

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

-----  
MARCELO SANDOVAL,

Petitioner,

v.

GINGER JONES, JAMES REED,  
M. ASLAM, GENE WEGNER,  
DAVID STEINER, ANTHONY  
WALKER and VARIOUS UNKNOWN  
BUREAU OF PRISON STAFF,

Respondents.  
-----

ORDER

04-C-263-C

This is a proposed civil action for declaratory and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), 28 U.S.C. § 1343, 28 U.S.C. § 1346(b)(1), and the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2860. Petitioner, who is presently confined at the Oxford Correctional Institution in Oxford, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. In addition, under most circumstances, a prisoner's request for leave to proceed must be denied if the prisoner has failed to exhaust available administrative remedies.

In his complaint, petitioner alleges the following facts.

#### ALLEGATIONS OF FACT

Petitioner Marcelo Sandoval is confined at the Federal Correctional Institution in Oxford, Wisconsin. The respondents are employees of the Federal Correctional Institution in Oxford, Wisconsin and hold the following positions: Ginger Jones is Health Service Unit Administrator; James Reed is a physician and Health Service Clinical Director; M. Aslam is a staff physician; Gene Wegner is a consultant; David Steiner is a physician assistant; and Anthony Walker is a physician assistant.

On May 21, 2001 at 10:00 a.m., petitioner was pulling cable for his institution assignment in the Unicor Factory. Petitioner hurt his back and was sent to the health services unit where respondent Walker treated him. Respondent Walker prescribed five days of no recreation, five days of “medical idle” and issued him Motrin. Respondent Aslam reviewed Walker’s examination.

Despite the Motrin prescription, petitioner suffered pain and discomfort to the point where he could not stand upright for over a week. Respondent Walker refused to provide petitioner anything stronger than Motrin. Petitioner returned to work on May 26, 2001, even though his back caused him pain and he was unable to stand upright.

On May 29, 2001, petitioner was pulling cable at Unicor and reinjured his back. He was sent to the health services unit and seen by respondent Steiner. Steiner requested an x-ray and prescribed three days of “medical idle.” After the three day break, petitioner was sent back to his job at Unicor doing the same work despite his complaints of back pain and inability to stand upright.

On June 13, 2001, petitioner received an x-ray. Respondent Wegner entered the results of the x-ray into petitioner’s medical file on June 19, 2001. Between June 27, 2001 and June 6, 2002, petitioner complained constantly to respondents that his back was causing him all kinds of pain and trouble and that he was unable to stand upright.

On June 27, 2001 petitioner saw Nestor Osorno who prescribed the same course of

treatment as the other respondents. On September 13, 2001, petitioner saw respondent Aslam who requested an MRI be taken of petitioner's back. Petitioner saw Aslam on October 2, 2001 requesting treatment for his back pain and inability to stand upright. Petitioner continued to work at Unicor, exacerbating his back pain which caused him to lose sleep.

On January 24, 2002, petitioner requested sick call because of his back. The medical personnel failed to alter his treatment. Petitioner requested sick call again on February 19, 2002. In response, respondent Reed gave him a three day medical idle.

On June 6, 2002, petitioner received an MRI of his lumbar spine. Respondents Reed and Aslam reviewed a report prepared by medical personnel diagnosing petitioner with slight disc desiccation at L2 and L3. According to the report, L4's disc is desiccated and a broad-based protrusion is present. The spinal canal is relatively narrow from L2 to L5 because of congenitally short pedicles. This in combination with the protrusion at the L5-S1 level combines to create moderately severe canal narrowing. The sac is tapered at this level, likely causing nerve root compression.

By June 2003, respondents concluded that petitioner's injury was serious enough to warrant an operation. Petitioner had to suffer needless pain and discomfort from his back injury for 13 months.

## DISCUSSION

Petitioner brings three claims: 1) that defendants acted with deliberate indifference to his serious medical needs in violation of the Eighth Amendment; 2) that defendants conspired to deprive him of adequate treatment of his serious medical needs; and 3) that defendants violated the Federal Tort Claims Act when they failed to respond in a timely manner to his back pain.

### A. Eighth Amendment

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)). This does not mean that prisoners are entitled to whatever medical treatment they desire. 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 allege 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). Id. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). 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. 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. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. 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. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

I understand petitioner to allege that respondents were deliberately indifferent to his back injury because it took respondents 13 months to acknowledge that his injury required an operation rather than a prescription of Motrin and medical idle. However, respondent Steiner requested an x-ray one month after the initial injury occurred and respondent Aslam requested an MRI four months after the initial injury occurred. Nine months later petitioner received an MRI after which respondents determined petitioner required an operation. Nothing in petitioner’s allegations suggest that respondents intended petitioner to suffer

pain or were reckless in the care that they provided him. At most, respondents were negligent in the care they provided him. An allegation of negligence is insufficient to state an Eighth Amendment claim. *Snipes*, 95 F.3d at 590-91. To the extent petitioner alleges that respondents should have given him stronger medication than Motrin to relieve his back pain or performed an MRI sooner, petitioner's Eighth Amendment claim fails. "Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." *Estate of Cole v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996); *Snipes*, 95 F.3d at 591 (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview"). Therefore, I will deny petitioner leave to proceed in forma pauperis on his Eighth Amendment claim.

#### B. Conspiracy

Petitioner alleges that respondents violated 28 U.S.C. § 1343, which allows plaintiffs to recover damages for injuries that result from acts done in furtherance of conspiracies under 42 U.S.C. § 1985. To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979) (citing

Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Nothing in petitioner's allegations suggest that respondents worked in concert to inflict injury upon petitioner. In fact, petitioner's allegations demonstrate that respondents agreed that petitioner's back injury required an operation, a result petitioner wanted. I will deny petitioner leave to proceed in forma pauperis on his conspiracy claim against respondents.

### C. Federal Tort Claims Act

Petitioner alleges that respondents' treatment of his back injury violated the Federal Tort Claims Act and the duty of care owed to petitioner under 18 U.S.C. § 4042. Petitioner alleges also that the initial injury occurred while he was working at his institution assignment at the Unicor Factory. Ordinarily, a person suing in federal court for an injury arising out of the negligence of the United States or one of its officials or employees would be required to bring his lawsuit under the Federal Tort Claims Act. It is understandable that petitioner chose that route. However, because petitioner's injuries occurred in connection with his job at a federal prison, the federal workers' compensation scheme for participants in prison industrial work programs established pursuant to 18 U.S.C. § 4126 and the regulations created to carry out that law govern his method of recovery and foreclose his action in this court. He may recover for his injuries only by following the administrative procedures described in the Inmate Accident Compensation section of the Code of Federal Regulations,



28 C.F. R. § 301.101 et seq. In other words, this court has no authority to award plaintiff damages for his injuries, whether he attempts to sue under the Federal Tort Claims Act or under 18 U.S.C. § 4126. If he is to be compensated, the compensation award will have to come from a claims examiner or the Inmate Accident Compensation Committee as described in 28 C.F.R. §§ 301.305 and 301.306. As a result, I will deny petitioner leave to proceed in forma pauperis on his Federal Tort Claims Act claim.

#### ORDER

IT IS ORDERED that:

1. Petitioner Marcelo Sandoval's request for leave to proceed in forma pauperis on his Eighth Amendment, conspiracy and Federal Tort Claims Act claims are DENIED and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$109.57; 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 15th day of June, 2004.

BY THE COURT:

---

BARBARA B. CRABB  
District Judge