

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

WILLIE C. SIMPSON,

Petitioner,

v.

DALIA SULIENE and LORI ALSUM,

Respondents.

ORDER

08-cv-054-bbc

This is a proposed civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner Willie Simpson is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. He seeks leave to proceed in forma pauperis.

Although the case is still at its beginning stages, it already has a significant procedural history. Initially, I rejected petitioner's complaint under Fed. R. Civ. P. 8 and 20 because it was unwieldy and contained unrelated claims. Dkt. #8. In addition, I noted that petitioner had struck out under § 1915(g), which prohibits prisoners from proceeding in forma pauperis "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which

relief may be granted.” I informed petitioner that if he filed an amended complaint that satisfied the federal rules, he could proceed in forma pauperis only if his claims fell under the “imminent danger” exception to § 1915(g). After petitioner filed an amended complaint, I concluded that it satisfied Rule 8 and Rule 20 because at least some of the claims satisfied the exception to § 1915(g). Dkt. #15. I directed petitioner to make an initial partial payment in accordance with 28 U.S.C. § 1915(b) and petitioner has complied with that order.

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 asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. Petitioner raises four claims in his complaint: (1) respondents refused to transport him to see a specialist in person when he complained of side effects from HIV medication in 2007; (2) respondents failed to renew one of his prescriptions for three weeks in 2007; (3) respondents are refusing to provide him with double portions of food; and (4) respondents are refusing to provide any treatment to petitioner for pancytopenia, a condition that leads to a reduction in blood cells and platelets.

Petitioner may not proceed on the first two claims in this case because both of them involve allegations of *past* harm that is not ongoing and therefore cannot fall under the

“imminent danger” exception of § 1915(g). Heimermann v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003). If petitioner wishes to assert those claims, he will have to bring a new lawsuit and pay the \$350 filing fee. Petitioner’s complaint must be dismissed as to his third claim because he has failed to state a claim upon which relief may be granted.

I will allow petitioner to proceed on his claim that respondents are refusing to treat his pancytopenia. Once respondents have been served with petitioner’s complaint and filed an answer, I will schedule a hearing.

Petitioner alleges the following facts in this complaint. As I explained to petitioner in a previous order, dkt. #15, I have disregarded the many attachments to his complaint. If I considered them to be part of his allegations, his complaints would fail to satisfy the requirements of Rule 8. In addition, I have disregarded any allegations that do not relate to his claims against respondents.

ALLEGATIONS OF FACT

Petitioner Willie Simpson is a prisoner at Columbia Correctional Institution in Portage, Wisconsin. Petitioner has been diagnosed with “HIV/AIDS” and pancytopenia, a condition that causes a reduction in blood cells and platelets.

A. Failure to Refer to Specialist and Failure to Treat Pancytopenia

From February 2007 to August 2007, petitioner was prescribed Kaletra, Norvic and Truvada by his “HIV/AIDS specialist Dr. Urban in Madison.” Petitioner experienced side effects from these drugs, including stomach pain, dizziness, vomiting, muscle and bone weakness and swelling. Petitioner was unable to inform Dr. Urban of these symptoms immediately because respondents Dalia Suliene and Lori Alsum refused to schedule an appointment. Suliene is a doctor at the prison; Alsum is the health services manager.

In May 2007, petitioner had a “telamed” conference with Dr. Urban. When petitioner complained that he could not tolerate his current medications, Urban said “he could do nothing over the TV.” However, Urban stopped petitioner’s prescription for Kaletra and “ordered” that he be treated by a hematologist for his pancytopenia. Despite receiving these instructions, respondents refused to refer petitioner to a hematologist or provide any treatment for his pancytopenia.

B. Failure to Refill Prescription

On November 10, 2007, petitioner filed a health services request for a renewal of his Truvada prescription.¹ When he did not receive a refill, he filed a follow-up request on

¹ In his complaint, petitioner says that “10-11-07” is the date he submitted a health services request. I believe that petitioner inadvertently transposed the day and the month of the date. Later in his complaint, he alleges that he was without Truvada “for over 3 weeks.” According to his own allegations, petitioner did not receive a new Truvada

November 13. He received a response on November 15 that was initialed by respondent Suliene but he “hardly understood” it. Truvada must be taken consistently; if it is stopped for even a short time, it may become ineffective to treat HIV. Petitioner was experiencing the following symptoms during this time: skin rashes, swollen lymph nodes and pain in his feet and joints.

On November 19, an inmate complaint examiner directed petitioner to address his concern with respondent Alsum. Petitioner “complied with [the inmate complaint examiner’s] directive.”

On November 20, petitioner received an HIV medication called Atripla, which had been prescribed for him by respondent Suliene. Atripla contains the same ingredients as Sustiva, a medication that petitioner had received previously. While petitioner was taking Sustiva he suffered from “suicidal thoughts, dizziness, trouble concentrating, depression, violent dreams of killing people and eating their guts and killing [him]self.” Dr. Urban discontinued the Sustiva prescription because it could cause petitioner “to commit suicide due to [his] mental illness” and told petitioner not to take Sustiva again.

