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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COLBERT F. NICHOLS,

Plaintiff,

v.

ROBERT BANNISTER, et al.,

Defendants.

2:09-cv-1698-LDG-GWF

ORDER

Plaintiff Colbert Nichols is presently in the custody of the Nevada Department of Corrections. After this civil rights action was initiated and screened, plaintiff filed his amended complaint on January 12, 2011 (#12). Plaintiff alleges that at some point between May 2008 and August 2008, while he was a pre-trial detainee in custody at the Clark County Detention Center (“detention center”), he was assaulted by another detainee who twisted plaintiff’s right arm up and back, injuring his shoulder. Plaintiff alleges that he complained to an unnamed detention center doctor of severe pain, lack of mobility, and inability to sleep, and that after examining x-rays of plaintiff’s shoulder, the doctor informed plaintiff that he would have to wait until he was incarcerated in prison for treatment.

Plaintiff further alleges that, after his conviction and transportation to High Desert Correctional Center in August of 2008, he was seen by the outside orthopedic consultant on September 9, 2008. That doctor recommended that plaintiff receive an MRI for further evaluation.

1 Because the Nevada Department of Corrections (“NDOC”) does not have the capability to perform
2 certain procedures, such as an MRI, a recommendation for the procedures is brought before a
3 Utilization Review Panel (“URP”). The URP is a committee of NDOC physicians who meet to
4 decide the medical necessity of referring an inmate for evaluation or treatment outside the
5 NDOC’s medical capabilities. Defendant Dr. Robert Bannister, at times, sits on the URP when it
6 convenes.

7 On September 16, 2008, the URP, consisting of defendants Johns, Mumford, Sanchez and
8 Holmes, convened and considered, among others, the recommendation that plaintiff receive an
9 MRI. The URP elected to deny the recommendation for an outside MRI, on the basis that it was
10 not medically necessary. On November 6, 2008, plaintiff filed an inmate grievance based on the
11 URP’s disapproval of the recommendation. The grievance was routed to the NDOC Director of
12 Nursing, Ms. Lavonne Atkins-St. Rose, who upheld the URP’s decision. Plaintiff appealed
13 Atkins-St. Rose’s denial to the next grievance level, where it was upheld by defendant Bannister
14 on the ground that there was no basis to believe the URP had reached the wrong decision.

15 Subsequently, the URP agreed that it was appropriate to refer plaintiff to a private
16 orthopedist for evaluation, Dr. Richard Long, which took place at the prison on April 27, 2011.
17 Upon Long’s recommendation, plaintiff was given an X-Ray exam, an MRI, and pain
18 management. In a followup visit with plaintiff, Long observed that plaintiff had suffered “unusual
19 tearing of the inferior ligament structures,” and in a subsequent review, Long noted that plaintiff’s
20 shoulder was extremely unstable, and that plaintiff had a tear in his rotator cuff that would be
21 difficult to repair. Upon consultation with NDOC physician defendant Johns, Long opined that
22 plaintiff’s shoulder injury was “a very difficult problem to repair, and the repair failure rate would
23 be very high.” Long met with plaintiff and discouraged him from seeking surgery as an
24 alternative.

1 Plaintiff's amended complaint states three causes of action: (1) that the unnamed detention
2 center doctor failed to treat plaintiff's shoulder injury over a four-month period in violation of
3 plaintiff's fourteenth amendment rights, (2) that the same physician denied the treatment for
4 budgetary reasons, in violation of plaintiff's fourteenth amendment rights, and (3) that NDOC
5 medical director Robert Bannister, and NDOC physicians James Holmes, Marsha Johns, Francisco
6 Sanchez and David Mumford, who sat on the URP and refused to refer plaintiff for an MRI, were
7 deliberately indifferent to his medical needs and violated plaintiff's eighth amendment rights.
8 Defendants moved for summary judgment on June 8, 2011 (#22). The court deferred ruling on the
9 motion to afford plaintiff the opportunity to conduct discovery to support a supplemental response.
10 See #48. Defendants moved to reinstate their motion for summary judgment (#50) and the parties
11 have filed additional briefs.

12 A grant of summary judgment is appropriate only where the moving party has
13 demonstrated through "the pleadings, the discovery and disclosure materials on file, and any
14 affidavits" that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); Anderson v.
15 Liberty Lobby, 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light
16 most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d
17 1148, 1154 (9th Cir. 2001).

18 The moving party bears the initial burden of showing the absence of a genuine issue of
19 material fact. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000). The
20 burden then shifts to the non-moving party to go beyond the pleadings and set forth specific facts
21 demonstrating there is a genuine issue for trial. Id. The party opposing summary judgment "must
22 cite to the record in support of the allegations made in the pleadings to demonstrate that a genuine
23 controversy requiring adjudication by a trier of fact exists." Taybron v. City & County of San
24 Francisco, 341 F.3d 957, 960 (9th Cir. 2003). If the non-moving party meets its burden, summary
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1 judgment must be denied. Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317, 324
2 (1986).

3 Counts I and II, should be dismissed as the defendant subject to plaintiff's allegations has
4 not been named.

5 In Count III, plaintiff alleges, in pertinent part:

6 Bannister and the members of the UR[P] are aware of Nichol['s serious medical needs for
7 a MRI and surgery, are denying Nichols treatment for nonmedical reasons. This
8 constitutes deliberate indifference to Nichol['s serious medical needs in direct violation of
9 his rights guaranteed by the eighth amendment. This delay of over two years is causing
10 Nichols unnecessary pain and suffering which may cause irreversible damage to his
11 shoulder.

12 Defendants argue that they are entitled to summary judgment because Nichols, at most,
13 raises a difference of medical opinion regarding plaintiff's treatment. "A difference of opinion
14 between a prisoner-patient and prison medical authorities regarding treatment does not give rise to
15 a § 1983 claim." Franklin v. State of Oregon, State Welfare Division, 662 F.2d 1337, 1344 (9th
16 Cir. 1981) (citation omitted). To establish that a difference of opinion amounted to deliberate
17 indifference, the prisoner "must show that the course of treatment the doctors chose was medically
18 unacceptable under the circumstances" and "that they chose this course in conscious disregard of
19 an excessive risk to [the prisoner's] health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.
20 1996).

21 Plaintiff maintains that the eventual authorization for the MRI by the URP almost three
22 years after its original denial confirms that the original denial was not a result of a difference of
23 medical opinion. Yet, the fact that a different medical opinion may have been rendered years after
24 a previous one does not support a conclusion of deliberate indifference to a medical need in the
25 first instance, and plaintiff has presented no evidence that the initial recommendation was
26 medically unacceptable under the circumstances, or in conscious disregard of an excessive risk to
plaintiff's health.

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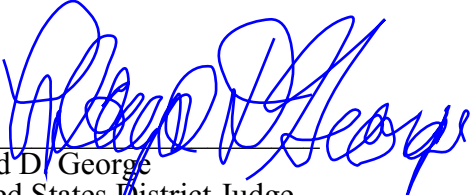
Furthermore, plaintiff's allegation in his amended complaint of unnecessary pain and suffering relates back to the original decision of the URP. He does not claim in his amended complaint, nor has he shown in the record, acts of deliberate indifference beyond those alleged in connection with the URP's initial denial of the recommendation for an MRI. Moreover, any such acts by defendants between the original denial of the MRI and its ultimate approval, had they been alleged, would be subject to an exhaustion analysis separate from the claims made in this action.

Accordingly,

THE COURT HEREBY ORDERS that defendants' motion for summary judgment (#22) as to Count III of plaintiff's amended complaint is GRANTED.

THE COURT FURTHER ORDERS that Counts I and II are hereby DISMISSED.

Dated this 26 day of September, 2013.



Lloyd D. George
United States District Judge