IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDUARDO M. PEREZ,

Petitioner,

v.

BHS-DOC R/N SHARON ZUNKER
in her personal and official capacities,

Defendants.

ORDER

05-C-711-C

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Plaintiff Eduardo Perez is a prisoner confined that the Stanley Correctional Institution in Stanley, Wisconsin. In an order dated January 4, 2006, I granted plaintiff leave to proceed on his claim that defendant Sharon Zunker, a prison nurse, was deliberately indifferent to his serious medical needs when she ignored his request for treatment at the UW-Health Pain Clinic for back injuries he sustained in 1997. In the same order, I denied plaintiff leave to proceed on his claim that defendant Zunker and former defendants Michael Sullivan and Wendy DeMotts were deliberately indifferent to his serious medical needs when they denied him surgery following his July 1997 back injury because plaintiff had litigated that same claim in an earlier lawsuit in this court.

On August 2, 2006, I appointed counsel for plaintiff, after determining that his limited English skills coupled with the medical complexity of his claim warranted the involvement of a lawyer in this case. Unfortunately, plaintiff and his counsel were unable to resolve differences in their approaches to the case. Plaintiff's lawyers moved to withdraw and, after a hearing at which plaintiff expressed his willingness to proceed pro se, I granted the motion to withdraw.

Now before the court is plaintiff's motion to amend his complaint, which was filed a mere week before the parties' deadline for filing dispositive motions. Because the amendments plaintiff proposes would not make a difference in the claims on which he has been given leave to proceed, the motion will be denied.

Rule 15(a) of the Federal Rules of Civil Procedure states that "a party may amend [its] pleading once as a matter of course at any time before a responsive pleading is served"; otherwise, amendment is permissible "only by leave of court." Whether to grant leave to amend a pleading pursuant to Rule 15(a) is within the discretion of the trial court. Sanders v. Venture Stores, Inc., 56 F.3d 771, 773 (7th Cir. 1995), and "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although leave to file an amended or supplemental complaint should be granted liberally, a request to amend may be denied on several grounds, including futility. Eastern Natural Gas Corp. v. Aluminum Co. of America, 126 F.3d 996, 999 (7th Cir. 1997) (leave should be granted freely "in the absence of undue

delay, undue prejudice to the party opposing the motion, or futility of the amendment").

In his proposed amended complaint, plaintiff renews his contention that he was denied back surgery wrongfully in 1997, and contends that because recent medical reports show that his back problems have worsened since they were first diagnosed, he should be permitted to pursue his dismissed claim against defendant Zunker and former defendants Michael Sullivan and Wendy DeMotts. He is mistaken.

As I explained to plaintiff in the January 4, 2006 order, the federal law of claim preclusion bars the relitigation of claims that have been decided in previous lawsuits. In Perez v. Sullivan, Case No. 01-C-519-C, plaintiff litigated an identical claim against defendants Sullivan, De Motts and Zunker, contending that they violated his Eighth Amendment rights by failing to provide him with back surgery following his July 1997 injury. I granted summary judgment to the defendants on that claim after finding that "no reasonable jury could conclude that defendants were deliberately indifferent to plaintiff's serious medical need." Perez v. Sullivan, Case No. 01-C-519-C, dkt. #45, at 2. The Court of Appeals for the Seventh Circuit affirmed that decision on November 21, 2002. Perez v. Sullivan, 52 Fed. Appx. 275 (7th Cir. 2002) (unpublished decision).

Nevertheless, when plaintiff moved for reconsideration of this claim, I explained that the decision in Case No. 01-C-519-C would not preclude him from pursuing a claim that prison medical staff had ignored deterioration of his spinal condition that occurred after

Case 01-C-519-C had been resolved. Specifically, I stated:

> Possibly [plaintiff] 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] . . . . 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.

Dkt. #8, at 3.

In his proposed amendment, plaintiff suggests that the mere fact that his back problems have worsened over time is enough to establish that between 2002 and 2004, defendant Zunker and former defendants Sullivan and DeMotts were deliberately indifferent to his need for back surgery. But plaintiff forgets that deliberate indifference requires more than error or even malpractice: for a state actor's decision to constitute deliberate indifference, she must be aware of facts that could lead to the conclusion that plaintiff was at substantial risk of serious harm and actually came to the conclusion that he was at substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 832 (1994). Plaintiff concedes that he was given pain treatments, X-rays and MRIs between 2002 and 2004 and

was seen by a specialist at the University of Wisconsin Hospital. Plaintiff has not suggested that any of the doctors who treated him during that time determined that back surgery was an appropriate option for him; in fact, his complaint alleges that the specialist who treated him believed surgery would not help him. Without any suggestion that surgery was medically indicated between 2002 and 2004, there is no factual basis for plaintiff's claim that prison nurses or the secretary of the Wisconsin Department of Corrections were deliberately indifferent to him by failing to provide that treatment. His new allegations indicate that his back problems were serious and that back surgery was later provided to him. However, they do not support a new claim against defendant Zunker and former defendants Sullivan and DeMotts. Because plaintiff's proposed amendment would be futile, his motion to amend the complaint will be denied.

ORDER

IT IS ORDERED that plaintiff Eduardo Perez's motion to amend his complaint is DENIED.

Entered this 18th day of May, 2007.

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