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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAY G. KIMPEL,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Defendants.

Case No. 08-CV-1734-LAB (JMA)

**REPORT AND RECOMMENDATION
GRANTING DEFENDANTS' MOTION
TO DISMISS**

[Doc. 12]

I. BACKGROUND

In this prisoner civil rights case, Jay G. Kimpel ("Kimpel" or "Plaintiff") is proceeding *pro se* and *in forma pauperis* ("IFP") pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915(a). Kimpel commenced this action on September 22, 2008. Doc. No. 1. Kimpel alleges a condition of pain to his shoulder, neck and arm, and that Defendants Dr. Walker and nurse practitioner Jayasundara (erroneously identified as a doctor) violated his Eighth Amendment right to be free from cruel and unusual punishment by wrongfully stopping Plaintiff's pain medication on December 15, 2007. Compl. at 2-5. Plaintiff seeks compensatory and punitive damages and injunctive relief. Compl. at 7.¹

¹ Plaintiff indicated in his June 2, 2009 request for an extension [Doc. 17] that he was scheduled to be released in June, 2009. According to a notice of change of address he filed on August 20, 2009, he was incarcerated again on June 16, 2009 for a parole violation and is now at the County jail [Doc. 20]. As Plaintiff is no longer located at the Donovan Correctional

1 On May 1, 2009, Defendants Dr. Walker and Jayasundara moved to dismiss the
2 Complaint on the grounds that: (1) Plaintiff failed to properly allege deliberate
3 indifference, and (2) Defendant Jayasundara is immune from liability for actions taken in
4 his official capacity. Doc. No. 12. Plaintiff twice requested extensions of time to file his
5 opposition [Doc. Nos. 14, 17], both of which were granted [Doc. Nos. 15, 18]; however,
6 no opposition was filed.

7 This Report and Recommendation is submitted to United States District Judge
8 Larry A. Burns pursuant to 28 U.S.C. §636(b)(1) and Local Rule 72.3 of the United
9 States District Court for the Southern District of California. After reviewing the Plaintiff's
10 Complaint, the exhibits to the Complaint and Defendants' Motion to Dismiss, the Court
11 recommends, for the reasons set forth below, that Defendants' Motion to Dismiss be
12 **GRANTED** and the Complaint be dismissed for failure to sufficiently allege deliberate
13 indifference.

14 **II. LEGAL STANDARDS ON DEFENDANTS' MOTION TO DISMISS UNDER**
15 **F.R.C.P. 12(b)(6)**

16 Defendants move to dismiss the Complaint pursuant to Fed. R. Civ P. 12(b)(6)
17 for failure to state a claim upon which relief can be granted. Under Fed. R. Civ. P.
18 8(a)(2), a pleading must contain a short and plain statement of the claim that
19 demonstrates that the pleader is entitled to some relief. The United States Supreme
20 Court observed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), that
21 detailed factual allegations are not required under Rule 8. However, the pleader cannot
22 merely state labels, legal conclusions or formulaic recitations of the elements of a cause
23 of action to withstand a Rule 12(b)(6) motion to dismiss (*Id.* at 557), and the court does
24 not have to accept as true any legal conclusions within a complaint, although
25 conclusions can help frame a complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950
26 (2009).

27 When evaluating a motion to dismiss, the court must accept as true all material

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Facility, his request for injunctive relief (*i.e.*, that Defendants Walker and Jayasundara be
ordered to "stay away" from him) is moot.

1 allegations in the complaint, as well as any reasonable inferences that may be drawn
2 from them, and must construe the complaint in the light most favorable to the plaintiff.
3 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Cedars-Sinai Med.*
4 *Ctr. v. Nat’l League of Postmasters*, 497 F.3d 972, 975 (9th Cir. 2007). The court may
5 consider the facts alleged in the complaint, documents attached to the complaint,
6 documents incorporated by reference in the complaint, and matters of which the court
7 takes judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

8 Where a plaintiff appears *pro se*, the court must construe the pleadings liberally
9 and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police*
10 *Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is “particularly
11 important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).
12 Nevertheless, and in spite of the deference the court is bound to pay to any factual
13 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove
14 facts that [he] has not alleged.” *Associated General Contractors, Ind. v. California State*
15 *Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, a court may not “supply
16 essential elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents*, 673
17 F.2d 266, 268 (9th Cir. 1982).

18 If a claim is dismissed because the complaint fails to allege essential facts, then
19 leave to amend the complaint should be granted along with the dismissal, “unless the
20 district court determines that the pleading could not possibly be cured by the allegation
21 of other facts.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001).

22 23 **III. PLAINTIFF FAILED TO PROPERLY ALLEGE AN EIGHTH AMENDMENT** 24 **CLAIM FOR DELIBERATE INDIFFERENCE**

25 The Eight Amendment to the federal Constitution prohibits cruel and unusual
26 punishment of inmates, and deliberate indifference to a prisoner’s serious medical
27 needs constitutes cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 103
28 (1976). To state a claim under the Eighth Amendment, “a prisoner must allege acts or
omissions sufficiently harmful to evidence deliberate indifference to serious medical

1 needs.” *Id.* at 106. To establish deliberate indifference, an inmate must allege facts to
2 indicate that prison officials acted with a culpable state of mind to inflict unnecessary
3 and wanton injury or pain. *Wilson v. Seiter*, 501 U.S. 294, 302 (1991); *Farmer v.*
4 *Brennan*, 511 U.S. 825, 834 (1994).

5 “Mere negligence in diagnosing or treating a medical condition, without more,
6 does not violate a prisoner’s Eighth Amendment rights.” *McGuckin v. Smith*, 974 F.2d
7 1050, 1059 (9th Cir. 1992), overruled on other grounds, *WMX Technologies, Inc. v.*
8 *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). Mere inadequate treatment due to
9 malpractice, or even gross negligence, does not amount to a constitutional violation.
10 *Estelle*, 429 U.S. at 106, *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). “A
11 difference of opinion between a prisoner-patient and prison medical authorities
12 regarding treatment does not give rise to a § 1983 claim.” *Franklin v. Oregon State*
13 *Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). While deliberate indifference may
14 appear when prison officials deny, delay or intentionally interfere with medical
15 treatment, “the delay must have caused substantial harm.” *Wood*, 900 F.2d at 1335.
16 Moreover, should a plaintiff establish that an official actually knew of a substantial risk to
17 an inmate’s health or safety, if the official responded reasonably to the risk, the official is
18 not deliberately indifferent. *Farmer*, 511 U.S. at 844.

19 Here, Plaintiff alleges in his Complaint that he had severe pain in his neck,
20 shoulder and fingers due to nerve damage in his right hand and arm. Compl. at 2-3.
21 Plaintiff claims that on December 15, 2007, Dr. Walker and nurse practitioner
22 Jayasundara wrongfully discontinued his prescription for his pain medication, Neurontin,
23 claiming that he was “faking it.” *Id.* Plaintiff claimed that he suffered great pain for 11
24 months until he saw a different doctor, Dr. Hunt, who gave the appropriate test on
25 September 9, 2008, and prescribed Plaintiff Neurontin as a pain medication again. *Id.*

26 However, the exhibits that Plaintiff submitted in support of his Complaint
27 demonstrate that Plaintiff received numerous examinations and treatments throughout
28 2007 and 2008 and suggest that, at most, Plaintiff’s allegations support a difference of
opinion between him and Defendants regarding the treatments (*i.e.* pain medication)

1 given to Plaintiff. For example, the Director's Level Appeal Decision dated July 15,
2 2008 reviews the numerous instances of examination, diagnosis and treatment Plaintiff
3 received. Beginning on October 17, 2007, Plaintiff was seen by a primary care
4 physician for ultrasound testing of his abdomen -- Plaintiff was prescribed Neurontin for
5 three months, and prescribed Tylenol for his pain. The next month, in November 2007,
6 Plaintiff was referred for labs and x-rays (the radiology report showed a normal lower
7 spine and hips) and Tylenol was continued. Plaintiff consulted with his primary doctor
8 again in December 2007.

9 On January 14, 2008, Plaintiff's primary physician referred Plaintiff for multiple x-
10 ray studies of his left elbow, right shoulder and right elbow, including an MRI of his right
11 shoulder and lumbosacral area. In February 2008, x-rays were taken of Plaintiff's right
12 hand, and he was referred to Orthopedics for his right fourth finger and was prescribed
13 Salsalate for pain. In March, Plaintiff received an MRI of his right shoulder and was
14 prescribed Motrin for pain.

15 The allegation that Dr. Walker "cut off" Plaintiff's prescription for Neurontin on
16 December 15, 2007 is not supported by Plaintiff's exhibits. The Outpatient Medication
17 Administration Record submitted by Plaintiff indicates that Plaintiff received prescription
18 orders for Neurontin from Dr. Ding through January 17, 2008.² Further, Plaintiff's
19 allegation that Defendants accused Plaintiff of "faking" pain symptoms is not supported
20 by the prescription by Defendant Jayasundara for Salsalate for "pain" for the period of
21 February 25, 2008 to March 26, 2008, and Dr. Walker's previous prescription to Plaintiff
22 of Neurontin for the period May 14, 2007 to June 14, 2007. Moreover, the list of
23 physicians prescribing medications to Plaintiff during the material time of the allegations
24 is extensive. Plaintiff was not denied access to healthcare providers or prescription
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27 ² The Outpatient Medication Administration Record submitted by Plaintiff indicates that
28 Plaintiff was prescribed Neurontin on the following dates: June 2007 by Defendant Dr. Walker
for the period May 14, 2007 to June 14, 2007; October 2007 by Dr. Ding for the period October
17, 2007 to January 17, 2008; November 2007 by Dr. Ding for the period of October 17, 2007
to January 17, 2008; and January 2008 by Dr. Ding for the period of November or December
16, 2007 to January 15, 2008.

1 medications by Defendants.³

2 Plaintiff alleges that in August, 2008, he saw a Dr. Hunt who had Plaintiff tested
3 and apparently re-prescribed Neurontin. Presumably, this refers to the
4 Electromyography Report by Dr. Ling in September 2008; Dr. Hunt is not identified on
5 any exhibit. However, a “difference of opinion” regarding treatment does not give rise to
6 a § 1983 claim. *Franklin*, 662 F.2d at 1344. Indeed, this demonstrates that officials
7 continued to examine, diagnose and treat Plaintiff. Therefore, Defendants’ motion to
8 dismiss for failure to properly allege deliberate indifference is **GRANTED**.

9
10 **IV. DEFENDANT JAYASUNDARA IS IMMUNE FROM SUIT FOR DAMAGES FOR
ACTS TAKEN IN HIS OFFICIAL CAPACITY**

11 The Eleventh Amendment bars a prisoner’s section 1983 claims for damages
12 against a state official sued in his official capacity. 42 U.S.C. § 1983; *Will v. Michigan*
13 *Dep’t of State Police*, 491 U.S. 58 (1989); *Hafer v. Melo*, 502 U.S. 21, 30 (1991); *Ashker*
14 *v. California Dep’t of Corrections*, 112 F.3d 392, 394-95 (9th Cir. 1997). Plaintiff
15 identified and sued Defendant Jayasundara in both his individual and official capacity.
16 Compl. at 2.⁴ The Court accordingly recommends that the Court **GRANT** Defendants’
17 Motion to Dismiss on Eleventh Amendment grounds to the extent that Plaintiff seeks
18 monetary damages against Defendant Jayasundara in his official capacity.

19 **V. CONCLUSION AND RECOMMENDATION**

20 For the reasons set forth above, the Court **RECOMMENDS** that Defendants’
21 motion to dismiss be **GRANTED** with leave to amend.

22 This Report and Recommendation is submitted to the Honorable Larry A. Burns,
23 United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any
24 party may file written objections with the Court and serve a copy on all parties on or


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26 ³ Plaintiff alleges that he tried to kill himself three times due to the pain he was suffering.
27 Cplt. at 2. Plaintiff submits various exhibits that indicate a history of substance abuse and
28 mental illness, a suicide attempt and at least one other threatened suicide attempt. However,
nothing in these exhibits establishes an objective serious deprivation of care or culpable state
of mind of the Defendants.

⁴ Plaintiff identified and sued Defendant Dr. Walker in his individual capacity only, not
his official capacity. Cplt. at 2.

1 before **September 24, 2009**. The document should be captioned "Objections to Report
2 and Recommendation." Any reply to the Objections shall be served and filed on or
3 before **October 5, 2009**. The parties are advised that failure to file objections within the
4 specified time may waive the right to appeal the district court's order. *Martinez v. Ylst*,
5 951 F.2d 1153 (9th Cir. 1991).

6 **IT IS SO ORDERED.**

7 DATED: August 25, 2009

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10 Jan M. Adler
11 U.S. Magistrate Judge
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