrative appeals.

17 In Appeal No. MCSP HC 15047179, plaintiff wrote that on August 8, 2015, at a clinic he

18 was notified by the nurse that I was going out for procedure. I asked  
19 if this would be a pre-surgery counseltation [sic] or right into  
20 surgery? She said the doctor would talk to me (not answering my  
21 question). I asked, besides just resectioning the 2 cm of cancer were  
22 they also going to repair the underlying cause, hialal hernia, lower  
23 esophageal sphincter and remove the Barrett's? When I said I needed  
24 these questions addressed, the nurse immediately asked if I was  
25 refusing the surgery. I said, No, I am absolutely not refusing the  
26 surgery. That simply I need this surgery to save my life but want  
27 these questions answered to know what is happening.

28 On August 11, 2015 I was seen by Dr. Jackson who asked why I had  
"refused" this surgery on Monday. When I explained what took  
place, and that I was not even aware of the transport on Monday, he  
did not seem to have any answers for me.

ECF No. 38-4 at 28, 30.

17 In Appeal No. MCSP HC 15047222, plaintiff claimed that on Monday, August 10, 2015,  
18 his cancer surgery "was erroneously cancelled" because staff said he had refused the surgery.

1 ECF No. 38-4 at 35. He cross-referenced Appeal No. MCSP HC 15047179 for additional details.  
2 *Id.* He then claimed he had been sent to the wrong hospital on August 20, 2015 and was again  
3 returned to Mule Creek without undergoing the surgery. *Id.* at 37. Plaintiff asserted the surgery  
4 was “urgent” and requested it be rescheduled.

5 The court finds both administrative appeals challenge the delays in scheduling plaintiff’s  
6 surgery. The court further finds the questions raised by plaintiff, described in Appeal No. MCSP  
7 HC 15047222, were raised by plaintiff to understand the full scope of the procedures and  
8 treatment he would be receiving and not to decide whether to consent to the cancer surgery.  
9 However, the court adopts the magistrate judge’s findings that plaintiff did not pursue either of  
10 these administrative appeals beyond the first level of review. *See* ECF No. 56 at 14-15. For this  
11 reason, these two administrative appeals did not exhaust plaintiff’s claims concerning the delay in  
12 surgery.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Except as modified by this order, the findings and recommendations filed July 8, 2019,  
15 are adopted in full;

16 2. Defendants’ motion for summary judgment (ECF No. 38) is granted in part and denied  
17 in part, as follows:

18 a. Defendants’ motion is denied as to plaintiff’s claims that Dr. Smith and Dr.  
19 Horowitz failed to timely diagnose plaintiff’s cancer and improperly delayed plaintiff’s surgery,  
20 and

21 b. Defendants’ motion is granted as to Dr. Soltanian-Zadeh based on plaintiff’s  
22 failure to exhaust administrative remedies, and this claim is dismissed without prejudice;

23 3. Plaintiff’s cross-motion for summary judgment on the merits (ECF No. 46) is  
24 dismissed without prejudice; and

25 4. This action is referred back to the assigned magistrate judge for all further pretrial  
26 proceedings.

27 DATED: September 6, 2019.

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UNITED STATES DISTRICT JUDGE