

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MAURICE FORT GREER,

Petitioner,

v.

OPINION AND ORDER

01-C-586-C

GEORGE M. DALEY, Medical Director
of the Department of Corrections, and
DR. KAPLAN,

Respondents.

This is a civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner Maurice Greer, who is currently an inmate at Supermax Correctional Institution in Boscobel, Wisconsin, alleges that respondents denied him surgery to correct a deviated septum and, in doing so, violated his right to adequate medical care under the Eighth Amendment.

Petitioner seeks leave to proceed pursuant to 28 U.S.C. § 1915. Initially, petitioner was required to make an initial partial payment of \$2.76. Petitioner requested (and was granted) an enlargement of time to pay the assessed amount. At that time, petitioner was also informed that if he had no money to pay the initial partial payment, he might submit

another trust fund account statement to show that he lacked any income or carried a negative balance in his prison account. On November 28, 2001, petitioner submitted the required supplemental trust fund statement, which shows that he has no means to pay the initial partial payment. Because petitioner is destitute, I will review his complaint to determine whether he may be allowed leave to proceed on the claims that he has raised. See 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). Even giving petitioner's complaint a liberal reading, I cannot find that he has stated a claim upon which relief can be granted. Therefore, I will deny his request for leave to proceed in forma pauperis on his claim of inadequate medical care under the Eighth Amendment.

In his complaint and attachments, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner is an inmate at Supermax Correctional Institution in Boscobel, Wisconsin. Respondent George M. Daley is a physician and the medical director of the Bureau of Health Services at the Department of Corrections. Dr. Kaplan is a prison physician employed by the Oshkosh Correctional Institution.

On April 10, 1998, while petitioner was incarcerated at the Milwaukee County Jail,

he suffered severe trauma to his nose during a basketball game.

The next day, petitioner was seen by doctors at Froedert Memorial Hospital in Milwaukee and diagnosed as having a deviated septum. The treating physician recommended non-cosmetic surgery, prescribed a nasal spray and instructed petitioner to return the following week. Petitioner was not taken for a follow-up visit as instructed by the physician. Petitioner's injury causes him to experience continuous nose bleeding, respiratory problems, difficulty sleeping and constant migraine headaches in the area of the upper nose and eyes.

In August 1998, petitioner was transferred to Dodge Correctional Institution. On September 9, 1998, a Dodge physician, Dr. Wong, examined petitioner and requested surgery to correct his deviated septum.

On October 6, 1998, respondent Daley denied Dr. Wong's surgery request by checking the box on the Class III Request for Authorization Memorandum indicating that "[n]o procedures should be scheduled at this time" and he also stated in handwritten note that "nasal bone non-displaced, note of 9/9/98 states minimal deviation." The form included the provision that "[i]f more information will change this status, resubmit the request and the information."

In December 1998, petitioner was transferred to Fox Lake Correctional Institution. In April 1999, a Fox Lake physician, Dr. J.T. Lloren, examined petitioner and requested

surgery. On April 28, 1999, respondent Daley denied that request by completing another Class III Request for Authorization Memorandum and checking the box that indicates that “[n]o procedures should be scheduled at this time.” Petitioner received nasal spray and pain medication while at Fox Lake.

In May 2000, petitioner was transferred to Oshkosh Correctional Institution. On June 1, 2000, an Oshkosh physician, respondent Kaplan, would not request surgery for petitioner and, additionally, would not refill petitioner’s prescription for nasal spray. Because of the lack of nasal spray, from May 26, 2000 to August 4, 2000, petitioner suffered nose bleeds, respiratory problems, difficulty sleeping and migraine headaches. According to the inmate complaint report that was filed by petitioner (OSCI-2000-18139), respondent Kaplan did not request surgery or prescribe nasal spray because “it was in his professional medical opinion that no further treatment was needed.”

On August 4, 2000, petitioner was transferred to Supermax Correctional Institution. On August 9, 2000, a Supermax physician prescribed nasal spray to petitioner. On August 14, 2000, petitioner was issued a special needs exemption so that he could sleep on the floor next to an air vent in order to obtain better ventilation.

On September 8, 2000, a Supermax physician, Dr. Riley, ordered x-rays and asked that petitioner have surgery to correct his deviated septum. Either respondent Daley or John Doe denied the request for surgery. (The inmate complaint report regarding the denial of Dr.

Riley's request for surgery (SMCI-2000-32700) states explicitly that respondent Daley did not deny the request but that it was denied by a "PHS Medical party.")

The PHS Outpatient Referral Request Form containing the denial of Dr. Riley's request for surgery stated that "34 yo M S/P trauma to nose 4/98 while playing basketball. X ray on 8/98 revealed non-displaced fx of nasal bone and minimal deviation of septum to right. X ray 8/31/00 negative. External PE reveals obvious deformity c/w septal deviation. Nasal passages are readily patent [with] good air mumt. I/m does c/o occasional nose bleed and difficulty breathing through nose." Although this PHS form is not signed, it indicates that the petitioner was seen by a doctor because the "physician visit" box is checked.

OPINION

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. Therefore, petitioner must establish facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). See Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111

F.3d 1364, 1369 (7th Cir. 1997). In attempting to define “serious medical needs,” the Court of Appeals for the Seventh Circuit has held that they 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. The Supreme Court has held that 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 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; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care can be shown by a respondent’s actual intent or reckless disregard. Reckless disregard is 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).

The essential question in petitioner’s case is whether the medical treatment he received is “so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner’s condition,” Snipes, 95 F. 3d at 592, giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate

indifference “is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed”).

The fact that petitioner was treated numerous times over a two-year period is sufficient to show at this early stage of the proceedings that he has a serious medical condition under the Eighth Amendment. Moreover, petitioner alleges that four physicians (at Froedert Memorial Hospital, Dodge Correctional Institution, Fox Lake Correctional Institution and Supermax Correctional Institution) recommended surgery to correct his deviated septum. Respondent Daley, the final decision maker as to surgery requests, denied two of these requests. According to respondent Daley’s report, the first request for surgery (by Dr. Wong) was denied because “nasal bone non-displaced, note of 9/9/98 states minimal deviation.” According to the inmate complaint report (OSCI-2000-18139) that was filed by petitioner, respondent Kaplan did not request surgery or prescribe nasal spray because it was in his professional medical opinion that no further treatment was needed. In addition, the inmate complaint report as to the denial of Dr. Riley’s request for surgery states explicitly that respondent Daley did not deny the request but that it was denied by a PHS medical party. Although it is unclear from the allegations whether “PHS medical party” is a doctor, the PHS form indicates it was a “physician visit.” Therefore, there are four doctors who requested surgery and three individuals, at least two of whom are doctors, who denied

the surgery as medically unnecessary. These facts do not establish the required deliberate indifference in order to maintain a claim under the Eighth Amendment.

It is not enough to simply assert facts that, if true, would constitute poor or negligent medical care. Such assertions might make out a state law tort claim for medical malpractice, but they do not support a claim that petitioner's rights under the Eighth Amendment have been violated. See Estelle, 429 U. S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Moreover, differences of opinion as to matters of medical judgment, negligent treatment or even medical malpractice are insufficient to state a claim under § 1983. See Kelley v. McGinnis, 899 F. 2d 612, 616 (7th Cir. 1990). Although petitioner believes that those doctors who requested surgery are correct and those doctors who denied the surgery are incorrect, this belief is not enough to show that the lack of surgery amounts to deliberate indifference. To the contrary, the dispute indicates that the denial of surgery does not rise to the level of an Eighth Amendment claim for inadequate medical care. Differences of opinion as to matters of medical judgment do not state a claim under § 1983.

Because petitioner failed to state a claim upon which relief can be granted, I will deny him leave to proceed on his Eighth Amendment claim of inadequate medical care.

ORDER

IT IS ORDERED that

1. Petitioner Maurice Fort Greer's request for leave to proceed in forma pauperis on his Eighth Amendment claim against respondents George M. Daley and Dr. Kaplan is DENIED because petitioner has failed to state a claim upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$150.00; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of court is directed to close the file.

Entered this 27th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge