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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALVIN PERKINS,  
Plaintiff,  
v.  
MARSHALL SAIPHER, et al.,  
Defendants.

No. 2:19-cv-2096 TLN CKD P

ORDER

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 April 3, 2020, the undersigned filed findings and recommendations which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations indicating that the screening order did not mention plaintiff's pre-existing medical condition of a bunion. ECF No. 9 at 1. Plaintiff indicates in his objections that he had a serious medical need for orthopedic shoes as a result of his bunion. ECF No. 9 at 1. As a result, plaintiff requests leave to amend his complaint to include an Eighth Amendment deliberate indifference claim to his serious medical need for orthopedic shoes even though he originally raised only a conditions of confinement claim based on the denial of orthopedic shoes.

1 ECF No. 1 at 3. In light of these new allegations, the court will provide plaintiff with the  
2 appropriate legal standards governing a deliberate indifference claim and dismiss his complaint  
3 with leave to amend.

#### 4 **I. Legal Standards**

5 Denial or delay of medical care for a prisoner's serious medical needs may constitute a  
6 violation of the prisoner's Eighth and Fourteenth Amendment rights. Estelle v. Gamble, 429 U.S.  
7 97, 104-05 (1976). An individual is liable for such a violation only when the individual is  
8 deliberately indifferent to a prisoner's serious medical needs. Id.; see Jett v. Penner, 439 F.3d  
9 1091, 1096 (9th Cir. 2006); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Lopez v.  
10 Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000).

11 In the Ninth Circuit, the test for deliberate indifference consists of two parts. Jett, 439  
12 F.3d at 1096, citing McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991), overruled on other  
13 grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the  
14 plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's  
15 condition could result in further significant injury or the 'unnecessary and wanton infliction of  
16 pain.'" Id., citing Estelle, 429 U.S. at 104. "Examples of serious medical needs include '[t]he  
17 existence of an injury that a reasonable doctor or patient would find important and worthy of  
18 comment or treatment; the presence of a medical condition that significantly affects an  
19 individual's daily activities; or the existence of chronic and substantial pain.'" Lopez, 203 F. 3d  
20 at 1131-1132, citing McGuckin, 974 F.2d at 1059-60.

21 Second, the plaintiff must show the defendant's response to the need was deliberately  
22 indifferent. Jett, 439 F.3d at 1096. This second prong is satisfied by showing (a) a purposeful act  
23 or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the  
24 indifference. Id. Under this standard, the prison official must not only "be aware of facts from  
25 which the inference could be drawn that a substantial risk of serious harm exists," but that person  
26 "must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). This "subjective  
27 approach" focuses only "on what a defendant's mental attitude actually was." Id. at 839. A  
28 showing of merely negligent medical care is not enough to establish a constitutional violation.

1 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998), citing Estelle, 429 U.S. at 105-106. A  
2 difference of opinion about the proper course of treatment is not deliberate indifference, nor does  
3 a dispute between a prisoner and prison officials over the necessity for or extent of medical  
4 treatment amount to a constitutional violation. See, e.g., Toguchi v. Chung, 391 F.3d 1051, 1058  
5 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Furthermore, mere delay of  
6 medical treatment, “without more, is insufficient to state a claim of deliberate medical  
7 indifference.” Shapley v. Nev. Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).  
8 Where a prisoner alleges that delay of medical treatment evinces deliberate indifference, the  
9 prisoner must show that the delay caused “significant harm and that Defendants should have  
10 known this to be the case.” Hallett, 296 F.3d at 745-46; see McGuckin, 974 F.2d at 1060.

## 11 **II. Leave to Amend**

12 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
13 complained of have resulted in a deprivation of plaintiff’s constitutional rights. See Ellis v.  
14 Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, in his amended complaint, plaintiff must allege in  
15 specific terms how each named defendant is involved. There can be no liability under 42 U.S.C.  
16 § 1983 unless there is some affirmative link or connection between a defendant’s actions and the  
17 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976). Furthermore, vague and conclusory  
18 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
19 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

20 Finally, plaintiff is informed that the court cannot refer to a prior pleading in order to  
21 make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended  
22 complaint be complete in itself without reference to any prior pleading. This is because, as a  
23 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
24 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
25 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
26 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

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**III. Plain Language Summary for Pro Se Party**


The following information is meant to explain this order in plain English and is not intended as legal advice.

In light of the allegations in your Objections to the Findings and Recommendations, your complaint is being dismissed with leave to amend. If you so choose, you may file an amended complaint within 30 days from the date of this order. Pay careful attention to the legal standards outlined in this order as well as the court’s April 3, 2020 screening order if you decide to file an amended complaint.

Accordingly, IT IS HEREBY ORDERED that:

- 1. The Findings and Recommendations filed April 3, 2020 are vacated;
- 2. Plaintiff’s complaint is dismissed.
- 3. Plaintiff is granted thirty days from the date of service of this order to file an amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must bear the docket number assigned this case and must be labeled “Amended Complaint.” Failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

Dated: April 29, 2020

  
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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE