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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 VICENTE ARRAIGA ALVAREZ,
12 Plaintiff,
13 v.
14 DR. S. KO, MD., et al.,
15 Defendants.

Case No.: 16-CV-1302-CAB-(NLS)

**ORDER ADOPTING REPORT AND
RECOMMENDATION [Doc. No. 35]
AND DENYING DEFENDANTS'
MOTION TO DISMISS [Doc. No. 24]**

16
17 Plaintiff Vicente Alvarez, a California prisoner, filed this civil rights complaint
18 against Defendants under 42 U.S.C. § 1983. On March 24, 2017, Magistrate Judge Nita L.
19 Stormes filed a Report and Recommendation recommending the Court deny the motion to
20 dismiss filed by Defendants Dr. S. Ko, M.D., Dr. Connall McCabe, M.D., Dr. A. Sangha,
21 C.M.E., and Deputy Director J. Lewis. [Doc. No. 35.]

22 PROCEDURAL BACKGROUND

23 On May 31, 2016, Plaintiff filed a Complaint alleging that Defendants Ko, McCabe,
24 Sangha and Lewis (collectively “Defendants”) were deliberately indifferent to Plaintiff’s
25 serious medical need, in violation of the Eight Amendment. [Doc. No. 1 at 1-2.]

26 On December 14, 2016, Defendants filed a motion to dismiss the Complaint. [Doc.
27 No. 24.] On February 15, 2017, Plaintiff filed his opposition to the motion. [Doc. No. 29.]
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1 On February 23, 2017, Defendants filed a reply in support of the motion to dismiss. [Doc.
2 No. 32.]

3 On March 24, 2017, Magistrate Judge Nita L. Stormes filed a Report and
4 Recommendation recommending that the motion to dismiss filed by Defendants be denied.
5 [Doc. No. 35.] On April 7, 2017, Defendants filed an objection to the Report and
6 Recommendation. [Doc. No. 37.] On April 24, 2017, Plaintiff filed a reply to the
7 objection. [Doc. No. 38.]

8 FACTUAL BACKGROUND

9 Defendants do not object to the factual background provided by Magistrate Judge
10 Stormes [Doc. No. 34 at 2-6] and, therefore, it is incorporated by reference.

11 REVIEW OF REPORT AND RECOMMENDATION

12 The duties of the district court in connection with a report and recommendation of a
13 magistrate judge are set forth in Federal Rules of Civil Procedure 72(b) and 28 U.S.C. §
14 636(b). The district judge must “make a de novo determination of those portions of the
15 report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
16 part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b).
17 The district court need not review de novo those portions of a report and recommendation
18 to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir.
19 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

20 A. Deputy Director Lewis

21 Magistrate Judge Stormes found that Plaintiff sufficiently stated a claim against
22 Deputy Director Lewis. [Doc. No. 35 at 14-15.] Defendants object to the ruling as to
23 Director Lewis on two grounds. First, Defendants argue that Plaintiff has failed to allege
24 any facts that establish her supervisory status over Dr. Ko. [Doc. No. 37 at 2.] However,
25 as noted by the Magistrate Judge, Plaintiff alleges Director Lewis was responsible for the
26 overall operation of the California Department of Corrections Health Care Department, and
27 Director Lewis condoned the actions of her subordinate, Dr. Ko. [Doc. No. 35 at 14.]
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1 These allegation are sufficiently pled to establish that Dr. Ko was a subordinate of Director
2 Lewis’.

3 Second, Defendants object on the grounds that Plaintiff has failed to adequately
4 plead supervisory liability on the part of Director Lewis to support a § 1983 claim.
5 Defendants argue that Plaintiff’s allegations regarding Director Lewis’ level of
6 involvement in decisions about his care are insufficient.¹ [Doc. No. 37 at 3-4.]
7 Additionally, Defendants contend the complaint fails to adequately allege the requisite
8 deliberate indifference on the part of Director Lewis. [*Id.* at 4-5.] But, as found by
9 Magistrate Stormes, Plaintiff alleges Deputy Director Lewis did more than simply review
10 Plaintiff’s administrative appeal. [Doc. No. 35 at 14-15]. As the Recommendation reports,
11 Plaintiff alleges that Director Lewis knew Dr. Ko refused to provide effective treatment for
12 his chest pains and refused to refer him to a specialist and that Director Lewis condoned
13 Dr. Ko’s actions directing Plaintiff to seek medical care at his own expense and denying
14 him medical care because it was too expensive. [*Id.*] Further, as Magistrate Stormes noted,
15 Plaintiff alleges that nonetheless Deputy Director Lewis denied his 602 Appeal and that
16 the delay in treatment has caused him harm. [*Id.* at 15.] Thus, Plaintiff has sufficiently
17 stated a claim against Deputy Director Lewis for deliberate indifference based upon her
18 knowledge of and acquiescence in unconstitutional conduct by her subordinate, Dr. Ko.
19 *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011). Therefore, this Court agrees with the
20 Magistrate Judge that the motion to dismiss as to Deputy Director Lewis should be denied.

21 B. Dr. Sangha

22 Magistrate Judge Stormes denied Defendants’ motion to dismiss the claim against
23 Dr. Sangha. [Doc. No. 35 at 13-14.] Defendants object to the ruling, arguing that the
24 complaint is devoid of allegations sufficient to establish Dr. Sangha’s role as Dr. Ko’s
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27 ¹ Relatedly, Defendants assert that the court need not accept Plaintiff’s allegation of Deputy Director
28 Lewis’ job duties even at this stage of the litigation. [Doc. No. 37 at 3-4.] But, an *informa pauperis*
complaint should not be dismissed before any factual development is conducted simply because the
court finds the allegations unlikely. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

1 supervisor and fails to allege how Dr. Sangha knew that the treatment provided by Dr. Ko's
2 was constitutionally deficient. [Doc. No. 37 at 6.] However, as the Magistrate Judge noted,
3 Plaintiff does more than merely allege Dr. Sangha reviewed and denied his 602 Appeal, he
4 alleges Dr. Sangha knew Dr. Ko refused to provide effective treatment and refused to refer
5 him to a specialist, and yet did not take any actions to rectify the situation or stop his
6 subordinate's acts. [Doc. No. 35 at 14.] Further, as Magistrate Stormes pointed out,
7 Plaintiff also alleges Dr. Sangha referred one of Plaintiff's 602 Appeals to Dr. Ko for
8 investigation despite knowing Plaintiff complained of Dr. Ko's treatment. [*Id.* at 14.]
9 Additionally, the Complaint alleges Dr. Sangha is responsible for the medical care of all
10 inmates at CSP-Centinela including "the supervision, direction, and or proper training of
11 the medical staff at CSP-Centinela, including the defendant Dr. S. Ko." [Doc. No. 1 ¶ 8.]
12 These alleged facts are sufficient to state a claim for deliberate indifference based on Dr.
13 Sangha's alleged knowledge and acquiescence in unconstitutional conduct. This Court
14 agrees with the Magistrate Judge that the motion to dismiss as to Dr. Sangha should be
15 denied.

16 C. Dr. McCabe

17 Magistrate Judge Stormes found that Plaintiff states a cognizable Eighth
18 Amendment claim against Dr. McCabe. Defendants object to the ruling, arguing: (1) Dr.
19 McCabe's involvement in Plaintiff's care was limited to review of his inmate appeal at the
20 first level; (2) Dr. McCabe did not treat Plaintiff and interviewed him before Plaintiff had
21 any interaction with Dr. Ko; and (3) Plaintiff is simply dissatisfied with Dr. McCabe's
22 decision to deny his healthcare appeal, which is not actionable under § 1983. [Doc. No. 37
23 at 6-7.] However, as the Magistrate Judge noted, Plaintiff does not merely allege Dr.
24 McCabe denied his administrative appeal, he alleges Dr. McCabe knew about his continued
25 chest pains and requests to see a heart specialist, had authority to prevent a constitutional
26 violation, and yet denied his request and delayed treatment for medical care that Plaintiff
27 alleges was sorely needed. [Doc. No. 35 at 12.] Furthermore, Plaintiff's allegations
28 regarding deliberate indifference to his serious medical need predate his interactions with

1 Dr. Ko. Plaintiff alleges that in October 2014 he began requesting medical assistance for
2 his chest pains and to see a heart specialist but that these requests were denied and that the
3 delay in treatment caused him harm. [Doc. No. 1 ¶¶ 12-23, 66-70.] As Judge Stormes
4 highlighted, Plaintiff alleges Dr. McCabe is responsible for ensuring inmates who are
5 transferred to other institutions continue receiving proper care and Dr. McCabe violated
6 his Eighth Amendment rights by failing to make sure he received adequate medical care
7 when he transferred to Centienela. Therefore, this Court agrees with the Magistrate Judge
8 that the motion to dismiss as to Dr. McCabe should be denied.

9 D. Dr. Ko

10 Magistrate Judge Stormes concluded that Plaintiff's Complaint states an Eighth
11 Amendment claim for deliberate indifference to medical needs against Dr. Ko. [Doc. No.
12 35 at 8-11.] Defendants object to this ruling, arguing the Complaint fails to adequately
13 allege deliberate indifference by Dr. Ko or that Dr. Ko persisted in pursuing a medically
14 unacceptable treatment path and at best Plaintiff alleges a difference of opinions with Dr.
15 Ko. [Doc. No. 37 at 7-9.] In fact, Judge Stormes acknowledges that some, but not all, of
16 Plaintiff's allegations demonstrate a mere difference of opinion, before explaining that
17 Plaintiff also alleges he informed Dr. Ko that the initial treatment plan was ineffective, Dr.
18 Ko nodded "yes" when Plaintiff asked if he would first need to fall out from a heart attack
19 to be referred to a cardiologist, and Plaintiff continues to have chest pains. [Doc. No. 35
20 at 9.]

21 Defendants also argue the two EKG's and one chest x-ray performed on Plaintiff
22 and the changing of Plaintiff's medication from a NSAID to Tylenol are illustrative of Dr.
23 Ko's responsiveness to Plaintiff's complaints. [Doc. No. 37 at 7-8.] Defendants assert that
24 these actions are in direct contradiction to Plaintiff's allegation that Dr. Ko failed to order
25 diagnostic testing for cardiac disease and the Recommendation's statement that Dr. Ko did
26 nothing in response to Plaintiff's complaint that the treatment plan was not working. [*Id.*]
27 As to Defendants' past treatments argument, "it does not dispense with Plaintiff's
28 continued reports of chest pain despite the treatment plan." [Doc. No. 35 at 11:1-2.] As

1 the Magistrate Judge noted, Plaintiff alleges that the treatment plan of rest, not to work out
2 as much and to take Naproxin – was ineffective and that he continues to have chest pains.
3 [Id. at 9.] Moreover, as Magistrate Stormes explained, the exhibit containing the EKG
4 does not specify which doctor ordered the EKG, and notwithstanding the exhibit, Plaintiff
5 alleges that Dr. Ko only performed a verbal examination and did not order any diagnostic
6 testing and also alleges that he told Dr. Ko that the treatment plan was not working and that
7 Dr. Ko did nothing in response. [Id. at 10.] Furthermore, as the Magistrate Judge pointed
8 out, Plaintiff alleges that to the present, he still currently suffers from chest pain, and the
9 added pain to his right side. [Id.]

10 Therefore, the Court agrees with Magistrate Stormes, that if true, these facts could
11 demonstrate Dr. Ko knew the treatment plan he placed Plaintiff on was ineffective yet
12 continued on the treatment plan anyway and deliberately did not take steps to improve the
13 situation. *See Jett v. Penner*, 439 F.3d 1091, 1097-98 (9th Cir. 2006).

14 CONCLUSION

15 The Court has conducted a *de novo* review of the Report and finds it to be thorough,
16 complete, and an accurate analysis of the legal issues presented in the motion to dismiss.
17 Therefore, the Court: (1) adopts the Report [Doc. No. 35] in full; (2) rejects Defendants’
18 objections [Doc. No. 37]; and (3) Denies Defendants’ motion to dismiss [Doc. No. 24].
19 Defendants are instructed to answer the Complaint within the time limits set forth in
20 Federal Rule of Civil Procedure 12(1)(A)(i).

21 It is **SO ORDERED**.

22 Dated: May 5, 2017



23
24 Hon. Cathy Ann Bencivengo
25 United States District Judge
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