IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLAYTON MELLENDER,

Petitioner, OPINION and ORDER

v. 06-C-547-C

DR. CHARLES LARSON and
RICHARD RAEMISCH,

Defendants.

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In this civil action for injunctive and monetary relief, plaintiff Clayton Mellender, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, contends that defendant Dr. Charles Larson violated his rights under the Eighth Amendment and Americans with Disabilities Act (ADA) when Larson (1) reduced plaintiff's methadone without medical justification; (2) discontinued plaintiff's authorization for a wheelchair, cane, lower bunk restriction, lower tier restriction, an extra blanket, an egg crate mattress and ice packs; and (3) failed to treat plaintiff for his recent seizures. In addition, plaintiff contends that defendant Richard Raemisch violated his rights under the Eighth Amendment by failing to investigate plaintiff's complaint that defendant Larson was denying him

appropriate medical care.

In an order dated October 26, 2006, I stayed a decision on plaintiff's motion for a preliminary injunction until he submitted proposed findings of fact and evidentiary materials in support of his motion. Plaintiff has filed a statement of facts and conclusions of law in support of his motion, in which he requests that the court order defendants to provide him immediately with an egg crate mattress, a wheelchair, an ice pack four times daily, 120 mg. methadone, a cane, an extra blanket, a "lower bunk" restriction, a "lower tier" restriction and a medical evaluation to determine the cause of seizures petitioner has allegedly been experiencing in recent weeks. (In his reply brief, plaintiff concedes that he was given a cane last month by orthopedist Dr. Ellen O'Brien. Consequently, I understand him to have abandoned his request for a cane.) Although defendants have responded to plaintiff's proposed facts, they have done so in a manner that obfuscates, rather than illuminates, the disputes between the parties. Consequently, I have concluded that an evidentiary hearing is warranted to determine whether plaintiff has been denied medical treatment and accommodations gratuitously or pursuant to a legitimate medical purpose.

From the parties' proposed findings of fact and affidavits, I find the following facts solely for the purpose of deciding the present motion.

FACTS

Plaintiff Clayton Mellender is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin. Defendant Dr. Charles Larson is a physician at the Waupun Correctional Institution. Defendant Richard Raemisch is deputy secretary of the Wisconsin Department of Corrections.

When plaintiff arrived at the Waupun Correctional Institution he had numerous "medical restrictions" and special needs that had been accommodated by the state prisons where he had resided previously, including the Dodge, Columbia, Oshkosh and New Lisbon Correctional Institutions. Before coming to the Waupun Correctional Institution, plaintiff had a standing order for a second mattress or an "egg crate" mattress because he was diagnosed with "compression neuropathies" in the nerves of his outer thighs. From 2003 until the time he arrived at the Waupun Correctional Institution, plaintiff was given ice four times a day to relieve testicular pain, as ordered by doctors with the University of Wisconsin urology department. In addition, plaintiff was given an extra blanket to elevate his legs and relieve edema. At other prisons, plaintiff had a standing order permitting him to use a wheelchair when he travels long distances. He was diagnosed in the past with bone spurs and early stage arthritis of the knees and was given a "lower bunk" and "lower tier" restriction because climbing causes him knee pain. Currently, plaintiff is being treated by the University of Wisconsin pain clinic for sphenopalatine neuralgia (cluster headaches), a

condition that causes him severe pain behind his eyes.

When plaintiff arrived at the Waupun Correctional Institution, defendant Larson reduced plaintiff's methadone from 120 mg (administered in three doses of 40 mg daily) to 90 mg (administered in three doses of 30 mg daily). Defendant Larson did not taper plaintiff's dose, but made the reduction all at once. He did so because he was concerned about plaintiff's history of drug addiction. As a result of the reduction, plaintiff experienced increased pain. A nurse practitioner at the prison prescribed lidocaine for him, but plaintiff has been told that the lidocaine may be causing him heart problems.

Recently, plaintiff had a medical episode (which defendant calls a "spell" and plaintiff calls a "seizure") that required treatment in the emergency room at Wausau Memorial Hospital. Plaintiff has had more of these episodes since that time, though he has not received medical treatment for them. Defendant Larson has told plaintiff that he does not believe plaintiff is having seizures and he does not intend to evaluate the problem further.

In mid-November, prison orthopedist Dr. Ellen O'Brien provided plaintiff with a cane.

DISCUSSION

A preliminary injunction is "'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"

Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (quoting 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948 (2d ed.1995)). In determining whether preliminary injunctive relief is appropriate, district courts are guided by four factors: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest. Joelner v. Village of Washington Park, 378 F.3d 613, 619 (7th Cir. 2004); Faheem–El v. Klincar, 841 F.2d 712, 716 (7th Cir. 1988). At the threshold, a plaintiff must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If plaintiff makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

A. Reduction of Methadone

Plaintiff contends that defendant Larson violated his Eighth Amendment protection against cruel and unusual punishment by purposely reducing his methadone prescription in order to cause him needless pain. Recently, the court of appeals acknowledged that prison

officials may violate the Eighth Amendment by withholding medication if it results in gratuitous pain. Johnson v. Doughty, 433 F.3d 1001, 1017 (7th Cir. 2006). In Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)), the court stated that "the Eighth Amendment prohibits unnecessary and wanton infliction of pain, thus forbidding punishment that is 'so totally without penological justification that it results in the gratuitous infliction of suffering.'" Further, the court held that "[s]uch gratuitous infliction of pain always violates contemporary standards of decency and need not produce serious injury in order to violate the Eighth Amendment." Id.

Here, however, defendants have come forward with facts establishing that defendant Larson's decision to reduce plaintiff's pain medication was grounded in concern over plaintiff's history of drug abuse and the known addictive qualities of methadone. Defendant Larson did not discontinue plaintiff's methadone completely, but rather reduced it by a conservative 25% in order to determine whether plaintiff could function on a lower dose of the medication.

The Constitution does not require prison health care providers to provide each prisoner with the medical care the prisoner believes appropriate; it requires the providers to rely upon their own medical judgment to provide care that is reasonable in light of their knowledge of each prisoner's problems. See, e.g., Estelle v. Gamble, 429 U.S. 97, 107 (1976) (plaintiff's objection to prison physician's failure to order back x-ray failed to state

claim under Eighth Amendment when prison physicians provided minimal but adequate treatment). Moreover, the fact that plaintiff had been prescribed a higher dose of methadone in the past does not mean that defendant Larson was obligated to continue prescribing the same dose of medication to plaintiff when he was transferred to the Waupun Correctional Institution. Estate of Cole v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996) ("Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference."); Snipes v. Detella, 95 F.3d 586, 591 (7th Cir. 1996) (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview").

In this case, plaintiff appears to be doing no more than disagreeing with defendant Larson's decision to reduce his methadone. Such a claim is unlikely to succeed on its merits. Furthermore, although plaintiff may experience some discomfort while receiving a lower dose of methadone, "the threatened injury" he faces does not outweigh the harm that would result were the court to order defendant to provide plaintiff with a prescription that, in defendant's medical judgment, is inappropriate. Consequently, plaintiff's motion for a preliminary injunction will be denied with respect to his request that the court order defendant Larson to increase his daily methadone dose to 120 mg.

B. Seizures

Next, plaintiff asks the court to order defendant Larson to provide him with a medical evaluation to determine the cause of seizures he avers he has been experiencing in recent months. Although defendant Larson has not examined plaintiff since the seizures allegedly began, he denies that plaintiff has had any seizures because "there is nothing in [plaintiff's] medical record to support that [the seizures were] witnessed by any medical staff or noted by any medical staff." According to defendant Larson, plaintiff's trip to the Waupun Memorial Hospital emergency room was the result of a fainting spell and not a seizure. Defendant offers no explanation for plaintiff's alleged repeat "episodes," whatever they may be.

Clearly, the parties dispute plaintiff's condition with respect to the alleged seizures. However, it is difficult to see how defendant Larson could know whether plaintiff is experiencing medical problems when he has refused to meet with plaintiff about the alleged seizures. The facts surrounding plaintiff's serious allegations must be resolved before I may rule on plaintiff's request for a preliminary injunction ordering defendant Larson to provide plaintiff with a medical evaluation to determine the cause of his recent health problems. Consequently, as I will describe in more detail below, I will schedule an evidentiary hearing on this matter to be held January 5, 2007.

C. Denial of Adaptive Equipment and Accommodations

It is entirely unclear what, if any, accommodations have been made for plaintiff at the Waupun Correctional Institution. Defendants' responses are often contradictory, vacillating between assertions that plaintiff has no need for accommodation and statements that defendant Larson has accommodated plaintiff's medical needs. Take, for example, defendant Larson's second affidavit, dkt. #22, in which Larson avers that his June 13, 2006 examination of plaintiff "did not coincide with what other providers determined" plaintiff's medical needs to be and that his "opinion [was] that these [previously diagnosed] conditions [we]re speculative." Elsewhere, however, defendant Larson avers that he has "continued to allow [plaintiff] the use of his cane, crutches and/or wheelchair" as well as "a lower bunk and lower tier restriction."

Despite these latter assertions, which imply that plaintiff has been given the accommodation he has requested, defendants do not argue in their brief that at this moment plaintiff has access to his wheelchair and crutches. Instead, defendants assert repeatedly that Larson's examination of plaintiff "did not show" the conditions of which plaintiff complains. It is not clear that a routine medical examination would be expected to reveal physical evidence of conditions such as testicular pain and bone spurs. Even if defendant Larson found no evidence of plaintiff's problems on June 13, 2006, defendants do not deny (and, in fact, themselves propose) that plaintiff is seen by a host of medical treatment providers, including a pain specialist and orthopedist. If he has no medical problems requiring

treatment or accommodation, why is he being seen by so many doctors? In the alternative, if he is being given any of the accommodations he has requested, why have defendants not moved to dismiss those claims as moot?

It may be the case, as defendants imply, that plaintiff exaggerates his medical problems in order to obtain prescription pain medication. However, from the facts plaintiff has proposed, it appears equally possible that he suffers from severe and debilitating conditions that other doctors have recognized and treated, but that defendant Larson will not. Because it is impossible to determine whether plaintiff stands any chance of success on the merits of his case without resolving first some of the many factual disputes relevant to plaintiff's claims, I will hear testimony on these questions at the January 5, 2007 hearing.

At the hearing, the parties will have the opportunity to call witnesses and present evidence on their behalf. Because plaintiff can testify to all of the relevant facts himself, a writ of habeas corpus ad testificandum will issue for him to attend the hearing. If plaintiff believes any other incarcerated person has relevant evidence to offer regarding defendant Larson's alleged refusal to provide plaintiff with needed medical accommodations, he may file a motion for issuance of a writ of habeas corpus ad testificandum for that witness. However, before the court will issue a writ of habeas corpus ad testificandum for another incarcerated individual, the court must be satisfied that the witness is willing to attend and that he has actual knowledge of relevant facts. Plaintiff can show that a prospective witness

is willing to testify by (1) submitting an affidavit in which he swears that the witness is willing to testify voluntarily (that is, without being subpoenaed) or (2) obtaining and submitting an affidavit from the prospective witness in which the witness states that he is willing to testify voluntarily. Plaintiff can show that a prospective witness had personal knowledge of the relevant facts by (1) specifying in his own affidavit the relevant facts known to the prospective witness or (2) having the prospective witness swear in an affidavit what relevant facts he witnessed. Any such motion must be filed no later than December 15, 2006, so that proper arrangements may be made to transport the witness to court. Finally, I remind plaintiff that, at the hearing, the burden of persuasion remains with him to show that he is entitled to injunctive relief. As part of this burden, plaintiff will have to show that, without injunctive relief, he will continue to experience gratuitous pain in violation of the Eighth Amendment or will be unable to access prison "services, programs, or activities," in violation of the ADA.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for a preliminary injunction is DENIED with respect to plaintiff's request for an order requiring defendant Larson to increase his methadone prescription to 120 mg each day.

2. An evidentiary hearing will be held on January 5, 2007 at 1:30 p.m. in Room 250 at the U.S. District Courthouse in Madison, Wisconsin on the remaining requests raised by plaintiff in his motion for a preliminary injunction.

3. Plaintiff may have until December 15, 2006, in which to submit any requests for issuance of writs of habeas corpus ad testificandum he may have, seeking to secure the appearance at the hearing of any incarcerated witness having first hand knowledge of defendant Larson's alleged refusal to provide plaintiff with appropriate medical care.

4. The Clerk of Court shall issue a writ of habeas corpus ad testificandum for the attendance of plaintiff, inmate Clayton Mellender (Waupun Correctional Institution), at the January 5, 2007 hearing.

Entered this 6th day of December, 2006.

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