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2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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5
6 MARTIN J. BIBBS,

7 Plaintiff,

8 v.

9 MICHAEL C. SAYRE, M.D., NANCY
W. ADAM, M.D., and TERRY ROGDE,

10 Defendants.
11

Case No.: C 13-1570 CW (PR)

ORDER GRANTING DEFENDANTS'
MOTION TO SCREEN COMPLAINT;
BRIEFING SCHEDULE ON COGNIZABLE
CLAIMS AND DIRECTING PARTIES TO
FILE CONSENT OR DECLINATION TO
MAGISTRATE JUDGE JURISDICTION

Doc. No. 9

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13 INTRODUCTION

14 Plaintiff, a state prisoner incarcerated at Pelican Bay State
15 Prison (PBSP), has filed a pro se civil rights action pursuant to
16 42 U.S.C. § 1983, alleging the violation of his constitutional
17 rights by prison officials and medical staff at PBSP. He has paid
18 the filing fee and has served Defendants. Defendants move to
19 screen the complaint pursuant to 28 U.S.C. § 1915A and to stay
20 proceedings until the complaint has been screened. Plaintiff does
21 not object to the complaint being screened but opposes a stay of
22 proceedings. For good cause shown, the Court grants the motion to
23 screen the complaint.

24 DISCUSSION

25 I. Standard of Review

26 A federal court must conduct a preliminary screening in any
27 case in which a prisoner seeks redress from a governmental entity
28 or officer or employee of a governmental entity. 28 U.S.C.

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

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

14 II. Plaintiff's Allegations

15 Plaintiff alleges that, when he arrived at PBSP on January
16 20, 2009, Defendants Dr. Sayre and Dr. Adam failed to review and
17 evaluate his health care transfer information which documented his
18 need for a prosthetic lift for his right shoe and chronic pain
19 management for neuropathy in his feet. On January 26, 2009, Dr.
20 Adam changed the cause of Plaintiff's needs for a prosthetic to a
21 bunion, which only required a shoe insole. Dr. Adam stated
22 untruths in support of her diagnosis. Plaintiff's misdiagnosis by
23 Dr. Adam caused Plaintiff to walk in constant pain with numerous
24 ambulation problems.

25 On February 20, 2009, Dr. Sayre refused to process
26 Plaintiff's medical accommodation request for prosthetic
27 orthopedic shoes. Dr. Sayre did this without reviewing
28 Plaintiff's medical records or medical transfer information, which

1 thoroughly document Plaintiff's ongoing problem with his feet.
2 Dr. Sayre also failed to conduct any diagnostic studies of
3 Plaintiff's back, spine, legs or feet.

4 On October 31, 2012, Dr. Sayre abruptly discontinued all of
5 Plaintiff's chronic pain management care without regard to his
6 back, spine, legs and feet problems. Dr. Sayre discontinued this
7 pain management in retaliation for Plaintiff's filing numerous
8 complaints against him and other PBSP medical staff.

9 On February 25, 2009, Terry Rogde misrepresented Plaintiff's
10 medical record which further led to the misdiagnosis of
11 Plaintiff's serious medical needs.

12 Plaintiff's allegations regarding Dr. Sayre's discontinuance
13 of his pain management care on October 31, 2012 in retaliation for
14 Plaintiff's filing lawsuits against him and other medical staff
15 are duplicative of the allegations and claims in an earlier case
16 filed by Plaintiff, Bibbs v. Sayre, et al., C 12-5917 CW (PR).
17 Therefore, the claims based upon these allegations are dismissed
18 with prejudice as duplicative.

19 Plaintiff's allegations regarding the failure of Dr. Sayre
20 and Dr. Adam properly to treat problems with his feet, when
21 liberally construed, state a cognizable Eighth Amendment claim for
22 deliberate indifference to serious medical needs. See Estelle v.
23 Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d 1050,
24 1059 (9th Cir. 1992).

25 Plaintiff's allegations against Mr. Rogde fail to state a
26 claim. Plaintiff does not specify what Mr. Rogde misrepresented
27 in Plaintiff's medical record and how it led to the misdiagnosis
28 of his serious medical needs. The claim against Mr. Rogde is

1 belied by Plaintiff's allegations that his medical records were
2 replete with information documenting his serious medical needs and
3 that Drs. Sayre and Adams were deliberately indifferent, in part,
4 because they ignored the information in his medical records.
5 Furthermore, Plaintiff does not indicate Mr. Rogde's state of mind
6 that would indicate deliberate indifference. See Farmer v.
7 Brennan, 511 U.S. 825, 837 (1994) (prison official is deliberately
8 indifferent if he knows that a prisoner faces a substantial risk
9 of serious harm and disregards that risk by failing to take
10 reasonable steps to abate it); McGuckin, 974 F.2d at 1060 (in
11 order for deliberate indifference to be established, there must be
12 a purposeful act or failure to act on the part of the defendant
13 and resulting harm). Plaintiff is granted leave to amend to add
14 allegations to correct this deficiency, if he truthfully can do
15 so.

16 III. Consent or Declination to Proceed Before Magistrate Judge

17 In order to encourage the just, speedy and inexpensive
18 determination of 42 U.S.C. § 1983 cases filed in this district,
19 the parties may waive their right to proceed before a district
20 judge and consent to proceed before a magistrate judge for all
21 purposes. Attached to this Order is a Notice of Option to Consent
22 to Proceed Before United States Magistrate Judge and an Order
23 requiring the parties to notify the Court whether they consent or
24 decline to so proceeding. The parties shall complete the
25 requisite consent or declination form and return it to the Court
26 as set forth in paragraph 5 of the Conclusion of this Order.
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CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Defendants' motion to screen the complaint is GRANTED.

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2. Plaintiff states a cognizable claim for deliberate indifference to his serious medical needs against Drs. Sayre and Adam based upon their 2009 alleged conduct.

3. Plaintiff's claims against Dr. Sayre based upon his alleged conduct that occurred in 2012 are dismissed as duplicative of the allegations and claims Plaintiff alleged in an earlier case.

4. Plaintiff's claim against Mr. Rogde is dismissed for failure to state a cognizable claim of deliberate indifference to serious medical needs. Within thirty (30) days from the date of this Order, Plaintiff may file an amended complaint to cure the deficiencies noted above.

Plaintiff shall use the Court's civil rights complaint form, a copy of which is provided herewith, and include in the caption both the case number of this action, No. C 13-01570 CW (PR), and the heading "AMENDED COMPLAINT."

If Plaintiff fails timely to file an amended complaint in conformity with this Order, the claim against Mr. Rogde will be dismissed without prejudice and the cognizable claims against Drs. Sayre and Adam will proceed.

5. No later than thirty days from the date of this Order, all parties shall file their consent or declination to proceed before a United States Magistrate Judge.

6. Within twenty-one days from the date of this Order Defendants Dr. Sayre and Dr. Adam shall file an answer to the

1 complaint. The following briefing schedule shall govern
2 dispositive motions in this action:

3 a. No later than thirty days from the date their
4 answer is due, Defendants shall file a motion for summary judgment
5 or other dispositive motion. If Defendants file a motion for
6 summary judgment, it shall be supported by adequate factual
7 documentation and shall conform in all respects to Federal Rule of
8 Civil Procedure 56. If Defendants are of the opinion that this
9 case cannot be resolved by summary judgment, they shall so inform
10 the Court prior to the date the summary judgment motion is due.
11 All papers filed with the Court shall be promptly served on
12 Plaintiff.

13 At the time of filing the motion for summary judgment or
14 other dispositive motion, Defendants shall comply with the Ninth
15 Circuit's decisions in Woods v. Carey, 684 F.3d 934 (9th Cir.
16 2012), and Stratton v. Buck, 697 F.3d 1004 (9th Cir. 2012), and
17 provide Plaintiff with notice of what is required of him to oppose
18 a summary judgment motion or a motion to dismiss for failure to
19 exhaust administrative remedies.

20 b. Plaintiff's opposition to the motion for summary
21 judgment or other dispositive motion shall be filed with the Court
22 and served on Defendants no later than twenty-eight days after the
23 date on which Defendants' motion is filed.

24 Before filing his opposition, Plaintiff is advised to read
25 the notice that will be provided to him by Defendants when the
26 motion is filed, and Rule 56 of the Federal Rules of Civil
27 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party
28 opposing summary judgment must come forward with evidence showing
29 triable issues of material fact on every essential element of his

1 claim). Plaintiff is cautioned that because he bears the burden
2 of proving his allegations in this case, he must be prepared to
3 produce evidence in support of those allegations when he files his
4 opposition to Defendants' summary judgment motion. Such evidence
5 may include sworn declarations from himself and other witnesses to
6 the incident, and copies of documents authenticated by sworn
7 declaration. Plaintiff will not be able to avoid summary judgment
8 simply by repeating the allegations of his complaint.

9 c. Defendants shall file a reply brief no later than
10 fourteen days after the date Plaintiff's opposition is filed.

11 d. The motion shall be deemed submitted as of the date
12 the reply brief is due. No hearing will be held on the motion
13 unless the Court so orders at a later date.

14 7. Discovery may be taken in this action in accordance with
15 the Federal Rules of Civil Procedure. Leave of the Court pursuant
16 to Rule 30(a)(2) is hereby granted to Defendants to depose
17 Plaintiff and any other necessary witnesses confined in prison.

18 8. All communications by Plaintiff with the Court must be
19 served on Defendants, or Defendants' counsel once counsel has been
20 designated, by mailing a true copy of the document to Defendants
21 or Defendants' counsel.

22 9. It is Plaintiff's responsibility to prosecute this case.
23 He must keep the Court informed of any change of address and must
24 comply with the Court's orders in a timely fashion.

25 10. Extensions of time are not favored, though reasonable
26 extensions will be granted. Any motion for an extension of time
27 must be filed no later than fourteen days prior to the deadline

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United States District Court
For the Northern District of California

1 sought to be extended.

2 IT IS SO ORDERED.

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4 Dated: 9/24/2013

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CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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