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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAY MCNEIL,
Plaintiff,
v.
RASHEED KARIM, et al.,
Defendants.

Case No. [16-cv-00418-JD](#)

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

Re: Dkt. Nos. 27, 35

Bay McNeil is a state prisoner proceeding pro se in this civil rights action under 42 U.S.C. § 1983. Plaintiff alleges that the sole defendant in this case was deliberately indifferent to his serious medical needs by prescribing prednisolone eye drops after cataract surgery. Plaintiff contends that the eye drops caused blood clots and other harms. Defendant has filed a motion for summary judgment citing administrative exhaustion. Plaintiff filed an opposition. The motion is granted.

BACKGROUND

Medical Care

The following facts are undisputed:

Defendant Karim Rasheed is an ophthalmologist certified by the American Board of Ophthalmology. Motion for Summary Judgment (“MSJ”) at 3. In 2010 plaintiff was incarcerated at Correctional Training Facility. Compl. at 2; MSJ at CCHCS-0009. In 2010 defendant recommended corneal transplant surgery for plaintiff’s bilateral cataracts. Compl. ¶¶ 1-5; MSJ at CCHCS-0021. As part of the procedure defendant first removed the cataract in plaintiff’s left eye. Compl. ¶ 4. After 30 days of healing, plaintiff returned for the corneal transplant surgery for plaintiff’s left eye. *Id.* ¶ 5. During the surgery plaintiff had a panic attack and the operation could not be completed. *Id.* ¶ 6. Defendant could not complete the surgery until the left eye healed from

1 the aborted attempt. *Id.* ¶ 7. Defendant prescribed eye drops to aid in the healing of the eye. *Id.* ¶
2 8.

3 Defendant completed the surgery for the left eye on July 22, 2010. *Id.* ¶ 10. Plaintiff
4 decided to wait for the surgery for the right eye until he knew whether the left eye surgery was
5 successful. *Id.* ¶ 12. Defendants prescribed prednisolone eye drops for plaintiff’s left eye. *Id.* ¶
6 11; MSJ at CCHCS-0017 to 0019. Plaintiff used the eye drops through 2014. Compl. ¶ 14.

7 In 2014 plaintiff was incarcerated at Centinela State Prison. On January 6, 2014, plaintiff
8 became sick from food poisoning. *Id.* ¶ 15. Medical staff noticed that plaintiff had decreased
9 circulation and discoloration in his right foot. *Id.* Due to plaintiff’s diabetes and history of
10 smoking he was taken to the hospital, MSJ at CCHCS-0025, where it was discovered that plaintiff
11 had a clot in his right femoral artery. *Id.* at CCHCS-0023. After being discharged from the
12 hospital, plaintiff was seen by a doctor at a Centinela State Prison on January 17, 2014. *Id.* at
13 CCHCS-0021. Plaintiff stated he was doing fine. *Id.* Plaintiff argues in his complaint that the
14 prednisolone eye drops caused the blood clot in his leg and other eye problems. Compl. at ¶¶ 16,
15 18.

16 **Inmate Appeal**

17 On April 24, 2014, while at Centinela State Prison, plaintiff filed an inmate appeal, CEN
18 HC 14026861, stating that he intended to file a medical malpractice claim against defendant. MSJ
19 at CCHCS-0005. Plaintiff attached some medical documents including the surgical pathology
20 report. *Id.* at CCHCS-0021 to 0025. The appeal was processed at the second level of review. *Id.*
21 at CCHCS-0001 to 0002.

