IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL T. SHEA,

Plaintiff,

v.

ELAINE WHEELER and
RICHARD ARNESEN,

Defendants.

OPINION AND
ORDER

00-C-0072-C

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Plaintiff Daniel T. Shea is proceeding under 28 U.S.C. § 1915A in this case on his claim that defendants Elaine Wheeler and Richard Arnesen are denying him medical care by refusing to provide him prescribed medication for attention deficit disorder. Jurisdiction is present. See 28 U.S.C. §§ 1331 and 1343.

Presently before the court are two motions: defendants' motion for summary judgment and plaintiff's motion for a preliminary injunction. On May 9, 2001, I extended the deadline for plaintiff to file his response to defendants' motion from May 17, 2001, to May 31, 2001, and I extended the deadline for defendants to file their reply to June 11, 2001. As of this date, plaintiff has not filed a response to defendants' motion. Accordingly,

all of defendants' properly proposed facts will be taken as true to the extent that they do not conflict with plaintiff's properly proposed facts in his motion for a preliminary injunction. Despite defendants' contention to the contrary, I find that plaintiff has exhausted his administrative remedies. However, taking the evidence in the light most favorable to plaintiff, a reasonable jury could not find that defendants were deliberately indifferent to plaintiff's serious medical needs. Accordingly, I will grant defendants' motion for summary judgment.

Plaintiff filed a "motion to Renew Motion for Order to Show Cause," which I construed as plaintiff's second motion for a preliminary injunction. In an order entered April 12, 2001, I noted that only two of plaintiff's exhibits filed in support of his motion were admissible and granted him until April 25, 2001, in which to file additional evidentiary materials to supplement his proposed facts. On April 25, 2001, plaintiff supplemented his motion. Because I am granting defendants' motion for summary judgment, I will deny plaintiff's motion for a preliminary injunction as moot. However, I will consider the evidence that plaintiff proposed properly in his motion for a preliminary injunction in determining the undisputed facts for defendants' motion for summary judgment.

From the facts proposed by defendants and from the record, I find the following material and undisputed.

UNDISPUTED FACTS

Plaintiff Daniel T. Shea is an inmate at Oakhill Correctional Institution in Oregon, Wisconsin. Defendant Elaine Wheeler, R.N., is the manager of the health services unit at Oakhill. Defendant Richard Arnesen, M.D., was a medical consultant at Oakhill, providing psychiatric services and treatment.

In February 1995, plaintiff was diagnosed with attention deficit hyperactivity disorder and began taking medication to treat the disorder. When plaintiff's condition is untreated, he experiences "great mental confusion and a marked degree of internal distress." After plaintiff was incarcerated, he went to the health services unit on a "self-referral" for a psychiatric evaluation on February 21, 1997, describing symptoms of "distractibility, concentration problems, no motivation." Defendant Arnesen evaluated plaintiff and determined that he suffers from a very mild form of attention deficit disorder. Plaintiff's medical records show that he benefited from Ritalin but could function well without it. Defendant Arnesen prescribed plaintiff Pemoline and directed him to return in one month for a medication check or "sooner if need be."

On April 18, 1997, plaintiff returned to the health services unit, stating that the prescribed medications made him "feel as though he [has] drunk a number of cups of coffee." In response, defendant Arnesen prescribed Ritalin and directed plaintiff to return for a medication check.

On March 27, 1998, plaintiff went to the health services unit and told defendant Arnesen that the "Ritalin has been helpful" and wondered "whether the dose could be increased somewhat." Defendant Arnesen increased the dosage of Ritalin and directed plaintiff to return for a medication check in a month. On May 21 and on June 25, 1998, plaintiff's prescription for Rilatin was continued.

In July 1998, the health services unit changed its procedure for administering Ritalin, no longer dispensing it on weekends or holidays. The procedure was changed because Ritalin is used to enhance inmates' mental concentration, learning and performance for classes and other training that do not take place on weekends or holidays. For inmates who demonstrated a medical need, Ritalin could be obtained on weekends and holidays under physician's orders. The new dispensing procedure applied to all inmates at Oakhill, including plaintiff.

Pursuant to this new procedure, plaintiff was prescribed Ritalin for weekdays but not weekends or holidays starting in July 1998, subject to defendant Arnesen's continuing review of plaintiff's progress. Defendant Arnesen had the authority to prescribe Ritalin to plaintiff on weekends if he believed plaintiff had a medical need for it during those times. In defendant Arnesen's opinion, plaintiff did not need Ritalin to function on weekends or holidays.

On August 21, 1998, plaintiff returned to the health services unit, complained about

the new dispensing policy and did not complain of serious attention deficit disorder symptoms. Defendant Arnesen did not change his prescription at that time. Plaintiff's prescription was continued on November 11, 1998, May 26, 1999, August 27, 1999 and November 19, 1999.

For certain controlled substances, including Ritalin, an inmate at Oakhill must go to the health services unit where the medication is dispensed to him in the presence of a registered professional nurse. The inmate goes to the health services unit at the time he is to receive the drug; he is given the medication with water; and after he swallows the medication, he is asked to open his mouth so that the nurse can inspect his mouth and under his tongue. The procedure for dispensing medication has been established to insure that the inmate takes the medication that has been prescribed for him in the proper dosage and at the proper times. The procedure also insures that the inmate does not stockpile the medication in order to take a higher dosage at a later time or divert the medication for sale, barter or other illegal purposes.

On January 7, 2000, at 7:40 a.m. and at 3:30 p.m., nurse Terri Tyson observed plaintiff diverting his dose of Ritalin, intentionally not swallowing it when it was administered to him. Tyson reported the "cheeking" to defendants. Defendant Arnesen had also been told that plaintiff had been seen taking his Ritalin, going directly to the men's restroom and coming out again immediately. This behavior is an indication to trained

medical providers that the inmate may be trying to divert medications for stockpiling. Tyson, defendant Wheeler and defendant Arnesen discussed plaintiff's acts and their concerns about his behavior. Defendant Arnesen had a "high index of suspicion" that plaintiff was trying to divert his Ritalin for other uses.

On January 11, 2000, plaintiff was placed in administrative segregation. On the same day, defendant Arnesen issued an order discontinuing plaintiff's prescription of Ritalin and noting that plaintiff was to return to the health services unit on April 21, 2000 (his next scheduled evaluation) only if he asked to return. Plaintiff has not received any treatment for his attention deficit disorder since January 11, 2000.

On January 19, 2000, plaintiff sent defendant Wheeler a health services request, asking that his prescription for Ritalin be resumed. Plaintiff received a response that "Dr. Arnesen has discontinued the medication due to [his] misuse."

On January 20, 2000, plaintiff sent defendant Arnesen a health services request, asking for clarification about the discontinuation of his prescription for Ritalin. On January 21, 2000, defendant Arnesen wrote plaintiff a response, stating

> it has been reported that on one recent occasion you did not swallow your methylphenidate - [a CIV medication]. Previously, you have been seen quickly going to the bathroom after taking this medication. Further, if one is going to swallow a pill he does not place it under his tongue! It is my policy to discontinue controlled medication when there are questionable circumstances such as your behavior suggests. If after three months there is documentation for continued need, I will consider restarting you MPD. In

> April you can request an interview should you believe that you need continued prescriptions.

Oakhill medical records show that plaintiff did not ask for a psychiatric evaluation during the month of April 2000, the time during which he was allegedly suffering from serious attention deficit disorder symptoms.

On January 20, 2000, plaintiff filed an inmate complaint (no. OCI-2000-2896) about the "arbitrary and abrupt discontinuation" of his medication. On January 26, the institution complaint examiner recommended dismissal of the complaint and cited defendant Arnesen's medical discretion to determine medical treatment. On February 7, the corrections complaint examiner agreed with the institution complaint examiner's recommendation to dismiss the complaint. On the same day, the Secretary of the Department of Corrections upheld the correction complaint examiner's recommendation for dismissal.

On February 1, 2000, at an administrative hearing, plaintiff was found not guilty of misuse of prescription medication but was found guilty of disobeying orders.

On May 30, 2000, plaintiff filed a new inmate complaint, asking that the inmate complaint examiner review the decision to discontinue his Ritalin treatment in light of the fact that he had been found not guilty of misusing his medication. On June 6, 2000, the inmate complaint examiner recommended dismissal of plaintiff's complaint. In a box titled "Rejection Comment," the examiner wrote, "filed previously under OCI-2000-2896." In a

box titled "Rejection Code," she wrote, "beyond 14 calendar day limit." On June 21, 2000, the corrections complaint examiner agreed with the institution complaint examiner's assessment and noted that complaint #2000-2896 has been addressed on appeal and dismissed by the secretary. On June 23, 2000, the Secretary of the Department of Corrections accepted the corrections complaint examiner's recommendation of dismissal as his own.

All inmates are free to ask for and obtain medical consultations on an "as needed" basis. Throughout the course of defendant Arnesen's treatment of plaintiff, it was plaintiff's responsibility to request consultations with defendant Arnesen in the event plaintiff was suffering symptoms of attention deficit disorder or believed he required modified treatment.

It is common practice for correctional personnel to alert defendant Wheeler when they observe unusual or detrimental behavior. At no time since April 1998 have security personnel brought plaintiff's behavior to defendant Wheeler's attention as needing psychiatric care.

OPINION

I. ADMINISTRATIVE EXHAUSTION

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), mandates that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any

other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The term "prison conditions" is defined in 18 U.S.C. § 3626(g)(2), which provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." The Court of Appeals for the Seventh Circuit has held that "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits." Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999).

The Seventh Circuit has stated that "if a prison has an internal grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Massey, 196 F.3d at 733. Wisconsin inmates must follow the administrative exhaustion procedure set out in Wis. Admin. Code § DOC 310.04, which provides that "[b]efore an inmate may commence a civil action . . . the inmate shall file a complaint under §§ DOC 310.09 or 310.10, receive a decision on the complaint under § DOC 310. 12, have an adverse decision reviewed under § DOC 310.13, and be advised of the secretary's decision under § DOC 310.14."

Defendants contend that plaintiff has not exhausted his administrative remedies because he has failed "to seek treatment of his symptoms or to file a complaint to seek treatment of his symptoms." Defendants place great reliance on the fact that plaintiff alleges that defendants discontinued his Ritalin improperly but not that defendants have denied him the opportunity to obtain medical treatment. According to defendants, because plaintiff has not sought medical care and treatment since his Ritalin prescription was discontinued in January 2000, he is precluded him from asserting that he has exhausted his administrative remedies.

Defendants' argument fails for two reasons. First, § DOC 310.04 describes exhaustion of the inmate complaint system; it does not require inmates to submit requests for medical care or otherwise seek resolution through alternate routes. Second, the distinction between denial of Ritalin and denial of medical care is not relevant; the fact that plaintiff has not asked for a psychiatric evaluation since January 2000 goes to the merits of deliberate indifference and not to administrative exhaustion. Therefore, I find that plaintiff has not failed to exhaust his administrative remedies.

II. EIGHTH AMENDMENT

On a motion for summary judgment, if the non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden

of proof, the moving party is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

To state an Eighth Amendment claim of cruel and unusual punishment arising from improper medical treatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). A condition is serious if "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain;" it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Gutierrez v. Peters, 111 F.3d 1364, 1373, 1372 (7th Cir. 1997). 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." Farmer v. Brennan, 511 U.S. 824, 837 (1994). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. See Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes v. Detella, 95 F.3d 586, 590-91 (7th Cir. 1996).

A. Serious Medical Need

Taking the evidence in the light most favorable to plaintiff, a reasonable jury could not conclude that he has a serious medical need. Plaintiff alleges that he suffered serious attention deficit disorder symptoms in April 2000, because his prescription for Ritalin was discontinued. Psychological or psychiatric conditions may constitute serious medical needs under the Eighth Amendment. See Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996). However, the evidence does not support a finding that plaintiff's attention deficit disorder is a serious medical need. Plaintiff's medical records indicate that when plaintiff's attention deficit disorder is untreated, he experiences "distractibility, concentration problems, no motivation." From defendant Arnesen's evaluation, it appears that plaintiff has a very mild form of attention deficit disorder; defendant Arnesen did not believe that it was serious enough to warrant an exception to the policy instituted in July 1998, under which Ritalin was no longer dispensed on weekends or holidays. Plaintiff's condition has not been "diagnosed by a physician as mandating treatment" under Gutierrez. To the contrary, defendant Arnesen determined that Ritalin improved plaintiff's condition but that he functioned well without it. Plaintiff was due for his quarterly evaluation in April 2000, the month in which he allegedly experienced serious symptoms, but he did not ask to be seen by defendant Arnesen or any psychiatrist at that time or any time since January 2000. This suggests that his symptoms did not require treatment. The facts do not suggest that

defendants' discontinuance of Ritalin resulted in "further significant injury or the unnecessary and wanton infliction of pain." Gutierrez, 111 F.3d at 1373. In short, the evidence shows that plaintiff may have experienced symptoms of attention deficit disorder after his prescription for Ritalin was discontinued but not that those symptoms rose to the level of a serious medical need under the Eighth Amendment.

B. Deliberate Indifference

Even if plaintiff has a serious medical need, he has failed to adduce evidence sufficient to allow a reasonable jury to conclude that defendants were deliberately indifferent to that need. Plaintiff's medical records show that he was not denied the services of the health services unit at Oakhill Correctional Institution. To the contrary, defendant Arnesen and plaintiff had an understanding that plaintiff could ask for a psychiatric evaluation at any time. Nevertheless, plaintiff has not asked for an evaluation since January 2000. As to the change in dispensing procedure, defendant Arnesen had no medical reason to make an exception for plaintiff to allow him to receive Ritalin on the weekends. Defendant Arnesen noted that plaintiff benefited from Ritalin but functioned well without it. As to the discontinuance of Ritalin, defendant Arnesen has a policy of discontinuing prescription medication when the patient is suspected of misusing the drug. Defendant Arnesen knew that plaintiff had been caught "cheeking" his Ritalin and had been observed going directly

to the restroom after receiving his Ritalin, behaviors that indicate misuse of medication. In reliance on these incidents, defendant Arnesen discontinued plaintiff's prescription for Ritalin; the subsequent finding that plaintiff was not guilty of misusing medications through an administrative hearing is not relevant to whether defendant Arnesen acted with deliberate indifference when he discontinued the medication. Moreover, defendant Arnesen told plaintiff that he could ask for a reevaluation if he believed that he still had a need for medication. Plaintiff has not asked for psychiatric help since January 2000; defendants are not mind readers and cannot be expected to know when plaintiff needs medical attention. Their failure to renew plaintiff's prescription for Ritalin does not constitute deliberate indifference.

Because I find that plaintiff failed to adduce evidence sufficient to establish that defendants have been deliberately indifferent to his serious medical need, liability under the Eighth Amendment cannot attach. Accordingly, I need not address defendants' arguments that defendants lack the requisite personal involvement in the challenged actions, that plaintiff failed to allege physical injury and that defendants are protected by qualified immunity. I will grant defendants' motion for summary judgment and deny plaintiff's motion for a preliminary injunction as moot.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Richard Arnesen and Elaine Wheeler is GRANTED; plaintiff Daniel T. Shea's motion for a preliminary injunction is DENIED as moot; and the clerk of court is directed to enter judgment for defendants and close this case.

Entered this 19th day of June, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge