IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRISON FRANKLIN,

Plaintiff,

v.

GARY R. McCAUGHTRY, Warden of Waupun Correctional Institution; PAULINE BELGGADO, Doctor of Waupun Correctional Institution HSU; and JIM WEGNER,

Defendants.

OPINION AND ORDER

00-C-157-C

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In this civil action for monetary and injunctive relief, plaintiff Harrison Franklin contends that defendants Gary McCaughtry, Paulino Belgado[1] and Jim Wegner were deliberately indifferent to his serious medical need in violation of the Eighth Amendment. Plaintiff's only claim remaining in this case is that defendant Belgado gave him Ibuprofen instead of a narcotic painkiller and that defendants McCaughtry and Wegner condoned a deprivation of his rights by failing to order Belgado to provide a narcotic painkiller.

[1]It appears from defendant Belgado's affidavit that the proper spelling of his name is "Paulino Belgado." I will use the correct spelling throughout this opinion.

Defendants have moved for summary judgment, arguing that plaintiff did not have a serious medical need for a narcotic painkiller at the relevant time and that even if he did, defendant Belgado was not deliberately indifferent to that need. Defendants argue that defendants McCaughtry and Wegner must be dismissed from the case because they had no personal involvement in the decision to give plaintiff Ibuprofen. Also, defendants contend that they enjoy qualified immunity from suit. Defendants' motion for summary judgment will be granted because plaintiff has failed to adduce evidence suggesting that defendants were deliberately indifferent to his pain. With this resolution, it is not necessary to reach defendants' assertion of qualified immunity.

Before reciting the undisputed facts, a word is warranted regarding their source. Plaintiff tries to support several of his responses to defendants' proposed findings of fact by citing to his complaint. As explained in this court's Procedures to be Followed on a Motion for Summary Judgment, a copy of which was given to each party with the preliminary pretrial conference order on August 22, 2000, "[a]ny response arguing the existence of a genuine issue of fact shall cite only to deposition transcripts, answers to interrogatories, admissions on file, including admissions made in an answer or other pleadings, and affidavits complying with Rule 56(e)." Plaintiff may not place a fact in dispute by citing to a paragraph of his complaint.

From the facts proposed by the parties and the record, I find that the following are

both undisputed and material.

UNDISPUTED FACTS

A. Parties

At all relevant times, plaintiff Harrison Franklin was confined at Waupun Correctional Institution. Defendant Paulino Belgado is a physician at Waupun Correctional Institution and is responsible for providing appropriate and necessary medical care to adult male inmates at the prison. Defendant Gary McCaughtry is the warden at Waupun Correctional Institution. At all relevant times, defendant Jim Wegner was a Corrections Program Supervisor 1 at Waupun Correctional Institution.

B. Pain Medication

On June 10, 1999, plaintiff's right index finger was partially amputated by a plastic surgeon at the University of Wisconsin Hospital in Madison, Wisconsin. Plaintiff's June 1999 Medication Record indicates that plaintiff received the medication recommended by the hospital for pain management, acetaminophen/hydrocodone TB 500 mg/5 mg (medication also known as Vicoden and Percocet) 5 times on June 11 and June 12, 3 times of June 13, once on June 14, 3 times on June 15, once on June 16, and 3 times on June 17 and June 18. June 18, 1999 was the last day plaintiff was given this medication.

On June 18, 1999, defendant Belgado replaced the Vicoden/Percocet with Darvocet N-1000, another narcotic pain reliever. On June 18, the health services unit issued thirty tablets of Darvocet N-100 for plaintiff. Plaintiff received Darvocet for pain on June 19, 20, 21 and 22. The Darvocet prescription was stopped on June 23, 1999.

On June 28, 1999, plaintiff saw defendant Belgado for a follow-up examination of the partial amputation of his right index finger. Defendant Belgado noted that plaintiff's finger was swollen, red and very tender without any drainage. Plaintiff's temperature was 99.9 degrees. Belgado ordered Keflex 500 mg twice a day for 10 days. (Keflex is an antibiotic medication.) Plaintiff never received Keflex 500mg. Belgado noted that plaintiff's finger was healing normally and that plaintiff should see him again in two weeks. During his visit to the health services unit on June 28, 1999, plaintiff asked to receive Percocet for pain as had been recommended by the University of Wisconsin Hospital plastic surgeon. Defendant Belgado believed that plaintiff had a history of drug abuse; because of that history and the Department of Corrections' strict policies and procedures, Belgado could not give plaintiff a narcotic pain drug for an extended period of time. (Plaintiff disputes that he had a history of drug abuse.) Belgado did not believe that a narcotic pain drug was required at that time for plaintiff's comfort. However, Belgado did prescribe Ibuprofen 600 mg for ten days. Ibuprofen is a non-narcotic pain reliever which could be self-administered by plaintiff as needed. Plaintiff states that he did not receive Ibuprofen 600 until June 29, 1999, after he

had complained all morning.

On July 16, 1999, Belgado prescribed Ibuprofen for plaintiff, 600 mg, four times daily for two weeks, to be taken as needed for pain. Plaintiff received 30 tablets of Ibuprofen 600 mg on July 19, 1999 and July 28, 1999.

The Bureau of Health Services employs staff at major institutions such as Waupun Correctional Institution. The Bureau of Health Services staff physician is the treating physician for inmates at Waupun Correctional Institution. The bureau also uses the services of consultant physicians who are not its employees, particularly when the treating physician desires a specialist's opinion on an inmate's condition and a recommendation on a course of treatment for an inmate's condition. At times, the bureau uses physicians at the University of Wisconsin Hospital for such consulting services. Consulting services are ordered on the authority of the treating physician.

As the treating physician at Waupun Correctional Institution, defendant Belgado had the final decision for follow-up treatment for plaintiff's finger. It was his decision not to renew the narcotic Vicoden/Percocet and to substitute Darvocet-N 100. It was also his decision not to renew the narcotic Darvocet-N 100 and to substitute Ibuprofen 600 mg. In Belgado's professional opinion, plaintiff no longer needed a narcotic pain killer and his pain could be effectively treated with Ibuprofen. Defendant Belgado did not squeeze plaintiff's finger to inflict pain on him and did not make any remarks to plaintiff that he was inflicting

pain on plaintiff deliberately. On June 18, 1999, June 21, 1999, June 25, 1999 and July 16, 1999, doctors at the University of Wisconsin Hospital prescribed Percocet for plaintiff.

Aloys Tauschek, M.D., a board certified specialist in dermatology licensed to practice in the state of Wisconsin, reviewed plaintiff's medical records for the purpose of this summary judgment motion. Under the same or similar circumstances, Tauschek would not expect an individual to experience significant pain beyond a one-week post-operative period. According to Tauschek, the use of narcotic analgesia such as acetaminophen/hydrocodone beyond a one-week period would be inordinate and pain management beyond the use of a simple non-narcotic analgesia such as aspirin, acetaminophen or non-steroidal anti-inflammatory such as Motrin or ibuprofen would not be warranted beyond a one-week post-operative period.

Tauschek noted that plaintiff's case is complicated by a well-documented history of depressive disorder dating from at least November 26, 1996. A depressive disorder can contribute to perceived or imagined pain. In a psychiatric report dated June 15, 1999, Dr. Yogesh Pareek, a consulting psychiatrist, stated that plaintiff had no delusions or paranoia but that "[h]e [has] been feeling depressed because of amputation of his finger." In a psychiatric report dated July 15, 1999, Dr. Pareek stated that plaintiff had no auditory or visual hallucinations or paranoia. In the report, Dr. Pareek noted that plaintiff had reported sleeping poorly and was reluctant to take any medications. Plaintiff refused to take a

medication designed to cure sleeping disorders as a substitute for pain medication.

In Tauschek's professional medical opinion, plaintiff's clinical course, medical treatment, surgical management and post-operative care and medication all met the usual and customary standard of medical care expected under the same or similar circumstances. Tauschek could identify no deviation from accepted standards of medical care, including medical care with respect to pain management before, during or after plaintiff's medically indicated partial amputation of his right index finger.

C. Complaints to Officials

Defendant Wegner and McCaughtry do not provide health care to inmates. The health services unit and its professional medical staff provide diagnostic and treatment services to inmates with health problems. Defendants Wegner and McCaughtry do not have any control over medical decisions and do not supervise prison physicians. Defendants Wegner and McCaughtry do not have any formal medical training or education and would never second-guess a physician's medical expertise and treatment of an inmate.

Defendants Wegner and McCaughtry do not remember seeing any correspondence from plaintiff about his medical treatment at Waupun Correctional Institution. If plaintiff had written to defendants, they would have forwarded his correspondence to the health services unit. Defendants Wegner and McCaughtry were not aware of any medical treatment

plaintiff received or what medications he was prescribed. On July 22, 1999, plaintiff filled out an Interview/Information Request form addressed to "Treatment Director - Ass. Warden" stating,

> I am not satisfied with the degree of medical treatment I've received this far. I have been denied pain pills for the amputation of my finger. And I received inadequate medical attention for my finger since 12-97. I've contacted Ms. Dittman about these issues and I've still received no reply. I am in extreme pain. And I want to know what is going to be done about Dr. Belgado denying me my prescribed medication for pain.

Affid. in Supp. of Plt.'s Opp. to Dfts.' Mot. to Dismiss, dkt. #27, Ex. C.

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 322, 324 (1986).

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996)

(quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

The Court of Appeals for the Seventh Circuit has held that "serious medical needs" encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. See Gutierrez, 111 F.3d at 1371. For the purpose of this motion, I will assume without deciding that plaintiff's pain after June 22, 1999, when he last received Darvocet, rose to the level of a serious medical need.

Deliberate indifference requires that "'the 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.'" Sherrod v. Lingle, 223 F.3d 605, 611 (7th Cir. 2000) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). In Farmer, 511 U.S. at 839-40, the Supreme Court defined deliberate indifference as recklessness in the criminal law sense, that is, recklessness implying "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the act] can be inferred." Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985). An official is deliberately indifferent when he acts or fails to act "despite his knowledge of a substantial risk of serious harm." Farmer, 511 U.S. at 842. Inadvertent

error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. See Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Plaintiff has failed to adduce evidence suggesting that defendants were deliberately indifferent to his pain. Although plaintiff told defendant Belgado that he wanted the narcotic painkillers prescribed by the doctors at the University of Wisconsin Hospital, plaintiff has not adduced evidence suggesting that Belgado knew that Ibuprofen 600 mg would not be strong enough to help his pain. For the purpose of this motion, it is undisputed that defendant Belgado did not believe that plaintiff needed a narcotic pain drug as of June 28, 1999, eighteen days after his finger was partially amputated. Defendant Belgado did not ignore plaintiff's complaint of pain on June 28, 1999, but instead prescribed Ibuprofen 600 mg for plaintiff on June 28, 1999, and on July 16, 1999. Plaintiff has failed to adduce evidence suggesting that defendant Belgado knew that Ibuprofen would not be sufficient to control his pain. The fact that other doctors had written prescriptions for plaintiff for Percocet on June 18, 1999, June 21, 1999, June 25, 1999, and July 16, 1999,

does not mean that Belgado knew plaintiff needed a narcotic pain reliever and was deliberately indifferent to plaintiff's pain. "A prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996). Although plaintiff denies he has any drug history, it is undisputed that defendant Belgado believed plaintiff had a history of drug abuse and that therefore Belgado believed that he could not give plaintiff a narcotic for an extended period of time. Deliberate indifference is a subjective standard; plaintiff has failed to set forth sufficient facts raising a genuine issue for trial that defendant Belgado was deliberately indifferent to his pain.

Plaintiff's failure to adduce evidence showing that defendant Belgado was deliberately indifferent to his pain dictates dismissal of plaintiff's claim that defendants McCaughtry and Wegner condoned Belgado's deprivation of his rights under the Eighth Amendment. Defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion of defendants Gary McCaughtry, Paulino Belgado and Jim Wegner for summary judgment is GRANTED. The clerk of court is directed to

enter judgment for defendants and to close this case.

Entered this 22nd day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge