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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE ELLIS GRAY,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:18-cv-00071-KJN PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff, proceeding without counsel, initially commenced this social security action on January 12, 2018, and requested leave to proceed *in forma pauperis*. (ECF Nos. 1, 2.) The court granted plaintiff’s request and ordered him to “submit to the United States Marshal an original and five copies of the completed summons, five copies of the complaint, five copies of the scheduling order, and a completed USM-285 form, and [to] file a statement with the court that such documents have been submitted to the United States Marshal” by February 2, 2018. (ECF No. 3 at 2.) Plaintiff failed to provide the court with a statement that he provided the necessary documents to the United States Marshal.

On August 30, 2018, this court ordered plaintiff to show cause in writing why this action should not be dismissed based upon his failure to prosecute this case, no later than September 14, 2018. (ECF No. 6.) Plaintiff was also ordered to submit to the United States Marshal an original

1 and five copies of the completed summons, five copies of the complaint, five copies of the
2 scheduling order, and a completed USM-285 form, and to file a statement with the court that such
3 documents have been submitted to the United States Marshal, no later than September 14, 2018.
4 (Id.) Plaintiff was specifically cautioned that failure to timely respond to the order to show cause
5 and to timely provide the United States Marshal with the necessary documents may result in
6 dismissal of the action pursuant to Federal Rule of Civil Procedure 41(b). (Id.)

7 Although the new deadline has now passed, plaintiff has again failed to provide the
8 necessary documents to the United States Marshal and also failed to respond to the court's order
9 to show cause. At this juncture, the court concludes that dismissal is appropriate.

10 Eastern District Local Rule 110 provides that “[f]ailure of counsel or of a party to comply
11 with these Rules or with any order of the Court may be grounds for imposition by the Court of
12 any and all sanctions authorized by statute or Rule or within the inherent power of the Court.”
13 Moreover, Eastern District Local Rule 183(a) provides, in part:

14 Any individual representing himself or herself without an attorney is
15 bound by the Federal Rules of Civil or Criminal Procedure, these
16 Rules, and all other applicable law. All obligations placed on
17 “counsel” by these Rules apply to individuals appearing in propria
18 persona. Failure to comply therewith may be ground for dismissal,
19 judgment by default, or any other sanction appropriate under these
20 Rules.

21 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the
22 same rules of procedure that govern other litigants”) (overruled on other grounds). A district
23 court may impose sanctions, including involuntary dismissal of a plaintiff's case pursuant to
24 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or
25 fails to comply with the court's orders, the Federal Rules of Civil Procedure, or the court's local
26 rules. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act
27 sua sponte to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
28 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action
pursuant to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to prosecute
or comply with the rules of civil procedure or the court's orders); Ghazali v. Moran, 46 F.3d 52,
53 (9th Cir. 1995) (per curiam) (“Failure to follow a district court's local rules is a proper ground

1 for dismissal”); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal
2 Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with
3 any order of the court”); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.
4 1986) (per curiam) (stating that district courts have inherent power to control their dockets and
5 may impose sanctions including dismissal or default).

6 A court must weigh five factors in determining whether to dismiss a case for failure to
7 prosecute, failure to comply with a court order, or failure to comply with a district court’s local
8 rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

9 (1) the public’s interest in expeditious resolution of litigation; (2) the
10 court’s need to manage its docket; (3) the risk of prejudice to the
11 defendants; (4) the public policy favoring disposition of cases on
their merits; and (5) the availability of less drastic alternatives.

12 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002); Ghazali, 46
13 F.3d at 53. The Ninth Circuit Court of Appeals has stated that “[t]hese factors are not a series of
14 conditions precedent before the judge can do anything, but a way for a district judge to think
15 about what to do.” In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226
16 (9th Cir. 2006).

17 Here, the first two Ferdik factors support dismissal. Plaintiff failed to comply with the
18 court’s orders, and failed to take the steps necessary to prosecute and move his case forward. The
19 third Ferdik factor, prejudice to the defendant, also favors dismissal. At the very least, the
20 Commissioner has been named in a civil action and plaintiff’s actions have delayed progress
21 towards resolution of the matter.

22 The fifth Ferdik factor, availability of less drastic alternatives, also favors dismissal.
23 Before recommending the harsh sanction of dismissal, the court, especially in light of plaintiff’s
24 *pro se* status, first issued an order to show cause, providing plaintiff with an opportunity to be
25 heard, and also granted plaintiff an extension to provide the Unites States Marshal with the
26 necessary documents. However, plaintiff entirely failed to respond to the court’s order, and did
27 not even request a further extension of time to comply. As such, the court has little confidence
28 that plaintiff would comply with an order to pay monetary sanctions. Furthermore, based on the

1 nature of this action and the limited record, the court is unable to frame any other meaningful, less
2 drastic sanctions, such as issue or evidentiary sanctions.

3 Finally, although the court recognizes the importance of the fourth Ferdik factor, which
4 addresses the public policy favoring disposition of cases on the merits, that public policy is
5 outweighed by the other Ferdik factors. If anything, a disposition on the merits has been hindered
6 by plaintiff's own failure to comply with the court's orders and failure to prosecute the case.

7 In sum, after a careful evaluation of all the Ferdik factors, the court finds that plaintiff's
8 case should be dismissed.

9 CONCLUSION

10 Accordingly, IT IS HEREBY RECOMMENDED that:


- 11 1. The action be dismissed pursuant to Federal Rule of Civil Procedure 41(b).
- 12 2. The Clerk of Court be directed to vacate all dates and close this case.

13 In light of the above recommendations, IT IS HEREBY ORDERED that the Clerk of
14 Court shall randomly assign a United States District Judge to this matter.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
17 days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served on all parties and filed with the court within fourteen (14) days after service of the
21 objections. The parties are advised that failure to file objections within the specified time may
22 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
23 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

24 IT IS SO ORDERED AND RECOMMENDED.

25 Dated: September 28, 2018

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27 _____
28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE