

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 03, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRYCE N. HUBER,

Plaintiff,

v.

ROBERT JACKSON, and MELISSA
ANDREWJESKI,

Defendants.

No. 4:23-cv-05013-MKD

ORDER DISMISSING ACTION

1915(g)

ECF Nos. 16, 17, 23

BEFORE THE COURT are Plaintiff's Second Amended Complaint received on September 19, 2023, ECF No. 15, a Motion for Appointment of Counsel, ECF No. 16, an Application to proceed *in forma pauperis*, ECF No. 17, and a "Motion to Object to Defendant's Motion Denying Appointment of Counsel," ECF No. 23. By Order entered August 21, 2023, the Court advised Plaintiff Bryce N. Huber, a *pro se* prisoner at the Washington State Penitentiary (WSP), of the deficiencies of his First Amended Complaint and directed him to amend or voluntarily dismiss within thirty (30) days. ECF No. 13.

1 On March 20, 2023, the full \$402.00 filing fee was paid on Plaintiff's behalf.
2 On August 25, 2023, Assistant Attorney General Cassie B. vanRoojen entered a
3 limited notice of appearance on behalf of now former Defendant Washington
4 Department of Corrections. ECF No. 14. On October 16, 2023, Attorney
5 vanRoojen entered a second limited notice of appearance on behalf of Defendant
6 Robert Jackson, ECF No. 19, and a Response, ECF No. 20, to the Motion for
7 Appointment of Counsel, ECF No. 16. Attorney vanRoojen then withdrew the
8 limited notice of appearance on behalf of Defendant Jackson, ECF No. 22, and
9 Attorney Candie M. Dibble entered a limited notice of appearance on behalf of
10 Defendant Jackson. ECF No. 21.

11 As a general rule, an amended complaint supersedes the original complaint
12 and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927
13 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint
14 which are not alleged in an amended complaint are waived." *King v. Atiyeh*, 814
15 F.2d 565, 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811,
16 814 (9th Cir. 1981)), *overruled in part by Lacey*, 693 F.3d at 928 (any claims
17 voluntarily dismissed are considered to be waived if not repled). Furthermore,
18 defendants not named in an amended complaint are no longer defendants in the
19 action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Accordingly,
20

1 Defendant Washington State Department of Corrections was **TERMINATED** from
2 this action on September 19, 2023.

3 The Court cautioned Plaintiff that if he chose to amend and the Second
4 Amended Complaint failed to state a claim upon which relief may be granted then
5 the Second Amended Complaint would be dismissed pursuant to 28 U.S.C. §§
6 1915(e)(2), 1915A(b)(1), and such dismissal would count as one of the dismissals
7 under 28 U.S.C. § 1915(g). ECF No. 13 at 10. Liberally construing the Second
8 Amended Complaint in the light most favorable to Plaintiff, the Court finds that it
9 fails to cure the deficiencies of the prior complaints and does not state a claim upon
10 which relief may be granted. Therefore, Defendants Maryann Curl, Jake Jennings,
11 James Duncan and Jonathan Neau shall not be reinstated. Furthermore, Plaintiff's
12 pending Motion for Appointment of Counsel, Application to proceed *in forma*
13 *pauperis*, and "Motion to Object to Defendant's Motion Denying Appointment of
14 Counsel," shall be denied as moot.

15 **REVIEW OF SECOND AMENDED COMPLAINT**

16 In his Second Amended Complaint, Plaintiff accuses Defendants
17 Superintendent Robert Jackson, Medical Provider James Duncan, Chief Medical
18 Officer Maryann Curl, Superintendent Melissa Andrewjeski, Medical Provider
19 Jonathan Neau, and Physical Therapist Jake Jennings, of violating his Eighth
20 Amendment rights. ECF No. 15 at 5, 10, 13, 15, 16. The conclusory assertions of

1 deliberate indifference to Plaintiff's serious medical needs, however, are
2 unsupported by factual allegations sufficient to state a claim for relief against the
3 named Defendants. *Id.* at 10, 15, 18.

4 Plaintiff indicates that he has received two surgeries while incarcerated. *Id.*
5 at 5, 13. The first occurred on March 11, 2020, while he was housed at the WSP,
6 after he tore his Achilles tendon on February 29, 2020. *Id.* at 5-6. The second
7 surgery, a "congenital tarsal coalition surgery and calf-lengthening procedure[,]"
8 occurred while he was housed at the Coyote Ridge Corrections Center (CRCC) on
9 October 5, 2021. *Id.* at 13, 17. Plaintiff asserts that, following the first surgery, the
10 surgeon recommended physical therapy and he complains of "a delay of over one
11 year for therapy." *Id.* at 6-7, 10-11.

12 Plaintiff states that he was in Defendant Jackson's custody at the WSP from
13 March 11, 2020 to March 24, 2021. *Id.* at 9. He claims that Defendant Jackson was
14 responsible for developing and initiating "systems, operational memorandums, and
15 programs for all aspects of operating the facility in compliance with Department
16 Policies[,]" including to "facilitate personal contact and interaction between
17 employees and incarcerated individuals[,]" and to "provide 2-way communication
18 between all levels of employees/contract staff and incarcerated individuals." *Id.* at
19 8. Plaintiff claims that Defendant Jackson failed in these duties because he "did not
20 coordinate Physical therapy sessions with Jake Jennings in order to provide serious

1 medical needs for [Plaintiff.]” *Id.* at 8-9.

2 Plaintiff asserts that he should have begun physical therapy in June 2020,¹
3 following his first surgery. *Id.* at 6-7. Plaintiff admits that he did not ask to see a
4 specialist for his Achilles injury until January 20, 2021. *Id.* at 6. He asserts at that
5 time his medical kite “informed officials at WASH. ST. Penitentiary . . . [that he]
6 was in pain and having problems in his recovery.” *Id.* Plaintiff states that he filed
7 additional medical kites on February 8, 2021 and March 3, 2021, when he had still
8 not received physical therapy. *Id.*

9 Plaintiff admits that Medical Provider James Duncan spoke with him on
10 approximately February 18, 2021, and approved six physical therapy sessions. *Id.*
11 Plaintiff avers that Physical Therapist Jake Jennings conducted the first physical
12 therapy session on March 24, 2021. *Id.* at 4, 7. Plaintiff asserts, “Besides the wrong
13 foot diagnosis, Jake Jennings said Huber would likely need a tendon lengthening
14 surgery to regain the lost range of motion in [his] foot and leg[,]” because Plaintiff
15 had not received “Physical Therapy in a timely manner.” *Id.* at 7.

16 Here, Plaintiff does not support the assertion of a “wrong foot diagnosis,”
17 with any factual allegations. *Id.* at 7. Later in the Second Amended Complaint,
18

19 ¹ The Court takes judicial notice of the fact that a global pandemic existed in 2020
20 which limited the receipt of medical services.

1 Plaintiff seems to allege that Defendant Jennings “diagnosed” his range of motion
2 on “the wrong leg/ankle” in December 2021, which was after the second surgery,
3 and Plaintiff claims that Defendant Jennings failed to “diagnose” his “nerve
4 problem.” *Id.* at 17-18.

5 Plaintiff asserts that Defendant Jennings, a physical therapist at both the
6 WSP and CRCC, was “personally responsible for Plaintiff’s ankle/Leg being
7 permanently injured by only giving limited medical treatment to recover from
8 Plaintiff[s] torn achilles [sic] and only one Physical therapy session after
9 Plaintiff[s] congenital tarsal coalition surgery and calf-lengthening procedure.” *Id.*
10 at 16-17. Plaintiff indicates that he met with Defendant Jennings “four times to
11 check range of movement in foot between March 24, 2021 and May 21, 2021[,]”
12 and he concludes that “[t]his deliberate indifference to Plaintiff serious medical
13 needs” allegedly led to Plaintiff needing medication for nerve damage. *Id.* at 18.

14 Plaintiff claims that Defendant Duncan, a Medical Provider at the WSP
15 “failed to provide and coordinate Physical therapy session with Jake Jennings in
16 order to provide the serious medical needs of [Plaintiff] on or about March 11,
17 2020[,]” and that “this was deliberate indifference to Plaintiff’s medical needs.” *Id.*
18 at 10. Plaintiff accuses Defendant Duncan of “complete disregard of Prisoner[’s]
19 pain, suffering, and recovery process after major surgery,” which allegedly caused
20 “muscle deformation and the need for a second surgery.” *Id.* at 10-11. He claims

1 that Defendant Duncan was “part of the one year delay of providing Physical
2 therapy sessions.” *Id.* at 11.

3 Plaintiff contends that there is a state statutory “duty to provide a
4 reasonable standard of health care[,]” and from June 15, 2020 until March 24, 2021,
5 Defendant Maryann Curl, as the Chief Medical Officer, “failed that duty by not
6 providing Physical therapy sessions for Plaintiff[,]” which is allegedly a
7 “contributory factor within this case[.]” *Id.* at 11-12.

8 Plaintiff indicates that he was transferred to the CRCC and received a
9 second surgery on October 5, 2021, “to repair permanent damage injured right
10 leg/ankle (among other things)[.]” *Id.* at 13. He claims that he was “denied []
11 adequate follow-up treatment[,] and that “Defendant Andrewjeski Personally
12 Participated in causing the deprivation of [Plaintiff’s] Protected rights by failing to
13 coordinate Physical therapy sessions with Jake Jennings[.]” *Id.* at 13-14. Plaintiff
14 states that he “continued to seek medical treatment but Physical therapy was delayed
15 resulting in ‘pain and suffering,’ loss of movement and Permanent damages to
16 injured right leg/ankle.” *Id.* at 14. Plaintiff states that he “had only one physical
17 therapy session with Jake Jennings eventually which was not adequate for the injury
18 Plaintiff sustained.” *Id.*

19 Plaintiff avers that on November 15, 2021, over a month after his second
20 surgery, he asked Defendant Jonathan Neau, a Medical Provider at CRCC for

1 physical therapy, and Defendant Neau approved six sessions. *Id.* at 15. Plaintiff
2 states that “only one session occurred. This was deliberate indifference to
3 Plaintiff[s] serious medical need.” *Id.*

4 Plaintiff states that he “was re-injured and still not instructed to proper
5 guidance or instruction to regain full control of calf muscle.” *Id.* at 17. Plaintiff
6 does not state when he was re-injured, the extent of the re-injury, or any facts from
7 which the Court could infer that identified Defendants denied him medically
8 necessary treatment for the re-injury.

9 Plaintiff states that he received his “one and only Physical Therapy session
10 with Defendant Jake Jennings” on December 13, 2021, at which he claims the
11 wrong leg/ankle was assessed for range of motion. *Id.* at 17. Plaintiff also asserts
12 that although he “complained of numbness and tingling[,] Jake Jennings never
13 diagnosed Plaintiff[s] nerve problem.” *Id.* at 18. Plaintiff states that Defendant
14 James Duncan, as a Medical Provider, prescribed medication for nerve damage on
15 September 26, 2022. *Id.*

16 **SUPERVISORY DEFENDANTS**

17 Plaintiff’s description of Defendant Jackson’s “responsibilities,” *id.* at 8-9,
18 suggests supervisory liability. This is not a cognizable claim under 42 U.S.C. §
19 1983. A supervising state official may be liable under Section 1983 only if he or
20 she “participated in or directed the violations, or knew of the violations and failed to

1 prevent them,” *Taylor v. List*, 880 F.2d 1040, 1045 (1989), or established a custom
2 or policy that led to the violation, *see Ybarra v. Reno Thunderbird Mobile Home*
3 *Vill.*, 723 F.2d 675, 680 (9th Cir. 1984); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th
4 Cir. 2011) (holding that a supervisor can be held liable under § 1983 only when a
5 sufficient causal connection exists between his or her conduct and the deprivation of
6 a federally secured right).

7 Here, Plaintiff alleges no facts, apart from his conclusory assertions, to
8 support an inference that Superintendent Jackson was aware of constitutional
9 violations or that any alleged violations were caused by a custom or policy he
10 established. Plaintiff presents no facts showing Defendant Jackson knew of
11 Plaintiff’s medical situation in 2020 or had direct control over the coordination of
12 prisoner’s medical appointments. Likewise, Plaintiff’s conclusory assertion that
13 “Defendant Andrewjeski Personally Participated in causing the deprivation of
14 [Plaintiff’s] Protected rights by failing to coordinate Physical therapy sessions with
15 Jake Jennings[,]” is insufficient to show that Defendant Andrewjeski was
16 deliberately indifferent to Plaintiff’s serious medical needs. ECF No. 15 at 13-14.

17 Similarly, Plaintiff’s conclusory assertion that Defendant Curl, as the Chief
18 Medical Officer, failed in her state statutory duty to provide a reasonable standard of
19 health care from June 15, 2020, until March 24, 2021, because she did not provide
20 physical therapy sessions does not support an inference that Defendant Curl knew of

1 Plaintiff's medical situation in 2020, or acted with deliberate indifference to
2 Plaintiff's serious medical needs. *Id.* at 11. Plaintiff's allegations against
3 Defendants Jackson, Andrewjeski and Curl, fail to state a claim upon which relief
4 may be granted.

5 EIGHTH AMENDMENT

6 The treatment a convicted prisoner receives and the conditions under which
7 he or she is confined are subject to scrutiny under the Eighth Amendment. *Helling*
8 *v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment was made
9 "applicable to the states through the Due Process Clause of the Fourteenth
10 Amendment[.]" *Baze v. Rees*, 553 U.S. 35, 47 (2008).

11 To establish a section 1983 claim for medical mistreatment or denial of
12 medical care under the Eighth Amendment, a prisoner must allege "acts or
13 omissions sufficiently harmful to evidence deliberate indifference to serious medical
14 needs." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *Estelle v. Gamble*, 429 U.S. 97,
15 106 (1976). Deliberate indifference exists when an official knows of and disregards
16 a serious medical condition and the official is "aware of facts from which the
17 inference could be drawn that a substantial risk of serious harm exists, and he must
18 also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To
19 demonstrate deliberate indifference, a prisoner must allege facts sufficient to
20 indicate a culpable state of mind on the part of prison officials. *Wilson v. Seiter*, 501

1 U.S. 294, 297 (1991).

2 A showing that a prison official was negligent or medically negligent is
3 insufficient to establish a constitutional deprivation under the Eighth Amendment.
4 *See Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (“Mere medical
5 malpractice does not constitute cruel and unusual punishment.”) (internal citation
6 omitted)); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998) (finding no merit in
7 claims stemming from alleged delays in administering pain medication, treating
8 broken nose and providing a replacement crutch, because claims did not amount to
9 more than negligence); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)
10 (stating that mere negligence in diagnosing or treating a medical condition, without
11 more, does not violate the Eighth Amendment), *overruled on other grounds by*
12 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997); *Wood v.*
13 *Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (holding that even gross
14 negligence is insufficient to establish a constitutional violation). A showing of
15 medical malpractice or negligence is insufficient to establish a constitutional
16 deprivation under the Eighth Amendment. *Toguchi v. Chung*, 391 F.3d 1051, 1060
17 (9th Cir. 2004).

18 Plaintiff complains that Defendant Duncan, a Medical Provider at the WSP,
19 did not coordinate physical therapy on approximately March 11, 2020. ECF No. 15
20 at 5-6, 10-11. Plaintiff admits that Defendant Duncan approved physical therapy

1 sessions within a month after Plaintiff asked via a medical kite to see a specialist
2 and to have physical therapy. *Id.* at 6. Plaintiff also states that Defendant Duncan
3 prescribed a medication for “nerve damage” on September 26, 2022. *Id.* at 18.
4 Plaintiff states that Defendant Neau, a Medical Provider at the CRCC approved six
5 sessions of physical therapy, when Plaintiff requested physical therapy more than a
6 month after his second surgery in October 2021. *Id.* at 15. Liberally construing
7 these allegations in the light most favorable to Plaintiff, the Court is unable to infer a
8 constitutional violation against these Medical Providers, Defendants Duncan and
9 Neau.

10 Plaintiff states that Defendant Jennings conducted his first physical therapy
11 session in March 2021 and opined that Plaintiff would need a tendon lengthening
12 surgery. *Id.* at 4, 7. Plaintiff then met with Defendant Jennings “four times to check
13 range of movement in foot between March 24, 2021 and May 21, 2021.” *Id.* at 18.
14 Plaintiff’s conclusion that “[t]his deliberate indifference to Plaintiff serious medical
15 needs” led to him needing medication for nerve damage, *id.*, is unsupported by facts.
16 The Court can infer no constitutional violation from the allegations presented.

17 While Plaintiff’s assertion that Defendant Jennings assessed the wrong
18 leg/ankle may constitute negligence, *id.* at 7, 17-18, this is insufficient to state an
19 Eighth Amendment claim under 42 U.S.C. § 1983. *See Toguchi*, 391 F.3d at 1060.
20 Plaintiff presents no facts from which the Court could infer that Defendant Jennings

1 was qualified to make medical diagnoses. To the extent Plaintiff indicates that he
2 pursued the issue of his “nerve problem,” he admits that he was prescribed a
3 medication for “nerve damage” on September 26, 2022. ECF No. 15 at 18.

4 Liberally construing the Second Amended Complaint in the light most
5 favorable to Plaintiff, the Court is unable to infer that identified Defendants were
6 deliberately indifferent to Plaintiff’s serious medical needs. Therefore, the Second
7 Amended Complaint, ECF No. 15, fails to state an Eighth Amendment claim upon
8 which this Court may grant relief. *See Farmer*, 511 U.S. at 833, n. 4; *Estelle*, 429
9 U.S. at 106.

10 Accordingly, this action is **DISMISSED** with prejudice for failure to state a
11 claim against Defendants upon which relief may be granted. 28 U.S.C. §§
12 1915A(b)(1) and 1915(e)(2).

13 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
14 brings three or more civil actions or appeals which are dismissed as frivolous or for
15 failure to state a claim will be precluded from bringing any other civil action or
16 appeal *in forma pauperis* “unless the prisoner is under imminent danger of serious
17 physical injury.” 28 U.S.C. § 1915(g). **Plaintiff is advised to read the statutory**
18 **provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff’s action may**
19 **count as one of the three dismissals allowed by 28 U.S.C. § 1915(g) and may**
20 **adversely affect his ability to file future claims in forma pauperis.**

1 Accordingly, **IT IS ORDERED:**

2 1. This action is **DISMISSED WITH PREJUDICE** for failure to state a
3 claim upon which relief may be granted under 28 U.S.C. §§ 1915A(b)(1) and
4 1915(e)(2).

5 2. The Motion for Appointment of Counsel, **ECF No. 16**, is **DENIED** as
6 moot.

7 3. The Application to Proceed *in forma pauperis*, **ECF No. 17**, is
8 **DENIED** as moot.

9 4. The “Motion to Object to Defendant’s Motion Denying Appointment of
10 Counsel,” **ECF No. 23**, is **DENIED** as moot.

11 5. The Court certifies that any appeal of this Order would not be taken in
12 good faith and would lack any arguable basis in law or fact.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
14 Order, enter judgment, provide copies to Plaintiff, and **CLOSE** the file. The
15 District Court Executive is further directed to provide a copy of this Order to the
16 Office of the Attorney General of Washington, Corrections Division.

17 **DATED** November 3, 2023.

18
19 s/Mary K. Dimke
20 MARY K. DIMKE
UNITED STATES DISTRICT JUDGE