22 The inmate appeal was rejected on April 29, 2014. *Id.* at CCHCS-0009. The rejection
23 noted that the allegations were against defendant and a different prison, Soledad State Prison
24 (a.k.a., Correctional Training Facility), where the events occurred, not Centinela. *Id.* The denial
25 letter stated, “Centinela does not have jurisdiction over another institution or their medical staff . .
26 . . . You are advised to forward your complaint to the Health Care Appeals Coordinator at Soledad
27 State Prison.” *Id.* The denial letter also informed plaintiff that “appeals are required to be
28 submitted within 30 calendar days of the event that led to the filing of the appeal.” *Id.* The letter

1 further advised plaintiff, “you cannot appeal a rejected appeal, but should take the corrective
2 action necessary and resubmit the appeal within the timeframes, 30 calendar days, as specified in
3 CCR 3084.6(a) and CCR 3084.8(b).” *Id.*

4 On May 9, 2014, the already rejected appeal was also cancelled at the second level based
5 on untimeliness. *Id.* at CCHCS-0005, 0011. The cancellation notice stated, “To appeal this
6 cancellation, you will need to demonstrate that you first had knowledge that the medication caused
7 blood clots no more than thirty days prior to having submitted this appeal.” *Id.* at CCHCS-0011.
8 The notice also described the procedure to appeal the cancellation, stating, “Cancellation Note:
9 Pursuant to CCR 3084.6(e), once an appeal has been cancelled, the appeal may not be resubmitted.
10 However, a separate appeal can be filed on the cancellation decision. When an appeal is
11 cancelled, your administrative remedies have not been exhausted pursuant to Title 15 CCR
12 Section 3084.1(b).” *Id.*

13 On May 16, 2014, plaintiff submitted a response to the cancellation notice. *Id.* at CCHCS-
14 0015. Plaintiff submitted two pages of medical information concerning prednisolone eye drops
15 that he received on April 24, 2014, from the medical department. *Id.* On May 28, 2014,
16 plaintiff’s submission was cancelled due to noncompliance with appeal procedures. *Id.* at
17 CCHCS-0013. The May 28 cancellation notice stated that plaintiff must challenge the
18 cancellation in a separate appeal as stated in the prior notices. *Id.*

19 On June 18, 2014, plaintiff requested a review of inmate appeal CEN HC 14026861 at the
20 Director’s Level. *Id.* at CCHCS-0006. On August 12, 2014 the Director cancelled and returned
21 the appeal for noncompliance with appeal procedures. *Id.* at CCHCS-0003 to 0004. The letter
22 stated, “Cancelled at Lower Level: Your appeal was cancelled by the institution at a lower level of
23 review.” *Id.* at CCHCS-0003. The letter described the procedure to challenge the cancelled
24 appeal and noted, “When an appeal is cancelled, your administrative remedies have not been
25 exhausted pursuant to Title 15 CCR Section 3084.1(b).” *Id.* at CCHCS-0003 to 0004.

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1 **LEGAL STANDARD**

2 “The PLRA mandates that inmates exhaust all available administrative remedies before
3 filing ‘any suit challenging prison conditions,’ including, but not limited to, suits under § 1983.”
4 *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (citing *Woodford v. Ngo*, 548 U.S. 81, 85
5 (2006)). To the extent that the evidence in the record permits, the appropriate procedural device
6 for pretrial determination of whether administrative remedies have been exhausted under the
7 PLRA is a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.
8 *Id.* at 1168. The burden is on the defendant to prove that there was an available administrative
9 remedy that the plaintiff failed to exhaust. *Id.* at 1172. If the defendant meets that burden, the
10 burden shifts to the prisoner to present evidence showing that there is something in his particular
11 case that made the existing and generally available administrative remedies effectively unavailable
12 to him. *Id.* The ultimate burden of proof remains with the defendant, however. *Id.* If undisputed
13 evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant
14 is entitled to summary judgment under Rule 56. *Id.* at 1166. But if material facts are disputed,
15 summary judgment should be denied, and the district judge, rather than a jury, should determine
16 the facts in a preliminary proceeding. *Id.*

17 The California Department of Corrections and Rehabilitation (“CDCR”) provides any
18 inmate under its jurisdiction the right to appeal “any policy, decision, action, condition, or
19 omission by the department or its staff that the inmate or parolee can demonstrate as having a
20 material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, §
21 3084.1(a). To initiate an appeal, also referred to as a grievance, the inmate or parolee must submit
22 a CDCR Form 602 describing the issue to be appealed to the appeals coordinator’s office at the
23 institution for receipt and processing. *Id.* § 3084.2(a)-(c). The appeal must name “all staff
24 member(s) involved” and “describe their involvement in the issue.” *Id.* § 3084.2(a)(3). The
25 CDCR appeal process consists of three formal levels of appeals: (1) first formal-level appeal filed
26 with one of the institution's appeal coordinators, (2) second formal-level appeal filed with the
27 institution head or designee, and (3) third formal-level appeal filed with the CDCR director or
28 designee. *Id.* §§ 3084.7, 3084.8. A prisoner exhausts the appeal process when he completes the

1 third level of review. *Id.* § 3084.1(b); *Harvey v. Jordan*, 605 F.3d 681, 683 (9th Cir. 2010). A
2 “cancellation or rejection” of an appeal “does not exhaust administrative remedies.” Cal. Code
3 Regs. tit. 15, § 3084.1(b).

4 The PLRA amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with
5 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
6 confined in any jail, prison, or other correctional facility until such administrative remedies as are
7 available are exhausted.” 42 U.S.C. § 1997e(a). Although once within the discretion of the
8 district court, exhaustion in prisoner cases covered by § 1997e(a) is now mandatory. *Porter v.*
9 *Nussle*, 534 U.S. 516, 524 (2002). The PLRA’s exhaustion requirement requires “proper
10 exhaustion” of available administrative remedies. *Woodford*, 548 U.S. at 93. Proper exhaustion
11 requires using all steps of an administrative process and complying with “deadlines and other
12 critical procedural rules.” *Id.* at 90.

13 An inmate “need not exhaust unavailable [remedies].” *Ross v. Blake*, 136 S. Ct. 1850,
14 1858 (2016). An administrative remedy is unavailable “when (despite what regulations or
15 guidance materials may promise) it operates as a simple dead end-with officers unable or
16 consistently unwilling to provide any relief to aggrieved inmates”; or when “an administrative
17 scheme [is] so opaque that it becomes, practically speaking, incapable of use [because while] some
18 mechanism exists to provide relief . . . no ordinary prisoner can discern or navigate [the
19 mechanism]”; or “when prison administrators thwart inmates from taking advantage of a grievance
20 process through machination, misrepresentation, or intimidation.” *Id.* at 1859–60.

21 **DISCUSSION**

22 Defendant contends that plaintiff failed to properly exhaust his administrative remedies.
23 His appeal was rejected and cancelled at the second and third levels. The appeal was also deemed
24 untimely and filed at the wrong institution. The rejection and cancellation letters from the
25 different appeal levels discussed the proper manner to appeal the decision and exhaust the appeal.
26 Defendant argues that plaintiff failed to properly comply with the procedural rules.

27 The PLRA’s exhaustion requirement requires “proper exhaustion” of available
28 administrative remedies. *Woodford*, 548 U.S. at 93. This requirement cannot be satisfied “by

1 filing an untimely or otherwise procedurally defective administrative grievance or appeal.” *Id.* at
2 83-84. “Proper exhaustion demands compliance with an agency’s deadlines and other critical
3 procedural rules because no adjudicative system can function effectively without imposing some
4 orderly structure on the course of its proceedings.” *Id.* at 90-91. A prisoner must complete the
5 administrative review process in accordance with the applicable procedural rules, including
6 deadlines, as a precondition to bringing suit in federal court. *See id.* at 87; *see also Johnson v.*
7 *Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005) (holding that, to exhaust remedies, a prisoner
8 must file appeals in the place, and at the time, the prison’s administrative rules require).

9 Defendant has met his burden in showing that there was an available administrative
10 remedy that the plaintiff failed to exhaust. Plaintiff has partially met his burden in refuting this. It
11 is undisputed that the incident in this case-defendant prescribing prednisone eye drops-occurred in
12 2010 at Correctional Training Facility. It is also undisputed that plaintiff did not file an inmate
13 appeal about this incident until 2014 in Centinela State Prison.

14 Plaintiff essentially argues that the administrative remedy was unavailable to him based on
15 the responses from Centinela State Prison. Defendant argues that plaintiff failed to follow the
16 proper procedures. With respect to the timeliness of the appeal, plaintiff has shown that he was
17 not aware of the medical problems until a few years later, when he went to the hospital in January
18 2014, and it took several months for him to obtain the medical information and records concerning
19 the prednisolone drops. Plaintiff followed the instructions for filing an appeal and demonstrated
20 that he submitted the appeal within 30 days of discovering the information, as required by
21 California regulations. However, plaintiff failed to follow the proper procedures and instructions
22 and file the appeal at the appropriate prison.

23 Plaintiff filed the first appeal on April 24, 2014, at Centinela State Prison. Five days later
24 on April 29, 2014, the appeal was rejected, and the rejection letter explicitly noted that plaintiff
25 needed to submit his appeal to Correctional Training Facility, where the incident occurred,
26 because Centinela State Prison did not have jurisdiction over a different prison and its staff. The
27 rejection letter also noted that at that appeal level, plaintiff could not appeal the rejection; rather,
28 he needed to correctly resubmit the appeal, i.e., submit it to the correct prison. Plaintiff failed to

1 follow these instructions. Defendant also noted in the motion for summary judgment that plaintiff
2 submitted his appeal to the wrong location, yet plaintiff has not addressed this argument in his
3 opposition.

4 This is not a situation where plaintiff was transferred to a new facility in the midst of filing
5 inmate appeals and either one of the facilities was obstructing his appeals or it was unclear where
6 to submit the filings. No facility obstructed his appeal and Centinela State Prison made it clear
7 that the appeal needed to be submitted at Correctional Training Facility. It was reasonable for
8 Centinela State Prison to determine that the appeal should be filed at the prison where the incident
9 occurred and where staff named in the appeal was located, especially because the incident was
10 four years old. Plaintiff was notified within a few days of filing his appeal that he needed to
11 submit it to Correctional Training Facility, which had jurisdiction for the claim, yet plaintiff chose
12 not to comply with this procedural instruction. Plaintiff continued to resubmit appeals to
13 Centinela State Prison rather than follow the instructions to submit his appeal to Correctional
14 Training Facility. Even viewing the evidence in a light most favorable to plaintiff, he failed to
15 exhaust his administrative remedies and defendant is entitled to summary judgment.

16 **CONCLUSION**

- 17 1. Defendant's motion for summary judgment (Docket No. 27) is **GRANTED**.
18 2. Plaintiff's motion to dismiss the unserved defendants (Docket No. 35) is **GRANTED**
19 and Dr. F. Von Lintig and Dr. M. Frazee are **DISMISSED** from this action.
20 3. Plaintiff erroneously identified the defendant in this case reversing the name. The Clerk
21 shall **CHANGE** defendants name on the docket to Karim Rasheed
22 4. The Clerk shall terminate all pending motions, enter judgment, and close the file.

23 **IT IS SO ORDERED.**

24 Dated: January 16, 2018

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28 JAMES DONATO
United States District Judge

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 BAY MCNEIL,
4 Plaintiff,
5 v.
6 RASHEED KARIM, et al.,
7 Defendants.
8

Case No. [16-cv-00418-JD](#)

CERTIFICATE OF SERVICE

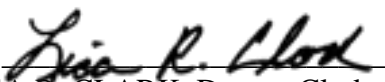
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
10 District Court, Northern District of California.

11
12 That on January 16, 2018, I SERVED a true and correct copy(ies) of the attached, by
13 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15 receptacle located in the Clerk's office.
16

17 Bay McNeil ID: #H38906
18 California Medical Facility
19 P.O. Box 2500
20 J1 Dorm 5 134u
21 Vacaville, CA 95696

22 Dated: January 16, 2018

23 Susan Y. Soong
24 Clerk, United States District Court

25
26 By: 
27 LISA R. CLARK, Deputy Clerk to the
28 Honorable JAMES DONATO