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

MARTIN RIOS,	)	No. C 11-5127 LHK (PR)
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANT’S MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	
MICHAEL C. SAYRE,	)	
	)	
Defendant.	)	

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against Defendant Chief Medical Officer Michael C. Sayre at Pelican Bay State Prison. In his complaint, Plaintiff alleges that Defendant was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Defendant has moved for summary judgment. Although given an opportunity, Plaintiff has not filed an opposition. Having carefully considered the papers submitted, the Court GRANTS Defendant’s motion for summary judgment, for the reasons set out below.

**BACKGROUND**

The following facts are taken in the light most favorable to Plaintiff, and are undisputed unless otherwise indicated.

While incarcerated at Pelican Bay State Prison (“PBSP”), in August 2009, Plaintiff began taking medication to treat his tuberculosis. (Compl. at ¶ 13.) Around that time, Plaintiff

1 developed a small rash on his forehead which then spread all over his face, neck and ears. (*Id.*)  
2 As a result, Plaintiff experienced dry skin, an itchy and burning sensation, bumps and boils on  
3 his face, swollen eyelids, inflammation of his face, and impairment of his eyesight. (*Id.* at ¶ 14.)  
4 Doctors and nurses observed Plaintiff and noted the progression of the rash. (*Id.* at ¶¶ 15-18.)  
5 Dr. Williams treated Plaintiff’s rash with hydrocortisone cream, and recommended that Plaintiff  
6 see a dermatologist. (*Id.* at ¶ 18; Decl. Sayre, Ex. A at 3, 15.)

7 On June 10, 2010, the Medical Authorization Review Committee (“MAR”) rejected Dr.  
8 Williams’ recommendation for Plaintiff to see a dermatologist, and instead ordered a biopsy of  
9 the rash. (Compl. at ¶ 19; Decl. Sayre at ¶¶ 2, 6.) Defendant is a member of the MAR  
10 Committee. (Decl. Sayre at ¶ 2.) The MAR Committee reviews and acts on requests submitted  
11 by medical providers, including referrals to see a specialist, and will usually deny a request for a  
12 referral to a specialist when it is determined that the inmate has a condition that is common, and  
13 can be treated by a primary care physician. (*Id.*)

14 In October 2010, the biopsy results indicated that the rash was most suggestive of  
15 “granulomatous rosacea.” (Compl. at ¶ 22; Decl. Sayre at ¶ 5.) Granulomatous rosacea is a type  
16 of rosacea. (Decl. Sayre at ¶ 5.) Rosacea is a chronic skin condition that involves inflammation  
17 of the cheeks, nose, chin, forehead, or eyelids. (*Id.*) It is not life-threatening. (*Id.*) Rosacea is  
18 cyclic for most people. (*Id.*) Symptoms may come and go, and there is no cure, although  
19 treatment can control and reduce symptoms. (*Id.*)

20 A second request for Plaintiff to see a dermatologist was again denied by the MAR  
21 Committee, and in lieu of a specialist, the MAR Committee recommended that Plaintiff’s doctor  
22 treat him with Retin-A, which was known to be an effective treatment for rosacea. (*Id.* at ¶ 6.)  
23 Three weeks later, a third request for Plaintiff to see a dermatologist was submitted. (*Id.*) The  
24 MAR Committee denied the request, recommending that a two-month course of oral antibiotics  
25 be tried instead. (*Id.*)

26 On April 18, 2011, Dr. Adam examined Plaintiff and recommended that he see a  
27 dermatologist. (Compl. at ¶ 20.) Again, the MAR Committee denied this fourth  
28 recommendation for Plaintiff to see a dermatologist. (*Id.* at ¶ 21.) The MAR Committee

1 suggested that Plaintiff’s primary care physician treat the rosacea aggressively by using topical  
2 medications, antibiotics, and steroids. (Decl. Sayre at ¶ 6.) A few months later, Plaintiff’s  
3 primary care physician noted that Plaintiff’s condition had greatly improved. (*Id.*)

#### 4 ANALYSIS

##### 5 A. Standard of Review

6 Summary judgment is proper where the pleadings, discovery and affidavits demonstrate  
7 that there is “no genuine issue as to any material fact and that the moving party is entitled to  
8 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect  
9 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute  
10 as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a  
11 verdict for the nonmoving party. *Id.*

12 The party moving for summary judgment bears the initial burden of identifying those  
13 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine  
14 issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Where the moving  
15 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no  
16 reasonable trier of fact could find other than for the moving party. But on an issue for which the  
17 opposing party will have the burden of proof at trial, as is the case here, the moving party need  
18 only point out “that there is an absence of evidence to support the nonmoving party’s case.” *Id.*  
19 at 325.

20 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
21 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a  
22 genuine issue for trial.” Fed. R. Civ. P. 56(e). The Court is only concerned with disputes over  
23 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”  
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not the task of the court to scour  
25 the record in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th  
26 Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity,  
27 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to make this  
28 showing, “the moving party is entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S.

1 at 323.

2 At the summary judgment stage, the Court must view the evidence in the light most  
3 favorable to the nonmoving party: if evidence produced by the moving party conflicts with  
4 evidence produced by the nonmoving party, the judge must assume the truth of the evidence set  
5 forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152,  
6 1158 (9th Cir. 1999).

7 B. Plaintiff's Claim

8 Liberally construed, Plaintiff claims that Defendant was deliberately indifferent to his  
9 serious medical need, i.e., the rosacea, by failing to approve requests for him to see a  
10 dermatologist. Defendant argues that he is entitled to judgment as a matter of law because the  
11 evidence is undisputed that he did not have the requisite culpable state of mind to meet the  
12 deliberate indifference standard.

13 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
14 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104  
15 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by*  
16 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A  
17 determination of "deliberate indifference" involves an examination of two elements: the  
18 seriousness of the prisoner's medical need and the nature of the defendant's response to that  
19 need. *See McGuckin*, 974 F.2d at 1059.

20 A prison official is deliberately indifferent if he knows that a prisoner faces a substantial  
21 risk of serious harm and disregards that risk by failing to take reasonable steps to abate it.  
22 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only "be aware of  
23 facts from which the inference could be drawn that a substantial risk of serious harm exists," but  
24 he "must also draw the inference." *Id.* If a prison official should have been aware of the risk,  
25 but was not, then the official has not violated the Eighth Amendment, no matter how severe the  
26 risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002).

27 Even assuming that rosacea is a "serious medical need," there is no genuine issue of  
28 material fact that Defendant did not exhibit deliberate indifference. First, there is no evidence

1 that Defendant was aware that Plaintiff faced a substantial risk of serious harm and disregarded  
2 it. Plaintiff was consistently being treated for his rosacea. The policy of the MAR Committee  
3 was to deny requests to refer inmates to a specialist when the inmate has a condition that is  
4 common, and could be treated by a primary care physician. (Decl. Sayre ¶ 2.) The MAR  
5 Committee denied the first request for a referral to a specialist, opting instead to order a biopsy.  
6 (*Id.* at ¶ 6.) The MAR Committee recognized that Plaintiff had already completed another test to  
7 check for lupus, and inflammatory activity in the body. (*Id.*) The MAR Committee repeatedly  
8 denied the requests for a referral, but issued alternative directives. (*Id.*) “A difference of  
9 opinion between a prisoner-patient and prison medical authorities regarding treatment does not  
10 give rise to a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).  
11 Similarly, a showing of nothing more than a difference of medical opinion as to the need to  
12 pursue one course of treatment over another is insufficient, as a matter of law, to establish  
13 deliberate indifference. *See Toguchi v. Chung*, 391 F.3d 1051, 1059-60 (9th Cir. 2004). In order  
14 to prevail on a claim involving choices between alternative courses of treatment, a plaintiff must  
15 show that the course of treatment the doctors chose was medically unacceptable under the  
16 circumstances and that they chose this course in conscious disregard of an excessive risk to the  
17 plaintiff’s health. *Id.* at 1058. Based on the record, the Court concludes that no reasonable  
18 inference can be drawn that Defendant knew that Plaintiff was faced with a substantial risk of  
19 harm and disregarded it. *See Farmer*, 511 U.S. at 837. At most here, Plaintiff has a difference  
20 of opinion as to whether Defendant should have approved Plaintiff’s doctors’ recommendations  
21 to see a dermatologist. Plaintiff has provided nothing to suggest that Defendant’s actions or  
22 inactions were medically unacceptable under the circumstances, or that his decisions were  
23 chosen in conscious disregard to Plaintiff’s health. *See id.*

24         Second, Plaintiff has not alleged that he has suffered any harm from the denial of being  
25 referred to a specialist. Although a “significant injury” is not required in order to establish a  
26 constitutional violation, at a minimum, Plaintiff must demonstrate some resulting harm. *See*  
27 *McGuckin*, 974 F.2d at 1060, 1061; *Shapley v. Nevada Bd. Of State Prison Comm’rs*, 766 F.2d  
28 404, 407 (9th Cir. 1985) (per curiam). Here, because Plaintiff has submitted no evidence that

1 Defendant's actions resulted in any harm to Plaintiff, Defendant is entitled to judgment as a  
2 matter of law.

3 **CONCLUSION**

4 Accordingly, Defendant's motion for summary judgment is GRANTED.<sup>1</sup> The Clerk  
5 shall terminate all pending motions and close the file.

6 IT IS SO ORDERED.

7 DATED: 11/12/12

  
LUCY H. KOH  
United States District Judge

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28 <sup>1</sup> Because the Court grants Defendant's motion for summary judgment on the merits, it  
will decline to address Defendant's argument that he is also entitled to qualified immunity.