IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

EDUARDO M. PEREZ,

Plaintiff,

ORDER

05-C-711-C

v.

BHS-DOC R/N SHARON ZUNKER,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In an order dated January 3, 2006, I granted plaintiff leave to proceed in forma pauperis against defendant Sharon Zunker on a claim that she violated plaintiff's Eighth Amendment rights when she refused to refer plaintiff to a pain clinic for treatment of pain he suffers because of a 1997 injury to his back. I denied plaintiff leave to proceed in forma pauperis on a claim that defendant Zunker and former defendants Michael Sullivan and Wendy DeMotts violated his Eighth Amendment rights by denying him back surgery, because I concluded that plaintiff had litigated the identical claim in a previous lawsuit in this court, Perez v. Sullivan, Case No. 01-C-519-C, that was resolved on its merits on a motion for summary judgment.

Now plaintiff has filed a motion to amend his complaint to include a new allegation

relating to the claim that was dismissed because, he says, he discovered new information recently when he reviewed his medical files. In particular, plaintiff wants to allege that his medical file contains a W-DOC form 3001 dated March 10, 2004, "and that form is the recommendation report of neurosurgeons Dr. Witwer and Dr. Trost. This forms shows that the doctors recommended 3 treatments for [plaintiff's] spine cord injury; the recommendations were (1) provide a chain w/ lumbar support . . . (2) diffuse lumbar spine surgical intervention indicated and (3) consult to the pain clinic recommendation."

Plaintiff's newest allegation is difficult to understand. Possibly he is saying that the information in his medical file shows that after case no. 01-C-519-C was resolved in defendants' favor in 2002, his medical condition worsened to the point where now, unlike the time before 2002, doctors have determined that surgical intervention is indicated for his injury but defendants are refusing to arrange for such surgery. However, if that is what plaintiff is now contending, the assertion directly contradicts an allegation he made in his original complaint in this case to the effect that "On 3-10-04. At this time Dr. Brian Witwer told me that nothing surgical can be done on my spine cord due to the current chronic[] symptoms that is not likelihood that I would be benefit from the surgery whic is very doubtful" [sic].

In plaintiff's earlier lawsuit, I granted summary judgment to the defendants, holding that

> It is undisputed that plaintiff received conflicting medical opinions about the optimal treatment for his back: an initial recommendation for surgery and a later recommendation for conservative therapy with pain management. It is well established that prisoners do not have a right to the treatment that they desire but only to treatment that is not "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." Snipes, 95 F.3d at 590. Inadvertent error, negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91. Because of the conflicting opinions of the two neurologists who treated plaintiff, plaintiff's complaint about defendants' not authorizing surgery on his back amounts only to plaintiff's dissatisfaction with his medical treatment. Such dissatisfaction standing alone does not rise to the level of an Eighth Amendment violation. I conclude that no reasonable jury could find that defendants were deliberately indifferent to plaintiff's back condition in deciding not to authorize surgery.

If plaintiff presently possesses proof that between the time his previous lawsuit ended in 2002 and March of 2004, his back condition has worsened so substantially that all of the doctors and specialists who have assessed his condition since 2002 agree that he needs surgery, then his claim would not be barred under the doctrine of claim preclusion. However, I am not prepared to allow plaintiff to amend his complaint to include such an allegation without first seeing a copy of the document plaintiff believes shows the concurrence of Drs. Witwer and Trost.

ORDER

IT IS ORDERED that plaintiff's motion to amend his complaint is DENIED without

prejudice to plaintiff's submitting a new motion that is supported with a copy of the March 10, 2004 Form 3001 he believes will show that Dr. Witwer and Dr. Trost have assessed his condition since 2002 and have concluded that plaintiff requires surgery to correct his medical condition.

Entered this 30th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge