

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

GEORGE J. LAZARIS,

Plaintiff,

OPINION
AND ORDER

v.

04-C-156-C

DR. FERN SPRINGS, WARDEN TOM KARLIN,
CAPTAIN TEGEL, OFFICER HALE,
OFFICER CARLSON, R.N. MEYER and
R.N. HOLNICK,

Defendants.

In an order dated April 14, 2004, I granted plaintiff leave to proceed on his claims
that

- (1) defendant Fern Springs refused to arrange for reconstructive surgery on his ankle,
in violation of the Eighth Amendment;
- (2) defendant Springs refused to allow him to use an electronic bone stimulator to
help his healing, in violation of the Eighth Amendment;
- (3) defendant Springs failed to treat an infection in petitioner's ankle, in violation of
the Eighth Amendment;

(4) defendants Springs and Tegels took away his crutches and leg brace while he was in segregation, in violation of the Eighth Amendment;

(5) defendants Meyer and Holnick refused to refill his prescriptions in a timely manner, in violation of the Eighth Amendment;

(6) defendant Karlin knew that petitioner was receiving inadequate medical care but failed to take corrective action, in violation of the Eighth Amendment; and

(7) defendants Hale and Carlson forced petitioner to stand on injured ankle without any penological justification, in violation of the Eighth Amendment.

Presently before the court is defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff failed to properly exhaust his administrative remedies prior to filing suit as required by 42 U.S.C. § 1997e(a). In support of their motion, defendants have submitted an affidavit and several documents relating to the plaintiff's efforts to exhaust his remedies within the Department of Corrections inmate complaint review system. Plaintiff did not submit additional documents in opposition to the motion. I can consider the parties' documentation without converting the motion to dismiss into a motion for summary judgment because the documentation of a prisoner's use of the inmate complaint review system is a matter of public record. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 455 (7th Cir.1998); General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th

Cir.1997). For the reasons stated below, I conclude that plaintiff has failed to properly exhaust his administrative remedies as to all of his claims. Accordingly, I will grant defendants' motion to dismiss this case.

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir.1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding defendants' motion, I accept as true the factual allegations in plaintiff's complaint. Also, I am considering the exhibits that defendants submitted regarding plaintiff's use of the inmate complaint review system, which are summarized below.

FACTS

On May 20, 2003, while he was an inmate at the Waupun Correctional Institution, plaintiff filed an inmate complaint, asserting that he should be given a medical parole because prison doctors were refusing to perform surgery on his ankle and leg where plaintiff had been diagnosed with an infection of the bone. On May 22, the Institution Complaint Examiner sent plaintiff a receipt indicating that his complaint had been received. This receipt also set out the timetable for the complaint procedure. "A recommendation on the complaint will be made and submitted to the appropriate reviewing authority within 20 working days

of acknowledgement . A decision will be made by the appropriate reviewing authority within 10 working days following receipt of the recommendation unless extended for cause.” On May 30, 2003, the Institution Complaint Examiner sent plaintiff a report with its recommendation that the reviewing authority dismiss his complaint. On June 13, the reviewing authority sent plaintiff a report, stating that it had accepted the Institution Complaint Examiner’s recommendation and that his complaint was dismissed. The report also included information on the time limits for appeal of the reviewing authority’s decision to the Corrections Complaint Examiner. “A complainant dissatisfied with a decision may, within 10 calendar days after the date of the decision, appeal that decision by filing a written request for review with the Corrections Complaint Examiner on form DOC-405 (DOC 310.13, Wis. Adm. Code).”

At some point, plaintiff was transferred from Waupun to the Jackson Correctional Institution in Black River Falls, Wisconsin. On January 5, 2004, nearly six months after the reviewing authority had dismissed his complaint, plaintiff filed an appeal with the Corrections Complaint Examiner. On the appeal form, plaintiff attempted to explain why he was filing so late.

The reason this appeal is late is on or about the last week in May I went to U.W. Madison to have the rod removed and antibiotic treatment. Then I was sent to Dodge Correctional for 3 months and I had no access to papers, plus I could not have done anything about this anyway. I was/is very ill. This is the first chance I’ve had to address this issue. I’m a very ill man and I’m still not

getting medical care here at J.C.I. [sic]

Under Wis. Admin. Code § DOC 310.13(2), the Corrections Complaint Examiner can accept an appeal filed later than the 10-day limit if a petitioner can show good cause. On January 8, 2004, the Corrections Complaint Examiner recommended dismissal of plaintiff's appeal as untimely. Examiner Sandra Hautamaki wrote,

Complainant maintains his appeal is late due to his absence from JCI and not having access to his papers. The complaint was decided on 6/13/03 and printed at DCI on 6/16/03, where complainant returned on 6/18/03 following his medical absence in Madison. He would have had access to appeal forms while at DCI. He was returned to JCI on 8/28/03. Even if he had no access to his papers while at DCI, he would have had upon return to JCI. DOC 310.13(1) requires appeals to be filed within ten days of the complaint decision. While I note complainant's medical absence and temporary residence at DCI, I do not find good cause to accept the late appeal and it is thus recommended it be dismissed as untimely filed.

On January 23, 2004, Cindy O'Donnell adopted the recommendation of the Corrections Complaint Examiner on behalf of the Secretary of Corrections, and dismissed plaintiff's appeal as untimely. Other than his complaint about his inability to see a doctor who would perform surgery on his ankle, plaintiff did not file any inmate complaint appeals concerning any of the other issues on which he has been granted leave to proceed.

OPINION

The 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides 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 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, 733 (7th Cir.1999). Also, the court of appeals has held that “if a prison has an internal administrative 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. In Wisconsin, before an inmate may begin a civil action, he must file a complaint with the inmate complaint examiner under §§ DOC 310.09 or 310.10, receive a decision on the complaint from the appropriate reviewing authority under § DOC 310.12, have an adverse decision reviewed by the corrections complaint examiner under § DOC 310.13 and be advised of the secretary’s decision under § DOC 310.14. Wis. Admin. Code § DOC 310.07.

The facts reveal that plaintiff’s appeal was dismissed because it was not filed with the Corrections Complaint Examiner within 10 calendar days of the adverse decision by the reviewing authority. “[U]nless [a] prisoner completes the administrative process by following

the rules the state established for that process, exhaustion has not occurred.” Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002). Therefore, defendants argue, this case must be dismissed for plaintiff’s failure to exhaust. Plaintiff has advanced no argument in opposition to the motion.

I conclude that because plaintiff did not file a timely appeal with the Corrections Complaint Examiner or any other appeals raising the issues on which he has been allowed to proceed in this case, he did not properly exhaust his administrative remedies. Although the Corrections Complaint Examiner had the discretion to accept plaintiff’s untimely appeal for good cause, she chose not to exercise that discretion after finding that plaintiff could have filed his appeal on time. Nevertheless, plaintiff’s case will be dismissed without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (*all dismissals under § 1997e(a) should be without prejudice, because “[s]tates may allow cure of failure to exhaust or litigation in state court without exhaustion rule*).

ORDER

IT IS ORDERED that defendants’ motion to dismiss this action is GRANTED because plaintiff failed to properly exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). The clerk of court is directed to enter judgment dismissing the case

without prejudice.

Entered this 11th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge