

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

JOHN L. ALLEN,

Petitioner,

v.

GLEN HEINZL, DAVID BURNETT
and JILL HANSON,

Respondents.

OPINION and ORDER

08-cv-37-bbc

This is a proposed civil action for monetary and injunctive relief brought under 42 U.S.C. § 1983. Petitioner John L. Allen, a prisoner who is housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin, requests leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. Petitioner suffers from painful cysts in his scrotum; he asserts that respondents Glen Heinzl, David Burnett and Jill Hanson have failed to respond properly to his requests for treatment for this condition in violation of his Eighth Amendment right to adequate medical care.

Petitioner has made his initial partial payment in accordance with 28 U.S.C. § 1915. However, because petitioner is a prisoner, I am required under the 1996 Prison Litigation

Reform Act to screen his complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint and attached materials, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner John Allen is a prisoner who is housed at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondents Glen Heinzl and David Burnett are doctors who work at the New Lisbon Correctional Institution. Respondent Jill Hanson is a nurse at the New Lisbon Correctional Institution.

In 2002, while petitioner was housed at the Columbia Correctional Institution, he began to experience pain in his scrotum. At that time, he was examined by a radiologist at the University of Wisconsin Hospital, who found small cysts inside his scrotum. While petitioner was housed at the Columbia Correctional Institution, he was given the antibiotic Cipro three times for his condition, once after he had been rushed to the emergency room. The Cipro had no effect on petitioner's symptoms.

For more than five years, petitioner has been unable to run, play basketball or engage in any other strenuous physical activities because of his condition. As a result, he has gained forty pounds and has lost jobs. He walks with a limp, which causes other inmates to make fun of him. Petitioner experiences varying levels of pain and once was found lying in his cell because he was unable to walk at all. At least twice a month, petitioner “has been leaking from his penis” and has had to “literally pull his penis off of his underwear.”

Petitioner was transferred to the New Lisbon Correctional Institution in 2005. He immediately began asking for “help regarding his testicles.” On November 10, 2006, petitioner was seen at the University of Wisconsin Hospital. At that time, the doctor prescribed naproxen for petitioner’s pain and an athletic brief supporter. He recommended that petitioner have a follow-up appointment a month later.

When petitioner returned to the New Lisbon Correctional Institution, he saw respondent Hanson. He asked her whether he would be called to pick up the medication and the brief supporter that he had been prescribed. She told him he would get the medication when the institution received it and the brief supporter when he got his medication.

Two weeks went by and petitioner did not receive either the medication or the brief supporter. Petitioner asked respondent Hanson about this one morning when she was making rounds on the units. She again told him that he would get the medication and brief

support when the institution received them. A week later, petitioner still had not received the medication or the brief support and asked respondent Hanson about it again. She told him that “Apparently it has not come yet and to stop asking.” Petitioner filed a complaint about the delay in receiving his medication. This complaint was investigated and it was affirmed that there had been a delay in implementing the doctor’s orders.

On approximately December 13, 2006, petitioner received his medication. Respondent Heinzl had ordered the medication on November 13, 2006 and the order had been filled the same day.

Petitioner did not receive a brief supporter for more than five months after his appointment at the University of Wisconsin Hospital. The unit manager for the Health Services Unit at the New Lisbon Correctional Institution told him that she had used her own money to purchase it at Wal-Mart. The brief supporter “cut down a lot” of petitioner’s pain.

On January 12, 2007, petitioner was examined at the University of Wisconsin Hospital by a urology specialist. The urology specialist recommended the following tests: a CT-Scan on petitioner’s upper tracts to rule out any abnormal pathology, a CT-Urogram to check for stones, renal tumors and urethral abnormalities and a cystoscopy, because the last one had been abnormal. The specialist also recommended physical therapy to help manage petitioner’s pain.

On February 1, 2007, respondents Heinzl and Burnett held a clinical review with a

committee to consider these recommendations. They reviewed petitioner's condition, the potential risks, benefits and costs of the recommended tests and the available alternatives. The committee determined that a limited trial of physical therapy was appropriate and that because the diagnostic tests were expensive and "weighed out" in light of plaintiff's illness, it was appropriate to defer diagnostic testing "for now." When petitioner asked respondent Heinzl about this decision, Heinzl told him that the tests were not appropriate at that time because of their cost and that they would try physical therapy first to see how that went.

Petitioner began physical therapy the following week. It went on for six weeks and did not work, ultimately. The physical therapist wrote in petitioner's file to let respondent Heinzl know that the therapy had been unsuccessful. When petitioner saw respondent Heinzl in the following months, Heinzl did not want to talk to petitioner about his testicles or the outcome of his physical therapy sessions.

DISCUSSION

The Eighth Amendment to the United States Constitution 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)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence

deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106.

A “serious medical need” may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have to be life threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or it otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A delay in treatment can constitute harm under the Eighth Amendment if it causes “needless suffering.” Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007) (quoting Gil v. Reed, 381 F.3d 649, 662 (7th Cir. 2004)). “Deliberate indifference” means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner’s claim is analyzed in three parts:

- (1) Whether petitioner had a serious health care need;
- (2) Whether respondents knew that petitioner needed care; and
- (3) Whether, despite their awareness of the need, respondents failed to take reasonable measures to provide the necessary care.

Petitioner does not have to allege the facts necessary to establish each of these elements at the pleading stage, but they provide the framework for determining whether

petitioner has alleged enough to give respondents notice of his claims. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

As an initial matter, it is possible to infer that petitioner's testicular pain and its underlying cause constitute a serious medical need. Petitioner alleges that the pain was sufficiently severe that he was limited in his ability to engage in a variety of physical activities. In addition, petitioner was examined by two doctors outside the institution who recommended varying degrees of medical treatment and follow-up care including pain medication.

Therefore, I turn next to the question whether any of the named respondents were deliberately indifferent to petitioner's need for treatment for this condition. With respect to respondent Burnett, the answer is a straightforward "no." According to petitioner's complaint, the only involvement respondent Burnett had with petitioner's medical care was his participation in the clinical review. During the clinical review, a group of doctors weighed several factors related to petitioner's care and condition and determined that it was appropriate for petitioner to receive physical therapy before expensive tests were performed. Petitioner believes that this was the wrong decision. However, disagreement with a treatment decision does not give rise to a claim of deliberate indifference. Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment

decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

I turn next to petitioner's claims with respect to respondent Heinzl. To the extent petitioner's claim relies on respondent Heinzl's involvement with the clinical review committee, he will not be permitted to proceed for the reasons discussed above. However, petitioner will be permitted to proceed on his claim that respondent Heinzl's care of petitioner was inadequate *after* he learned that the physical therapy had been unsuccessful. Petitioner alleges that, even though respondent Heinzl was aware that the physical therapy had provided him with no relief, respondent Heinzl would not discuss petitioner's need for additional treatment for his testicular pain.

At this early stage of the lawsuit, it is possible to infer that respondent Heinzl's refusal to discuss or provide other treatment for petitioner for several months could constitute deliberate indifference to petitioner's serious medical need. Although petitioner will be granted leave to proceed against respondent Heinzl on this claim, he should be aware that to prevail ultimately, he will need to demonstrate that respondent Heinzl was not simply negligent in his treatment or that his treatment choice was not the one that petitioner would have preferred. To prevail on his Eighth Amendment claim, petitioner will have to show that

respondent Heinzl was aware that his failure to treat petitioner posed a substantial risk to his health or caused him unnecessary pain and that he disregarded this risk.

Finally, petitioner's claim against respondent Hanson may proceed as well. When petitioner told her that he had been prescribed medication for a painful condition and asked her how he would obtain it, respondent Hanson simply told petitioner that he would get it whenever it arrived. This went on for weeks, in spite of the fact that respondent Heinzl had ordered the medicine immediately and the order had been filled (and presumably was, in fact, at the institution). Respondent Hanson's failure to follow-up in any way to determine the whereabouts of petitioner's medication when she knew that he was in pain and that medication had been prescribed to alleviate his pain could constitute deliberate indifference.

ORDER

IT IS ORDERED that:

1. Petitioner John Allen is GRANTED leave to proceed in forma pauperis on his claims under the Eighth Amendment that (1) respondent Glen Heinzl refused to discuss or provide treatment for petitioner's testicular condition after he learned that the recommended physical therapy was unsuccessful and (2) respondent Jill Hanson deliberately delayed providing petitioner with prescribed pain medication and a brief supporter.

2. Petitioner is DENIED leave to proceed on his claims under the Eighth Amendment

that respondents Heinzl and David Burnett and the review committee improperly recommended physical therapy in place of diagnostic tests. Respondent Burnett is DISMISSED from this lawsuit.

3. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint, materials attached to it and this order are being sent today to the Attorney General for service on the state respondents.

4. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is \$336.49; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

Entered this 5th day of March, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge