

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

ANDREW KENNEDY,

Plaintiff,

v.

JAKE MENDEZ, et al.,

Defendants.

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CIVIL ACTION NO. 3:CV-03-1366

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendants' Motion to Dismiss and for Summary Judgment (Doc. 16), Magistrate Judge J. Andrew Smyser's Report and Recommendation (Doc. 30), and Plaintiff's Objection to Magistrate Report and Recommendation Dated January 15, 2004. (Doc. 31.) On August 13, 2003, Plaintiff, an inmate at United States Penitentiary at Allenwood (hereinafter USP-Allenwood) filed the present action. The Complaint raised claims under the Federal Tort Claims Act (hereinafter FTCA), 20 U.S.C. § 26714, *et seq.*, and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. 403 U.S. 388 (1971). Plaintiff claims that while incarcerated at USP-Allenwood he has not received proper medical treatment for abdominal pain, anal pain, knee pain, and a positive purified protein derivative (PPD) test.¹

On November 17, 2003, Defendants filed Defendants' Motion to Dismiss and for Summary Judgment. Magistrate Judge Smyser issued a Report and Recommendation to the Court on January 15, 2004, containing six recommendations: (1) dismiss the constitutional claims against the United States, (2) dismiss the *Bivens* claims against the

¹ The PPD test is a screening technique for tuberculosis.

United States; (3) dismiss the *Bivens* claims against the individual Defendants in their official capacities; (4) dismiss the *Bivens* claims regarding Plaintiff's knee for failure to exhaust administrative remedies; (5) dismiss the FTCA claims regarding Plaintiff's knee injury and positive PPD status for failure to exhaust administrative remedies; and (6) deny the remainder of the motion. Plaintiff raises a single objection to the recommendations: the Court should stay the action instead of dismissing the *Bivens* claims regarding Plaintiff's knee. (Doc. 31.)

Where objections to the magistrate judge's report are filed, the Court must conduct a *de novo* review of the contested portions of the report, see *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(C)), provided the objections are both timely and specific. See *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). In making its *de novo* review, the Court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. See 28 U.S.C. § 636(b)(1); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). Uncontested portions of the report may be reviewed at a standard determined by the district court. See *Thomas v. Arn*, 474 U.S. 140, 154 (1985); *Goney*, 749 F.2d at 7. At very least, the Court should review uncontested portions for clear error or manifest injustice. See, e.g., *Cruz v. Chater*, 990 F. Supp. 375, 376-77 (M.D. Pa. 1998).

The Prison Litigation Reform Act (hereinafter PLRA) requires prison inmates to exhaust administrative remedies before bringing an action in federal court challenging conditions of confinement. 42 U.S.C. § 1997e(a). This requirement is not a jurisdictional

bar - it serves as an affirmative defense for defendants. *Ray v. C.O. Kertes*, 285 F.3d 287, 292, 295 (3d Cir. 2002). Plaintiff does not challenge the finding that he has failed to exhaust his administrative claims. He only challenges what the appropriate response by the Court should be. Plaintiff argues that instead of dismissing the unexhausted *Bivens* claims, the Court should stay the proceedings. Staying of an action pending PLRA exhaustion is not without precedent. See *Cruz v. Jordan*, 80 F. Supp. 2d 109, 123 (S.D.N.Y. 1999). Defendants contend that the Supreme Court's holding in *Porter v. Nussle*, 534 U.S. 516 (2002), requires the Court to dismiss unexhausted claims. I disagree. In *Porter*, the Court only held that there are no exceptions to the PLRA exhaustion requirement. *Id.* at 532. Staying of the present action would not create an exception to the exhaustion requirement, it would merely enforce the exhaustion requirement through a different procedural mechanism. Ultimately, the congressional intent of the exhaustion requirement is still served because the administrative process will fully review the matter before it is reviewed by a court. *C.f. Cruz*, 80 F. Supp. 2d at 122 (discussing a stay as consistent with congressional goal of permitting administrative remedies before judicial remedies).

Plaintiff makes a compelling argument that a stay is the appropriate action in this case. The Court first notes that the litigation process is nearly completed, with discovery already ended and the motions deadline pending. The Court also notes that Plaintiff has exhausted the administrative remedies available for his gastroenterological complaints, thus, the claims related to those complaints will survive in this action. Although the unexhausted claims are not directly related to his gastroenterological problems, all of his

claims relate to Defendants' failure to provide proper medical care. Given that some of Plaintiff's claims will survive, and the unexhausted claims are related to the surviving claims, the interest of judicial economy is strongly served by litigating all of the claims within a single action, rather than piecemeal.

After consideration of Magistrate Judge Smyser's Report and Recommendation and the objections filed by Plaintiff, I will modify the Report and Recommendation insofar as I will stay proceedings pending Plaintiff's exhaustion of administrative remedies² for the unexhausted *Bivens* claims instead of dismissing the claims. This stay is conditioned upon Plaintiff's good faith pursuance of administrative appeals. Failure of Plaintiff to actively pursue the administrative process will result in a review of the stay and potential dismissal of the claims upon motion of Defendants.

An appropriate Order will follow.

10/7/2004
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

² Alternatively, if Plaintiff decides to withdraw the unexhausted *Bivens* claims from this action, then he may petition the Court to lift the stay.

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(JUDGE CAPUTO)

ORDER

Now this 7th day of October, 2004, upon review of Magistrate Judge J. Andrew Smyser's Report and Recommendation (Doc. 30) **IT IS HEREBY ORDERED THAT:**

- (1) The Report and Recommendation is **MODIFIED**.
- (2) Defendant's Motion to Dismiss and for Summary Judgment (Doc. 16) is **GRANTED in part** and **DENIED in part**.
 - (a) All *Bivens* claims against the United States are **DISMISSED**.
 - (b) All *Bivens* claims against the individual Defendants in their official capacities are **DISMISSED**.
 - (c) Plaintiff's claims arising under the Federal Tort Claims Act regarding his knee injuries and his positive PPD status are hereby **DISMISSED for lack of jurisdiction**.
 - (d) Defendant's motion is otherwise **DENIED**.
- (3) This action is **STAYED** pending Plaintiff's exhaustion of administrative remedies.
- (4) The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

/s/ A. Richard Caputo_____
A. Richard Caputo

FILED: 10/7/2004

United States District Judge