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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JORGE PALACIOS,  
Plaintiff,  
v.  
KEVIN SMITH,  
Defendant.

No. 2:17-cv-02500-TLN-CKD

**ORDER**

Plaintiff Jorge Palacios (“Plaintiff”), a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 4, 2020, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen (14) days. (ECF No. 71.) Plaintiff has filed Objections to the Findings and Recommendations. (ECF No. 72.) Defendant Smith (“Defendant”) filed a Response to Plaintiff’s objections. (ECF No. 73.)

The Court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed

1 findings of fact to which no objection has been made, the Court assumes its correctness and  
2 decides the motions on the applicable law. See *Orand v. United States*, 602 F.2d 207, 208 (9th  
3 Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo. See *Britt v. Simi*  
4 *Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

5 Having carefully reviewed the entire file under the applicable legal standards, the Court  
6 finds the Findings and Recommendations to be supported by the record and by the magistrate  
7 judge’s analysis.

8 Plaintiff’s objections appear to reiterate his arguments in opposition to Defendant’s  
9 Motion for Summary Judgment and the allegations of his complaint. (See generally ECF No. 72.)  
10 As correctly noted in the Findings and Recommendations, these arguments are conclusory and  
11 lack an evidentiary basis, as Plaintiff “is not a qualified medical expert able to provide competent  
12 testimony regarding the sufficiency of a medical examination.” (See ECF No. 71 at 11 n. 2.) At  
13 most, Plaintiff’s arguments regarding his medical needs and treatment amount to a difference of  
14 medical opinion that does not rise to the level of deliberate indifference. *Sanchez v. Vild*, 891  
15 F.2d 240, 242 (9th Cir. 1989); *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).  
16 Accordingly, Plaintiff’s objections are overruled.

17 To the extent Plaintiff argues a neutral medical expert would have supported his claims  
18 and — for the first time in this action — requests appointment of a neutral medical expert (see,  
19 e.g., ECF No. 72 at 4), Plaintiff’s objections are not well-taken. The burden to request  
20 appointment of a neutral medical expert lies with Plaintiff, and it is a burden he failed to timely  
21 meet.<sup>1</sup> Furthermore, Plaintiff fails to set forth a factual predicate establishing that a competent  
22 expert would agree with his medical claims, or that such medical opinion could support a claim of  
23 deliberate indifference. *Sanchez*, 891 F.2d at 242; *Toguchi*, 391 F.3d at 1058. Accordingly, these  
24 objections are overruled.

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26 <sup>1</sup> The Court is additionally mindful that Plaintiff initiated this litigation nearly three years  
27 ago and therefore had ample time to assess his need for the appointment of a neutral expert and  
28 file a request. (ECF No. 1.) Plaintiff’s motion to appoint counsel, filed on June 24, 2019 (ECF  
No. 43), similarly demonstrates Plaintiff possessed the capacity to timely submit the instant  
request, though he has provided no justification for his failure to do so.

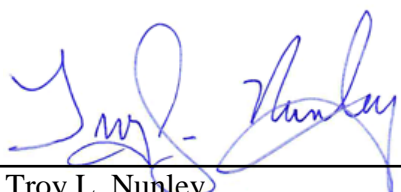
1 Finally, the Court addresses Plaintiff's October 13, 2020 motion requesting the testimony  
2 of a Court-appointed neutral medical expert to rebut Defendant's arguments on summary  
3 judgment. (ECF No. 74.) Plaintiff's Motion — filed nine months after Defendant's Motion for  
4 Summary Judgment was filed (ECF No. 59) and over a month after the Findings and  
5 Recommendations to grant the Motion for Summary Judgment were issued (ECF No. 72) — is  
6 untimely. Nor does Plaintiff meet his burden of establishing his claims are so complex that the  
7 trier of fact requires evidence from a Court-appointed expert. Fed. R. Evid. 706; Pedraza v.  
8 Jones, 71 F.3d 194, 196 (5th Cir. 1995) (purpose of a Rule 706 court-appointed expert is to assist  
9 the trier of fact, not serve as an advocate); see also, e.g., Salcido v. Zarek, 237 F. App'x 151, 152  
10 (9th Cir. 2007) (requests for more pain medication, therapeutic collar, and pillow "not ... a  
11 particularly complex claim"); Honeycutt v. Snider, No. 3:11-cv-00393-RCJ (WGC), 2011 WL  
12 6301429 (D. Nev. Dec. 16, 2011) (expert not required to evaluate plaintiff's need for specialized  
13 orthopedic footwear); Wilds v. Gines, No. C 08-03348 CW (PR), 2011 WL 737616 (N.D. Cal.  
14 Feb. 23, 2011) (expert not required to evaluate plaintiff's low back pain and degenerative disc  
15 disease). For these reasons, Plaintiff's motion is DENIED.

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. The Findings and Recommendations filed September 4, 2020 (ECF No. 71), are  
18 adopted in full;
- 19 2. Defendant's Motion for Summary Judgment (ECF No. 59) is GRANTED and all  
20 claims against Defendant Smith are DISMISSED;
- 21 3. Plaintiff's Motion for Expert Witness Testimony (ECF No. 74) is DENIED; and
- 22 4. The Clerk of the Court is directed to enter Judgment for Defendant and close this case.

23 IT IS SO ORDERED.

24 DATED: October 21, 2020

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Troy L. Nunley  
United States District Judge