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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC L. GONZALEZ,

No. C 10-3732 CW (PR)

Plaintiff,

ORDER OF DISMISSAL WITH
LEAVE TO AMEND

v.

J. CHUDY, et al.,

Defendants.

INTRODUCTION

Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his serious medical needs in violation of his Eighth Amendment right to be free from cruel and unusual punishment.

His motion for leave to proceed in forma pauperis has been granted.

Venue is proper because the events giving rise to the claim are alleged to have occurred at Correctional Training Facility (CTF), which is located in this judicial district. See 28 U.S.C. § 1391(b).

In his complaint, Plaintiff names the following Defendants: CTF Chief Medical Officer J. Chudy,¹ as well as CTF Registered Nurses Leary and Uy. Plaintiff seeks monetary damages.

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any

¹ In his complaint, Plaintiff occasionally misspells Defendant Chudy's name as "Chudi"; however, the record shows the correct spelling is "Chudy."

1 case in which a prisoner seeks redress from a governmental entity
2 or officer or employee of a governmental entity. 28 U.S.C.
3 § 1915A(a). In its review, the court must identify any cognizable
4 claims and dismiss any claims that are frivolous, malicious, fail
5 to state a claim upon which relief may be granted or seek monetary
6 relief from a defendant who is immune from such relief. Id.
7 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
8 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
9 1988).

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must
11 allege two essential elements: (1) that a right secured by the
12 Constitution or laws of the United States was violated, and
13 (2) that the alleged violation was committed by a person acting
14 under the color of state law. West v. Atkins, 487 U.S. 42, 48
15 (1988).

16 II. Factual Background

17 On June 19, 2009, Plaintiff banged on his cell door to alert
18 Defendant Uy and CTF Correctional Officer Martinus that he had been
19 "experiencing pain and swelling in his lower legs for the last few
20 weeks." (Compl. at 3.)² Plaintiff asked Defendant Uy to permit
21 him to see a doctor. Defendant Uy did not refer Plaintiff to see a
22 doctor. Instead, he directed Plaintiff to complete a Health Care
23 Services Request Form (CDC-7362), which is a form submitted by
24 inmates who are requesting medical care.

25 Ten minutes later, Plaintiff observed CTF Correctional
26

27 ² Plaintiff attaches fourteen pages to page three of his
28 complaint. The Court has renumbered them pages four through
seventeen.

1 Officers Martinus and Hernandez walking on the tier. He again
2 banged on his cell door for help. (Id. at 5.) Officer Hernandez
3 wrote Plaintiff a pass to see Defendant Leary at the infirmary.
4 When Plaintiff arrived at the infirmary, he informed Defendant
5 Leary that "he was experiencing pain and swelling in his lower legs
6 and that he wanted to see a doctor." (Id.) Plaintiff expressed
7 his concern that "he may be experiencing poor circulation in his
8 legs which could cause a stroke or heart attack." (Id. at 5-6.)
9 Defendant Leary informed Plaintiff that he could not see a doctor
10 because CTF was "'short of doctors.'" (Id. at 5.)

11 Plaintiff alleges that Defendant Leary "made no attempts to
12 locate Plaintiff's medical chart, which would have shown her that
13 Plaintiff was on baby asperin (81 mg ASA E.C.), cholesterol pills
14 (Simvastatin 20 mg) and high blood pressure pills (Atenolol 50
15 mg)." (Id. at 6.) Defendant Leary instructed Plaintiff to
16 complete a CDC-7362 form. She then sent Plaintiff back to his cell
17 without any diagnosis or treatment. (Id.)

18 Later that same day, Plaintiff filed a 602 inmate appeal
19 alleging that "CTF's medical staff was subjecting him to cruel and
20 unusual punishment." (Id. at 3.)

21 On July 3, 2009, Plaintiff "alerted the 2nd Watch C/O that he
22 was experiencing 'severe' pain and swelling in his lower legs."
23 (Id. at 7.) Plaintiff was given a "temporary inmate pass to the
24 infirmary," where he was told by CTF Correctional Officer McDonald
25 to wait on a bench outside. Officer McDonald alerted Defendant
26 Leary that Plaintiff was waiting outside the infirmary. Defendant
27 Leary then informed Plaintiff "that he could not see a doctor due
28 to Ad-Seg inmates being seen that day." (Id.) Without "taking any

1 of Plaintiff's vital signs or examining his legs," Defendant Leary
2 directed that Plaintiff be escorted back to his cell.

3 On July 6, 2009, Plaintiff saw a triage nurse for the pain and
4 swelling in his lower legs. The triage nurse advised Plaintiff to
5 elevate both of his legs. Plaintiff responded that "it was
6 impossible for him to elevate his legs because CTF's medical staff
7 has not given him any type of device" with which to elevate his
8 legs. (Id. at 8.) Plaintiff alleges he "still has not received
9 any type of medical device from CTF officials that would help
10 Plaintiff elevate his legs." (Id.)

11 On August 6, 2009, Plaintiff was "finally" seen by CTF
12 physician Koziol, who "issued Plaintiff pain medication for his
13 lower extremities." (Id. at 9.)

14 Plaintiff alleges that "during the fifty three days [he] was
15 without pain medication, he was so psychologically distraught that
16 he had to cancel all of his mental health sessions" because he
17 "believed he was going to die from a stroke or heart attack."
18 (Id.) During this time, Plaintiff was also unable to exercise
19 because "he was suffering in pain." (Id.)

20 At some point after being examined by CTF physician Koziol,
21 Plaintiff "could no longer take the pain medication that was issued
22 on 08/11/09 due to the medication irritating his stomach." (Id. at
23 10.)

24 On August 20, 2009, Plaintiff received the second level of
25 review response for his inmate grievance filed on June 19, 2009.
26 The response stated that a podiatry consultation was ordered to
27 address the severe pain and swelling in his lower legs; however,
28 Plaintiff did not receive the podiatry consultation at that time.

1 Plaintiff alleges that although Defendant Chudy "personally oversaw
2 Plaintiff's medical situation," he "did not make sure that
3 Plaintiff received the podiatry consult that was ordered"
4 (Id. at 11.) Plaintiff alleges that because Defendant Chudy
5 "failed to make sure Plaintiff received the podiatry consult," he
6 "suffered in severe pain and swelling in his lower extremities for
7 '105 days.'" (Id.)

8 On December 3, 2009, Plaintiff saw CTF physician Jamari, who
9 ordered Plaintiff a "'second' podiatry consult," because "feet
10 problems can cause pain and swelling in the lower leg area." (Id.
11 at 12.) Plaintiff alleges that Defendant Chudy "failed to make
12 sure that Plaintiff received the podiatry consult" for "an
13 additional '138 days,'" during which time Plaintiff "suffered in
14 severe pain and swelling in his lower extremities." (Id.)

15 On April 20, 2010, Plaintiff filed an inmate grievance
16 alleging "CTF prison officials were subjecting him to cruel and
17 unusual punishment by not providing the podiatry consult in order
18 to obtain new orthopedic shoes." (Id. at 13.) Plaintiff also
19 explained that "because he was a mental health patient, exercising
20 was a critical tool to help manage his anxieties." (Id. at 15.)
21 He further claimed that "without the correct orthopedic shoes, I
22 can't participate in jogging or walking to relieve any of my
23 anxieties which could result to [sic] sinking me into further
24 depression." (Id., Ex. C at C-3.)

25 On June 22, 2010, a podiatry consultation was ordered for the
26 third time, and Plaintiff was seen by a podiatrist, who informed
27 Plaintiff that his "feet [sic] structure had totally collapsed and
28 that he would not rule out arthritis, which would be the cause for

1 the severe pain and swelling in the lower extremities"

2 (Id.) The podiatrist ordered x-rays of Plaintiff's feet.

3 Plaintiff alleges that "during the 329 days [he] suffered with
4 the severe pain and swelling in his lower extremities, he was
5 unable to exercise outside and has been virtually confined to his
6 cell bed due to his limited mobility." (Id. at 14.) Plaintiff
7 also claims that as of August 4, 2010, the date he signed the
8 complaint, his "lower extremities have gotten worse over the last 7
9 to 8 months," stating:

10 . . . Plaintiff has great difficulty in just standing
11 up without shoes on. When Plaintiff stands up without
12 his shoes on in the cell to walk two feet to the
13 toilet, there is a stabbing pain shooting in the arch
14 of Plaintiff's left foot.

15 Moreover, . . . (both arches) have gotten so bad
16 that they are sore to the touch when Plaintiff is
17 laying down. When Plaintiff walks to chow he is always
18 experiencing stabbing pains on the top of his feet and
19 in both arches, plus it feels as though a claw is
20 pulling down on his calves.

21 (Id. at 14-15.)

22 III. Deliberate Indifference Claim

23 Deliberate indifference to serious medical needs violates the
24 Eighth Amendment's proscription against cruel and unusual
25 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The
26 analysis of a claim of deliberate indifference to serious medical
27 needs involves an examination of two elements: (1) a prisoner's
28 serious medical needs and (2) a deliberately indifferent response
by the defendants to those needs. McGuckin v. Smith, 974 F.2d
1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX
Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997)
(en banc).

A serious medical need exists if the failure to treat a

1 prisoner's condition could result in further significant injury or
2 the "unnecessary and wanton infliction of pain." McGuckin, 974
3 F.2d at 1059 (citing Estelle, 429 U.S. at 104). Examples of
4 indications that a prisoner has a serious need for medical
5 treatment are the existence of an injury that a reasonable doctor
6 or patient would find important and worthy of comment or treatment;
7 the presence of a medical condition that significantly affects an
8 individual's daily activities; or the existence of chronic and
9 substantial pain. Id. at 1059-60 (citing Wood v. Housewright, 900
10 F.2d 1332, 1337-41 (9th Cir. 1990)).

11 The plaintiff must also show that the defendant knew the
12 plaintiff faced "substantial risk of serious harm" yet failed to
13 take reasonable steps to abate it. Farmer v. Brennan, 511 U.S.
14 825, 837 (1994). A prison official "who act[s] reasonably cannot
15 be found liable under the Cruel and Unusual Punishments Clause."
16 Id. at 845. Further, a prison official must not only "be aware of
17 facts from which the inference could be drawn that a substantial
18 risk of serious harm exists," but "must also draw the inference."
19 Id.

20 Therefore, in order to establish deliberate indifference,
21 there must be a purposeful act or failure to act on the part of the
22 defendant and resulting harm. McGuckin, 974 F.2d at 1060; Shapley
23 v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.
24 1985). A defendant's actions need not be "egregious" nor need they
25 result in "significant injury" in order to establish a violation of
26 the prisoner's federal constitutional rights, McGuckin, 974 F.2d at
27 1059; however, the existence of serious harm tends to support an
28 inmate's deliberate indifference claim. Jett v. Penner, 439 F.3d

1 1091, 1096 (9th Cir. 2006).

2 Assuming Plaintiff's medical needs were "serious," Plaintiff
3 must allege facts which support a finding of deliberate
4 indifference to those needs by Defendants Chudy, Leary and Uy.
5 Such indifference may appear when prison officials deny, delay or
6 intentionally interfere with medical treatment, or it may be shown
7 in the way in which prison officials provide medical care. See
8 McGuckin, 974 F.2d at 1062.

9 Here, Plaintiff alleges that Defendants Uy and Leary, who are
10 registered nurses, acted with deliberate indifference to his
11 serious medical needs when, on June 19, 2009, they responded to his
12 complaints of pain and swelling in his legs by telling him to fill
13 out a medical request form rather than immediately referring him to
14 see a doctor. Plaintiff's allegations, however, do not state a
15 claim for deliberate indifference because the facts do not support
16 an inference that it was unreasonable for Defendants to follow
17 prison procedures and require Plaintiff to fill out a medical
18 request form before being seen by a doctor. Specifically, based on
19 the facts alleged, there is no indication that Plaintiff was
20 suffering from a medical emergency that required Defendants to
21 bypass prison procedures and call for immediate medical care for
22 Plaintiff.

23
24 Plaintiff further alleges that on July 3, 2009, Defendant
25 Leary acted with deliberate indifference to his serious medical
26 needs when, after a correctional officer allowed Plaintiff to go to
27 the infirmary based on Plaintiff's complaints of pain and swelling
28 in his legs, Leary told Plaintiff he could not see a doctor because

1 Ad-Seg inmates were being seen that day and sent Plaintiff back to
2 his cell without taking his vital signs or examining his legs.
3 Again, however, Plaintiff's allegations do not state a claim for
4 deliberate indifference because he has not alleged facts that show
5 he faced a substantial risk of harm, that Defendant Leary, knowing
6 of such risk, acted unreasonably, and that Defendant Leary's
7 actions resulted in harm to Plaintiff.

8 Finally, Plaintiff alleges that Defendant Chudy acted with
9 deliberate indifference to Plaintiff's serious medical needs
10 because Chudy failed to ensure that Plaintiff receive timely
11 podiatry consultations. Plaintiff's allegations fail to state a
12 cognizable claim, however, because they are entirely conclusory.
13 Specifically, Plaintiff has not alleged facts that show that Chudy,
14 knowing that Plaintiff faced a substantial risk of serious harm,
15 acted unreasonably. In particular, Plaintiff has not alleged facts
16 that show Chudy was the individual who was responsible for ensuring
17 the podiatry consultations were scheduled.

18 Accordingly, for the above reasons, Plaintiff's Eighth
19 Amendment claims against Defendants Uy, Leary and Chudy are
20 DISMISSED for failure to state a cognizable claim for relief.
21 Plaintiff may amend his complaint to cure the noted pleading
22 deficiencies if he can, in good faith, allege facts that show
23 Defendants acted with deliberate indifference to his serious
24 medical needs.

25
26 CONCLUSION

27 For the foregoing reasons, the Court orders as follows:

- 28 1. Plaintiff's Eighth Amendment claim for deliberate

1 indifference to serious medical needs is DISMISSED with leave to
2 amend.

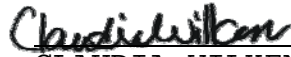
3 2. Within thirty (30) days from the date of this Order
4 Plaintiff may file an amended complaint as set forth above.
5 Plaintiff must use the attached civil rights form, write the case
6 number for this action -- C 10-3732 CW (PR) -- on the form, clearly
7 label the complaint "Amended Complaint," and complete all sections
8 of the form. Because an amended complaint completely replaces the
9 original complaint, Plaintiff must include in it all the claims he
10 wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262
11 (9th Cir. 1992). He may not incorporate material from the original
12 complaint by reference.

13 The failure to file an amended complaint by the thirty-day
14 deadline will result in the dismissal of this action without
15 prejudice.

16 3. The Clerk of the Court shall send Plaintiff a blank civil
17 rights form along with a copy of this Order.

18 IT IS SO ORDERED.

19 DATED: 9/9/2011



CLAUDIA WILKEN

UNITED STATES DISTRICT JUDGE

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ERIC L GONZALEZ,

Case Number: CV10-03732 CW

6 Plaintiff,

CERTIFICATE OF SERVICE

7 v.

9 J CHUDY et al,

10 Defendant.
11 _____/

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

14 That on September 9, 2011, I SERVED a true and correct copy(ies) of the attached **and a copy a**
15 **blank civil rights form**, by placing said copy(ies) in a postage paid envelope addressed to the
16 person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said
17 copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

18
19 Eric L. Gonzalez E66196
20 Correctional Training Facility (Central)
21 P.O. Box 689
22 FW 235 Low
23 Soledad, CA 93960-0689

24 Dated: September 9, 2011

25 Richard W. Wieking, Clerk
26 By: Nikki Riley, Deputy Clerk
27
28