UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DON A. WEBSTER,

Plaintiff,

v.

UNITED STATES OF AMERICA; DEWAYNE HENDRIX, Warden, Sheridan Correctional Institution; and ANDREW GRASLEY, Doctor, Director Utilization Review Committee,

Defendants.

Case No. 3:17-cv-01350-MK

FINDINGS AND RECOMMENDATION

KASUBHAI, United States Magistrate Judge:

Pro Se Plaintiff Don A. Webster, an inmate at the Federal Correctional Institution in Sheridan, Oregon ("FCI Sheridan"), initiated this lawsuit in August 2017. *See* ECF No. 2. In April 2020, Defendants moved for summary judgment on all of Plaintiff's claims. *See* Defs.' Mot. Summ. J., ECF No. 25 ("Defs.' Mot."). Initially, Plaintiff did not file a response in opposition to the motion. *See* July 26, 2021 Show Cause Order, ECF No. 41; *see also* December

6, 2021 Show Cause Order, ECF No. 44. As a result, in January 2022, the Court issued a Findings and Recommendation ("F&R"), recommending dismissal based upon Plaintiff's failure to prosecute. *See* January 20, 2022 F&R, ECF No. 45. Shortly thereafter, however, Plaintiff resumed his participation in this lawsuit, Pl.'s Mot. Extension Time, ECF No. 49, leading the Court to withdraw the F&R and issue the following minute order providing a deadline for Plaintiff to file a response to Defendants' motion:

> Given Plaintiff's recent participation in this lawsuit, the Findings and Recommendation (ECF No. 45) recommending dismissal for failure to prosecute is WITHDRAWN. *Plaintiff has until 5/4/2022 to file a response to the Defendants' motion for summary judgment* (ECF No. 25). Should Plaintiff require additional time to file a response, he is instructed to make the request in advance of the 5/4/2022 deadline.

February 10, 2022 Minute Order, ECF No. 52 (emphasis added). On May 5, Plaintiff filed a document titled "Objections to Magistrate's Findings and Recommendation," which the Court now construes as Plaintiff's opposition to Defendants' motion for summary judgment. ECF No. 53 ("Pl.'s Opp'n"). Defendants timely replied. ECF No. 54 ("Defs.' Reply"). For the reasons that follow, the motion should be GRANTED.

BACKGROUND

Andrew Grasley, M.D., serves as the clinical director of the Utilization Review Committee ("URC") at FCI Sheridan. Andrew Grasley, M.D., Decl. ¶ 1, ECF No. 26 ("Grasley Decl."). The URC approves or denies requests for various medical and dental procedures. *Id.* ¶ 2–3. This includes requests for specialist evaluations that are in-house or escorted trips. *Id*. Dr.

Grasley is under no obligation to follow recommendations from consulting providers.[1] *See Id.*; *see also* Program Statement at 7–8, ECF No 26-1.

Peter Van Patten, M.D., served as an orthopedic surgeon at Willamette Valley Medical Center. Grasley Decl. ¶ 6, ECF No. 26 before retiring, he contracted with the Bureau of Prisons ("BOP") to provide orthopedic services at FCI Sheridan. *Id.* Dr. Van Patten visited FCI Sheridan for patients who required orthopedic consultations. *Id*.

On February 5, 2015, Dr. Van Patten conducted a physical examination and reviewed an MRI of Plaintiff's shoulder in anticipation of an operation. Attachment A at 14–15, ECF No. 32. Dr. Van Patten recommended shoulder surgery; specifically, a shoulder arthroscopy with rotator cuff and labral repair, Mumford, and biceps tenodesis versus tenotomy. *Id*. at 15. The doctor discussed the risks and benefits of the surgery with Plaintiff:

> Risks and benefits of surgery were discussed with the patient and he understands them. These include but are not limited to infection, bleeding. Nerve damage, blood clots, heart attack, allergic reaction, pneumonia, death, failure of the procedure to provide relief of pain, worsening of his range motion and strength. He understands and wishes to proceed.

Id.

That same day, Dr. Van Patten performed a successful surgery on Plaintiff's right shoulder. *Id*. at 16–17. Plaintiff was discharged the following day. *Id*. His discharge paperwork advised that he have "no shoulder movement," take his prescribed medications, and leave his

[1] Defendants submitted multiple documents in support of their motion. *See* ECF Nos. 26, 32. The first document, attached to the Grassley Declaration, is Program Statement 6031.04, describing patient care protocols at FCI Sheridan. *See* ECF No 26-1 ("Program Statement"). Defendants also submitted two documents under seal out of privacy concerns. *See* ECF No. 32. This F&R's references to "Attachment A" refer to Plaintiff's medical records at ECF No. 32. References to "Attachment B" refer to additional medical records referred to in Dr. Grasley's declaration also filed at ECF No. 32.

dressings dry and in place. *Id*. at 18. Dr. Van Patten requested a follow-up appointment with Plaintiff in five days. *Id*. Dr. Grasley reviewed Dr. Van Patten's request for follow-up appointment and approved. Grasley Decl. ¶ 7, ECF No. 26.

During the follow-up appointment, Dr. Van Patten noted that Plaintiff was doing well but still experiencing some pain and that Plaintiff was no longer taking narcotics. Attachment A at 20, ECF No. 32. Dr. Van Patten planned to follow up in one month at which time he expected to get Plaintiff out of his abduction immobilizer and begin strengthening exercises. *Id*. The UDC approved Dr. Van Patten's request. Grasley Decl. ¶ 8, ECF No. 26.

During Plaintiff's next appointment on March 12, Dr. Van Patten noted that Plaintiff was doing well, had successfully been removing his shoulder immobilizer, and "reported that his pain [had] decreased compared to preoperatively about 85%." Attachment A at 64, ECF No. 32. During the visit, Dr. Van Patten also suggested Plaintiff begin resistance exercises in two weeks and follow up with him in two months. Grasley Decl. ¶ 9, ECF No. 26. The URC approved Dr. Van Patten's request for a follow-up visit, which it scheduled for June 10, 2015. *Id.* ¶¶ 10–11.

After his March 12 follow-up visit with Dr. Van Patten, but before his June 10 appointment, Plaintiff reported to the health services department at FCI Sheridan with questions about the activities his surgically repaired shoulder could tolerate. Attachment A at 21. Physician assistant Eric Dyer ("PA Dyer") referred to Dr. Van Patten's orthopedic notes and noted plaintiff was on limited range of movement ("ROM") recovery exercises. *Id*.

Plaintiff reported to the health services department March 31 to discuss and begin resistance exercises. *Id.* at 22. Plaintiff mentioned feeling a "pop" the previous night when reaching for his computer mouse, but PA Dyer noted that the pain was "not bad" at the time of the visit. *Id.* PA Dyer provided plaintiff with verbal instructions and a printout of exercises to

perform as well as a resistance band. *Id.* at 23. PA Dyer also noted Plaintiff's scheduled follow-up visit with Dr. Van Patten. *Id.*

During that June 10 follow-up appointment with Dr. Van Patten, Plaintiff reported his pain had improved by ninety percent. *Id*. at 23. Dr. Van Patten noted that Plaintiff had excellent range of motion and normal strength. *Id.* The doctor instructed Plaintiff to follow up in 3 months or earlier if any issues came up. *Id*. The URC approved Dr. Van Patten's request for another in-house orthopedic follow-up appointment the following day. Grasley Decl. ¶ 13, ECF No. 26.

On August 18, Plaintiff reported to the health services department to confirm that he had a follow-up appointment scheduled with Dr. Van Patten and that he was "still having pain" despite "doing all the exercises with the bands and everything[.]" Attachment A at 24, ECF No. 32. Physician Assistant Curtis Cole confirmed that Plaintiff's in-house orthopedic appointment had been approved by the URC. *Id*.

On October 2, Plaintiff sent an electronic message to the health services department complaining of pain in his back, neck, and under his right shoulder blade after doing his band exercises. *Id*. at 25. The health services department instructed Plaintiff to report to the triage nurse to schedule an appointment. *Id*.

During his October 7 follow-up appointment with Dr. Van Patten, Plaintiff again reported that he was "90% better than he was prior to surgery." *Id*. at 26. However, Plaintiff explained that he was still experiencing pain especially with forward elevation of the shoulder and his shoulder seemed to be deteriorating. *Id*. Dr. Van Patten performed a physical examination and found Plaintiff had a decreased range of motion and strength on the right as compared to the left. *Id*. Dr. Van Patten also observed, however, that Plaintiff provided exaggerated pain behaviors during the examination. *Id*. Dr. Van Patten requested that Plaintiff follow up in six months,

continue with his band exercises, and provided him with documentation to allow Plaintiff use of his exercise band. *Id*.

However, the URC declined Dr. Van Patten's request for a six-month follow-up appointment with Plaintiff on October 21. Decl. Dr. Grasley ¶ 17. Instead, Plaintiff was instructed to follow up as needed. *Id.* Specifically, he was also instructed that re-submission of the request would be considered when/if medically indicated. *Id.* The denial was based on Plaintiff's progress, the findings in the last consultation with Dr. Van Patten, and the six-month time period for the requested follow up. Grasley Decl. ¶ 18. As Clinical Director, Dr. Grasley determined that Plaintiff's care could be managed through the health services department at FCI Sheridan and that it was not necessary to use one of Dr. Van Patten's future, limited time slots for a patient who already had eight months of post-surgical follow-up, including four in-house consultations with Dr. Van Patten. *Id.*

On January 30, 2016, Plaintiff submitted an electronic message complaining about pain under his scapula, neck, and back. Attachment A at 27, ECF No. 32. Plaintiff noted the post-surgery band exercises seemed to worsen the pain. *Id*. On February 25, Dr. Grasley saw Plaintiff and requested an MRI of his neck and a renewal of his pain medications. *Id*. at 29. On April 9, the MRI showed osteoarthritis of the cervical spine and possible softening of the left anterior spinal cord. *Id*. at 30–31. Dr. Grasley also requested a neurosurgical consultation. *Id*. at 32, 34–37.

On July 21, Plaintiff submitted an electronic message after he heard his right shoulder "pop" while completing a band workout. Attachment A at 33, ECF No. 32. The "initial pain subsided after a few moment[s]." *Id.* Plaintiff was instructed to "come up to sick call and speak

to the triage nurse" who would arrange "an appointment with a medical provider to evaluate [Plaintiff's] shoulder." *Id.*

The next day, July 22, Plaintiff saw Maurice Collada, M.D., for neurosurgical consultation at the recommendation of Dr. Grasley. *Id.* at 32, 34–37. Plaintiff reported joint pain, neck pain, and neck stiffness. *Id.* at 35. The doctor assessed cervical spondylosis with foraminal stenosis of cervical region and recommended nonsurgical interventions, including neck exercises. *Id.* at 36.

Throughout the end of 2016, Plaintiff had several additional contacts with medical staff. On August 16, Plaintiff was a "no show" for an appointment to evaluate his shoulder. *Id.* at 38. Plaintiff was seen in the health services department October 14 and 17 for medication refills. *Id.* at 41–44. However, the treatment records do not contain further complaints of shoulder pain. *Id.* Plaintiff was also seen again on November 11 for pain in his neck, but made no reference to shoulder pain. *Id.* at 45–46.

On January 6, 2017, Nurse Practitioner Valerie Bagenski approved the renewal of pain medications for Plaintiff's shoulder. Attachment A at 47–48.

Dr. Grasley saw Plaintiff on August 1. *Id.* at 49–52. Plaintiff reported that while his shoulder pain persisted, it improved with "Theraband exercises." *Id.* at 49. The doctor noted that Plaintiff had not had a shoulder injection since his 2015 operation. *Id.* Dr. Grassley prescribed an injection for pain, requested an in-house orthopedic consultation, and provided Plaintiff a handout with shoulder exercises. *Id.* at 49–52; 55–61. Plaintiff did not return to the health services department regarding his shoulder for the remainder of 2017.

On October 30, 2018, Plaintiff refused an orthopedic consultation. *Id.* at 62 ("I DON WEBSTER . . ., refuse treatment recommended by the Federal Bureau of Prisons Medical staff

for the following condition(s): . . . shoulder pain[.] The following treatment(s) was/were recommended: evaluation by ortho[.]").

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 630.

