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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

KARLTON MCGARY,
Plaintiff,
v.
LINA MANGLICMOT, et al.,
Defendants.

Case No. [14-cv-04686-LB](#)

**ORDER GRANTING THE DEFENDANT
PALOMERO'S MOTION FOR
SUMMARY JUDGMENT**

[Re: ECF No. 58]

INTRODUCTION

Karlton McGary filed this *pro se* prisoner's civil rights action under 42 U.S.C. § 1983 to complain about the conditions at the Correctional Training Facility in Soledad. The parties have consented to proceed before a magistrate judge. (ECF No. 1 at 4; ECF Nos. 20-23.¹) The court earlier granted the defendants' motion for summary judgment on most of the claims due to Mr. McGary's failure to exhaust administrative remedies for those claims. The lone remaining claim is a medical-care claim against Dr. G. Palomero, who now moves for summary judgment on that claim. Mr. McGary does not oppose the motion. For the reasons discussed below, the court grants Dr. Palomero's motion for summary judgment and will enter judgment against Mr. McGary.

¹ Citations are to material in the Electronic Case File ("ECF"); pinpoint cites are to the ECF-generated page numbers at the top of the documents.

1 **STATEMENT**

2 The claim remaining for adjudication is an Eighth Amendment claim that Dr. G. Palomero was
3 deliberately indifferent to Mr. McGary’s medication needs. Mr. McGary alleges in his unverified
4 amended complaint that he had “advanced lower lumbar degen[e]rative disc disease,” which
5 caused him acute and occasionally disabling pain. (ECF No. 8 at 2.) He further alleges that Dr.
6 Palomero was deliberately indifferent to his medical needs in that Dr. Palomero “refus[ed] to
7 discuss long-term pain management medications ahead[y] approved” for Mr. McGary, and this
8 refusal caused Mr. McGary to be without pain medications for extended periods of time. (ECF No.
9 8 at 6.) The events giving rise to the claim against Dr. Palomero occurred at the Correctional
10 Treatment Center in Soledad (CTF-Soledad), where Mr. McGary was housed in or about 2013-
11 2014. After filing this action, Mr. McGary was released from prison. (See ECF No. 42-1.)

12 The following facts are undisputed unless otherwise noted.

13 G. Palomero, M.D., is a doctor who has worked at CTF-Soledad since July 2012. (ECF No. 59
14 at 1.)

15 Mr. McGary suffers from severe and chronic lower-back pain. This condition can be treated,
16 but not cured. Typically, treatment consists of pain medication and physical therapy to manage the
17 patient’s pain level and help improve his daily living activities. “Severe chronic pain is usually
18 treated using long term time release opiates such as morphine or methadone.” (*Id.* at 2.)

19 Dr. Palomero examined and treated Mr. McGary on only four occasions at CTF-Soledad, i.e.,
20 on June 17, 2013, November 25, 2013, January 14, 2014, and March 6, 2014.

21 On June 17, 2013, Dr. Palomero treated Mr. McGary for complaints of chronic lower-back
22 pain. At the time, Mr. McGary was receiving Tylenol III, a short-term opiate, to treat his pain. Mr.
23 McGary claimed the Tylenol III was causing him to twitch. Dr. Palomero offered to prescribe
24 morphine for pain management, but Mr. McGary declined. Dr. Palomero instead prescribed
25 amitriptyline and sent Mr. McGary to physical therapy. Amitriptyline is an antidepressant, but also
26 can be used for pain relief, as it was here. (*Id.*)

27 At a visit to Dr. Palomero on November 25, 2013, Mr. McGary again complained of lower-
28 back pain and said he no longer wanted to take amitriptyline because of his perception that it was a

1 “psych drug.” (*Id.*) Dr. Palomero again suggested Mr. McGary try either morphine or methadone,
2 and Mr. McGary again declined. Mr. McGary was prescribed oxcarbazepine (also known as
3 Trileptal) for pain management. (*Id.*)

4 Dr. Palomero next saw Mr. McGary on January 14, 2014, at which time Mr. McGary
5 complained of lower-back pain and reported that he had run out of his medication two days earlier.
6 Mr. McGary’s pain was worse due to the lack of medication and he appeared to be limping.
7 According to Dr. Palomero, patients have the option to make a direct request to the pharmacy for
8 prescription refills or can make a doctor’s appointment to obtain prescription refills; the former is
9 quicker and easier. Dr. Palomero advised Mr. McGary that he should seek a refill as soon as
10 possible and not wait for a doctor’s appointment. Mr. McGary was again offered stronger pain
11 medications such as morphine or methadone, and again declined. Mr. McGary’s prescription for
12 oxcarbazepine was refilled, and acetaminophen was prescribed to assist with pain management.
13 (*Id.*)

14 At a visit to Dr. Palomero on March 6, 2014, Mr. McGary complained of lower-back pain and
15 stated he had difficulty walking as a result of the pain. Mr. McGary was able to perform his job as
16 a barber, but his pain was not well managed. Dr. Palomero explained that chronic lower-back pain
17 such as Mr. McGary was suffering from, usually is treated with long-lasting time-release opiates
18 such as morphine or methadone. This time, Mr. McGary agreed to try a small dosage of morphine
19 and acetaminophen while tapering off the oxcarbazepine. Mr. McGary was scheduled for a follow-
20 up appointment in 60-90 days, but was transferred to another facility before that appointment
21 occurred. (*Id.*)

22 Dr. Palomero summarized Mr. McGary’s pain medication thusly: Mr. McGary “was initially
23 unwilling to take the long lasting opiates to treat his condition and instead chose a series of less
24 effective pain medications with less than satisfactory results. After a period of poorly managed
25 pain, he agreed to try morphine, but he was transferred to another facility before [Dr. Palomero]
26 could examine him again” to determine the effectiveness of the treatment. (ECF No. 59 at 3-4.) In
27 Dr. Palomero’s medical opinion, Mr. McGary “received the most effective pain management
28 treatment available that he was willing to accept.” (*Id.* at 4.)

1 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is based
2 on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder v.*
3 *McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's verified complaint as
4 opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746,
5 plaintiff stated under penalty of perjury that contents were true and correct, and allegations were
6 not based purely on his belief but on his personal knowledge). Mr. McGary's complaint (but not
7 his amended complaint) is signed under penalty of perjury, so the facts in the complaint (but not
8 the amended complaint) are evidence for purposes of evaluating the defendant's motion for
9 summary judgment.

10 **ANALYSIS**

11 Deliberate indifference to an inmate's serious medical need violates the Eighth Amendment's
12 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104
13 (1976); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). To establish an Eighth
14 Amendment claim on a condition of confinement, such as medical care, a prisoner-plaintiff must
15 show: (1) an objectively, sufficiently serious, deprivation, and (2) the official was, subjectively,
16 deliberately indifferent to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834
17 (1994). These two requirements are known as the objective and subjective prongs of an Eighth
18 Amendment deliberate indifference claim.

19 To satisfy the objective prong, there must be a deprivation of a "serious" medical need. A
20 serious medical need exists if the failure to treat an inmate's condition could result in further
21 significant injury or the "unnecessary and wanton infliction of pain." *Id.*

22 The evidence in the record is that Mr. McGary had severe and chronic lower-back pain that
23 was of the sort for which the usual treatment included opiates. This evidence would permit a jury
24 to find the existence of an objectively serious medical need. *Cf. Lolli v. Cnty. of Orange*, 351 F.3d
25 410, 419 (9th Cir. 2003) (Type I diabetes is a serious medical need). Dr. Palomero does not
26 dispute that Mr. McGary's lower-back pain was a serious medical condition.

27 For the subjective prong of an Eighth Amendment claim, there must be deliberate indifference.
28 A defendant is deliberately indifferent if he knows that an inmate faces a substantial risk of serious

1 harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at
 2 837. The defendant must not only “be aware of facts from which the inference could be drawn that
 3 a substantial risk of serious harm exists,” but he “must also draw the inference.” *Id.* If the
 4 defendant should have been aware of the risk, but was not, then he has not violated the Eighth
 5 Amendment, no matter how severe the risk. *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 (9th
 6 Cir. 2002), *overruled on other grounds by Castro v. Cnty. of Los Angeles*, No. 12-56829, slip op.
 7 at 31 (9th Cir. Aug. 15, 2016) (*en banc*). Deliberate indifference may be demonstrated when
 8 prison officials deny, delay or intentionally interfere with medical treatment, or it may be inferred
 9 from the way in which prison officials provide medical care. *See McGuckin v. Smith*, 974 F.2d
 10 1050, 1062 (9th Cir. 1992) (finding that a delay of seven months in providing medical care during
 11 which a medical condition was left virtually untreated and plaintiff was forced to endure
 12 “unnecessary pain” sufficient to present colorable § 1983 claim), *overruled on other grounds by*
 13 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*). Negligence does not
 14 amount to deliberate indifference and does not satisfy the subjective prong of an Eighth
 15 Amendment claim. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1122-23 (9th Cir. 2012) (finding no
 16 deliberate indifference but merely a “negligent misdiagnosis” by defendant-doctor who decided
 17 not to operate because he thought plaintiff was not suffering from a hernia).

18 A difference of opinion as to which medically acceptable course of treatment should be
 19 followed does not establish deliberate indifference. *See Toguchi*, 391 F.3d at 1058; *Sanchez v.*
 20 *Vild*, 891 F.2d 240 (9th Cir. 1989). “[T]o prevail on a claim involving choices between alternative
 21 courses of treatment, a prisoner must show that the chosen course of treatment ‘was medically
 22 unacceptable under the circumstances,’ and was chosen ‘in conscious disregard of an excessive
 23 risk to [the prisoner’s] health.’” *Toguchi*, 391 F.3d at 1058 (second alteration in original); *see*
 24 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Farmer*, 511 U.S. at 837).

25 Having carefully reviewed the evidence, the court concludes that no reasonable jury could find
 26 in Mr. McGary’s favor on his Eighth Amendment claim against Dr. Palomero. The undisputed
 27 evidence shows that: (1) Dr. Palomero saw Mr. McGary on four occasions at which Mr. McGary
 28 complained of lower-back pain; (2) Dr. Palomero and Mr. McGary considered Mr. McGary’s

1 pain-management medications at each of the visits; (3) Dr. Palomero offered to prescribe long-
2 term time-release opiates such as morphine or methadone for Mr. McGary's pain at each visit; (4)
3 Mr. McGary declined the offer of a prescription for opiates at the first three appointments, leading
4 Dr. Palomero to prescribe other medications for Mr. McGary; and (5) when Mr. McGary agreed to
5 try a small dosage of morphine at the fourth appointment, Dr. Palomero prescribed morphine as
6 well as acetaminophen to address the lower-back pain. The evidence also is undisputed that Dr.
7 Palomero did not treat Mr. McGary after the fourth appointment because Mr. McGary was
8 transferred to another prison. The evidence is undisputed that Mr. McGary received the most
9 effective pain-management treatment available that he was willing to accept.

10 Mr. McGary's amended complaint alleges that Dr. Palomero refused to discuss long-term
11 pain-management medications already approved for Mr. McGary. Mr. McGary has provided no
12 evidence as to what those pain-management medications were, or how Dr. Palomero's alleged
13 refusal to discuss them amounted to deliberate indifference. The only *evidence* in the record shows
14 that there was some back-and-forth between doctor and patient about medications for Mr.
15 McGary: Dr. Palomero offered opiates, and Mr. McGary turned them down three times before
16 agreeing to try morphine; Mr. McGary complained at one appointment that the Tylenol III was
17 causing him to twitch; Mr. McGary complained at another appointment that he no longer wanted
18 to take amitriptyline; and they talked at another appointment about the medication-refill
19 procedures available to Mr. McGary. Even if Mr. McGary wanted medications that were different
20 from those offered by Dr. Palomero, he has failed to show that the course of treatment chosen by
21 Dr. Palomero "'was medically unacceptable under the circumstances,' and was chosen 'in
22 conscious disregard of an excessive risk to [the prisoner's] health.'" *Toguchi*, 391 F.3d at 1058.

23 Dr. Palomero has met his burden on summary judgment to show the absence of evidence that
24 he acted with the deliberate indifference necessary for an Eighth Amendment violation. When the
25 evidence is viewed in the light most favorable to Mr. McGary, and inferences therefrom drawn in
26 his favor, no reasonable jury could return a verdict for him on his Eighth Amendment claim that
27 Dr. Palomero refused to discuss long-term pain medications. Dr. Palomero therefore is entitled to
28 judgment as a matter of law on the Eighth Amendment claim. Dr. Palomero's motion for summary

1 judgment is granted because he has presented evidence demonstrating the absence of any genuine
2 dispute as to any material fact in support of Mr. McGary's claim, and not merely because Mr.
3 McGary has failed to file an opposition to the motion. *See Cristobal v. Siegel*, 26 F.3d 1488, 1494-
4 95 & n.4 (9th Cir. 1994) (unopposed motion for summary judgment cannot be granted solely
5 because the plaintiff has failed to file an opposition; rather, the motion may be granted only after
6 the court determines that there are no material issues of fact).

7 **CONCLUSION**

8 Dr. Palomero's motion for summary judgment is GRANTED. (ECF No. 58.) Dr. Palomero is
9 entitled to judgment as a matter of law on Mr. McGary's Eighth Amendment claim regarding
10 medications. All the other claims were dismissed without prejudice in the order granting partial
11 summary judgment for the defendants. (ECF No. 53). The clerk shall close the file.

12 **IT IS SO ORDERED.**

13 Dated: October 14, 2016

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16 LAUREL BEELER
17 United States Magistrate Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KARLTON MCGARY,
Plaintiff,
v.
LINA MANGLICMOT, et al.,
Defendants.

Case No. 3:14-cv-04686-LB

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 14, 2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Karlton McGary ID: D87345
10465 S. Figueroa #5
Los Angeles, CA 90003

Dated: October 14, 2016

Susan Y. Soong
Clerk, United States District Court

By: 
Lashanda Scott, Deputy Clerk to the
Honorable LAUREL BEELER