DISCUSSION

Defendants move for summary judgment on Plaintiff's Eighth Amendment claim arguing that Dr. Grasley's post-surgical care for Plaintiff's shoulder was not deliberately indifferent because Plaintiff received adequate and continuous post-operative care. Alternatively, Defendants contend, that even if Plaintiff could establish that Defendants violated the Eighth

Amendment, Dr. Grasley did not violate clearly established law and is therefore entitled to qualified immunity. As explained below, Plaintiff's post-surgical treatment did not violate the Eight Amendment. The Court therefore need not reach Defendant's qualified immunity argument. Accordingly, summary judgment should be granted in favor of Defendants on Plaintiff's Eighth Amendment Claim.

I. Deliberate Indifference

A prison official violates an inmate's Eighth Amendment rights if they are "deliberately indifferent" to the inmate's "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976). To establish an Eighth Amendment deliberate indifference claim, an inmate must show: (1) that he had a "serious medical need" and (2) that Defendants were deliberately indifferent to that need. *Id.* at 104. "[A] serious medical need is present whenever the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain[.]" *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (internal quotations omitted).

Deliberate indifference may be satisfied by showing (1) "a purposeful act or failure to respond to a prisoner's pain or possible medical need" and (2) "harm caused by the indifference." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997)). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

"Indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide

medical care.'" *Jett*, 439 F.3d at 1096 (quoting *McGuckin*, 974 F.2d at 1059). However, a mere difference of opinion between an inmate and prison medical officials—or among medical professionals—regarding the appropriate course of treatment does not by itself amount to deliberate indifference to serious medical needs. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (citation and internal quotation marks omitted); *see also Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) ("A difference of opinion does not amount to a deliberate indifference to [the inmate's] serious medical needs.").

"In cases involving choices between alternative courses of treatment, [an inmate] must show that the course of treatment the doctors chose was medically unacceptable under the circumstances and that they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Gordon v. Cnty. of Orange*, 6 F.4th 961, 970 (9th Cir. 2021) (citation and quotation marks omitted).

Defendants do not contest the subjective element of Plaintiff's deliberate indifference claim—*i.e.*, that Plaintiff's shoulder injury was an objectively serious medical condition. Rather, they assert that the record establishes that (1) Plaintiff received adequate post-operative care; and (2) Dr. Grasley's decision to not schedule a follow-up appointment with Dr. Van Patten did not violate the Eight Amendment. The Court agrees.

The Court turns first to Plaintiff's post-operative care. Plaintiff asserts that he received inadequate care in relation to complaints of pain in his shoulder and as a result "now has decreased mobility of his right arm and excruciating on-going pain." *See* Pl.'s Opp'n 8–9. Specifically, Plaintiff alleges that that Dr. Van Patten recommended an additional shoulder surgery and physical therapy. *See* Amend. Compl. 5, ECF No. 10. The allegation, however, lacks support in the summary judgment record.

Dr. Van Patten's post-surgery instructions advised, among other things, that Plaintiff immobilize his surgically-repaired shoulder and ensure the dressing remain on and dry. Attachment A at 18, ECF No. 32. The doctor requested a follow-up appointment five days later, which Dr. Grasley approved. *Id.*; *see also* Grasley Decl. ¶ 7, ECF No. 26. At the appointment, Dr. Van Patten provided instructions on passive range of motion shoulder strengthening exercises and set a follow-up appointment for one month out. Attachment A at 18, ECF No. 32. At the next appointment, Plaintiff reported that "his pain [was] 90% better" and Dr. Van Patten assessed "excellent range of motion and normal strength," and a requested a follow up "3 months or earlier if any problems" arose. *Id.* at 23.

An independent review of the record reveals that Plaintiff received care consistent with Dr. Van Patten's instructions. For example, after Plaintiff's March 2015 appointment with the doctor, Beth Cloos, R.N., added an administrative note advising that Plaintiff could not "mop floors for his job at this time." *Id.* at 65. Later that month, when Plaintiff presented with questions about appropriate rehabilitation activities, Eric Dyer, P.A., specifically referred to Dr. Van Patten's notes. *Id.* at 66. Finally, during Plaintiff's follow-up appointment in June, Plaintiff presented with an excellent range of motion and normal strength. *Id.* at 23. The doctor instructed Plaintiff to follow up in 3 months or earlier if any issues came up, which the UDC approved. *Id*; Grasley Decl. ¶ 13, ECF No. 26.

Liberally construing the summary judgment record in Plaintiff's favor and drawing all reasonable inferences against Defendants, the record does not support Plaintiff's allegation that he was denied physical therapy ordered by Dr. Van Patten. Nor does the record support Plaintiff's allegation that he was denied an additional shoulder surgery recommended by the doctor. *See* Grasley Decl. ¶¶ 19–20 (explaining that Dr. Van Patten did not specifically order

physical therapy beyond band exercises nor did the doctor recommend a second shoulder surgery). In other words, beyond the conclusory allegations contained in the Amended Complaint, Plaintiff has failed to direct the Court to any evidence that could create an issue of fact that would allow a factfinder to conclude that Defendants were deliberately indifferent in failing to order physical therapy or a second shoulder surgery. *Celotex*, 477 U.S. at 324 ("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings [and] . . . designate specific facts showing that there is a genuine issue for trial.") (citation and quotation marks omitted). As such, summary judgment is appropriate for Defendants on Plaintiff's claim he received inadequate care following his shoulder surgery.

The Court next turns to Plaintiff's claim that rejecting a follow up appointment with Dr. Van Patten caused him to suffer a constitutional violation. At Plaintiff's October 2015 appointment, Plaintiff again reported that he was "90% better than he was prior to surgery," but also reported experiencing some shoulder pain. Attachment A at 18, ECF No. 32. Plaintiff had decreased range of motion and strength on the right as compared to the left, but Dr. Van Patten also observed exaggerated pain behaviors during the examination. *Id*. Dr. Van Patten requested that Plaintiff follow up in six months, continue with physical therapy exercise, and provided him with documentation to allow Plaintiff continued use of his exercise band. *Id.*

The URC declined Dr. Van Patten's request for a six-month follow-up. Decl. Dr. Grasley ¶ 17. Instead, Plaintiff was instructed to follow up as needed with FCI Sheridan's health services department. *Id.* Plaintiff was instructed that re-submission of the request would be considered when/if medically necessary. *Id.* Dr. Grasley based the denial on Plaintiff's progress, the findings in the last consultation with Dr. Van Patten, and the six-month time period for the requested follow up. Decl. Dr. Grasley ¶ 18. Dr. Grasley also determined that Plaintiff's care could be

managed by FCI Sheridan's medical infrastructure and that it was not necessary to use one of Dr. Van Patten's future, limited time slots for a patient who already had eight months of post-surgical follow-up, including four in-house consultations with Dr. Van Patten. *Id.*

On this record, Plaintiff has failed to "show that the course of treatment the [Dr. Grasley] chose was medically unacceptable under the circumstances and that they chose this course in conscious disregard of an excessive risk to [Plaintiff's] health." *Gordon*, 6 F.4th at 970 (citation and quotation marks omitted). Put differently, because the decision was based on individualized, health-based rationales, and not solely on administrative policy or concerns about the fifth appointment, Plaintiff has not raised a genuine dispute that Dr. Grasley was deliberately indifferent to Plaintiffs shoulder pain. As such, summary judgment is appropriate for Defendants on this claim as well.

In sum, the Court should find that Defendant was not deliberately indifferent to Plaintiff's post-surgical care.

II. Leave to Amend

Plaintiff seeks leave to amend his Complaint for a third time. *See* Pl.'s Opp'n 10. District courts have particularly broad discretion in deciding whether to grant leave to amend when a plaintiff has previously been permitted leave to amend. *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). In determining whether to grant leave to amend, courts consider the presence of any of the following four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) futility. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Significantly, futility of amendment "can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

Here, Plaintiff received multiple opportunities to amend his Complaint and multiple opportunities to respond to the pending summary judgment motion, including the opportunity to seek additional time if necessary. *See, e.g.*, February 10, 2022 Minute Order, ECF No. 52 ("Plaintiff has until 5/4/2022 to file a response to the Defendants' motion for summary judgment (ECF No. 25). Should Plaintiff require additional time to file a response, he is instructed to make the request in advance of the 5/4/2022 deadline."). Plaintiff did not seek such a request. Critically, based on this summary judgment record, any attempt at amendment would be futile. As such, the Court should find that allowing leave to amend is not appropriate.

RECOMMENDATION

For the reasons above, Defendant's motion for summary judgment (ECF No. 25) should be GRANTED.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the district court's judgment or appealable order. The Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today's date. *See* Fed. R. Civ. P. 72. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED this 19th day of September 2022.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI (He / Him)
United States Magistrate Judge