On November 21, petitioner received a letter from “HSU,” stating that Atripla and Sustiva are “the same.” A week later, petitioner learned that respondent Suliene had ordered

prescription until after November 29, 2007. If October 11 were the correct date, the alleged deprivation would have been much longer than three weeks.

the Atripla prescription but had not consulted with Dr. Urban before doing so. Further, she said that if petitioner refused the medication, he would not receive anything else. Petitioner refused to take the Atripla because of his fear of the side effects. Respondents Alsum and Suliene knew that Atripla and Truvada were not the same medication.

On November 27, petitioner wrote both respondent Suliene and respondent Alsum, expressing his displeasure with the decision to discontinue his Truvada prescription. Alsum responded in a letter, acknowledging that petitioner was refusing to take Atripla and stating that Atripla and Truvada are the same drug with different brand names.

Petitioner filed a grievance and an appeal when the grievance was denied. Respondent Alsum then changed her explanation in a response dated November 29, admitting that Atripla and Truvada were not the same and stating that petitioner received the wrong medication because there had been a “pharmacy labeling error.” Alsum contacted Dr. Urban and he ordered a new Truvada prescription.

C. Double Food Portions

Wasting is a symptom of HIV that causes weight loss. Beginning in April 2002, Dr. Urban had ordered double portions of food for petitioner to treat petitioner’s wasting symptoms. Respondents Suliene and Alsum withdrew the order for double portions on July 5, 2007. However, correctional officers continued to provide him double portions until

January 22, 2008. After petitioner filed a health services request, respondent Suliene told petitioner that he did not need double portions because his "weight is ok right now." Respondent Alsum concurs with Suliene. Since he stopped receiving extra food, petitioner suffers from hunger pains.

DISCUSSION

Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). 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 "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir.1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir.1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "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 has three elements:

- (1) Did petitioner need medical treatment?
- (2) Did respondents know that petitioner needed treatment?
- (3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

A. Failure to Treat Pancytopenia

Although petitioner does not allege many facts regarding the nature of pancytopenia, it is reasonable to infer that serious health consequences could follow if his blood cells and platelets fall below a certain level. Further, it may be inferred reasonably that petitioner had a serious medical need because the specialist ordered further treatment. Johnson v. Snyder, 444 F.3d 579, 584 -585 (7th Cir. 2006) (serious medical needs include conditions “that has been diagnosed by a physician as mandating treatment”).

With respect to the elements regarding respondents’ knowledge of his serious medical need and their response to it, petitioner alleges that respondents know he has the condition, but have refused to provide him with *any* treatment. Normally, no response is not a reasonable response. E.g., Haley v. Gross, 86 F.3d 630, 643 (7th Cir. 1996). See also Gil v. Reed, 381 F.3d 649, 664 (7th Cir. 2004) (prison doctors’ refusal to follow specialist’s orders may be evidence of deliberate indifference). It may be that respondents disagree with the specialist’s diagnosis or believe that no effective treatment is available, but that is a

question that must be answered on a more fully developed record in the context of a motion for summary judgment or at trial.

B. Double Food Portions

_____Petitioner has pleaded himself out of court on his claim that respondents are violating his Eighth Amendment rights by refusing to give him double portions of meals. Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004) (complaint may be dismissed for failure to state claim if facts alleged show that petitioner cannot prevail). He concedes that respondents withdrew the order for double portions because his weight has stabilized. He does not deny that his weight is at a safe level, but he speculates that it might not be in the future. This is insufficient. The Eighth Amendment guarantees a right to be protected from substantial risks of serious harm, not theoretical possibilities that a risk of harm could arise at some point in the future. If and when petitioner's health requires him to receive additional food and prison officials refuse to take reasonable measures, he may bring a claim.

C. Motion for a Preliminary Injunction

Petitioner seeks preliminary injunctive relief with respect each of the claims in his complaint. (He also raises new issues in his motion that are not part of his complaint; I have disregarded those.) The motion is moot with respect to all of the claims I am dismissing.

With respect to the remaining claim that respondents are not treating his pancytopenia, I will schedule a hearing on petitioner's motion as soon as respondents file an answer to the complaint.

At the evidentiary hearing, it will be plaintiff's burden to prove that he has a reasonable probability of proving at trial his claim that he faces an immediate threat of harm to his health and that he will be irreparably harmed if an injunction does not issue. Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). If plaintiff makes both of these showings, the court will allow the parties to introduce evidence on the questions whether the threatened injury plaintiff faces outweighs the threatened harm an injunction may inflict on defendants and whether the granting of a preliminary injunction will disserve the public interest.

I have attached to this order the court's procedures for obtaining a preliminary injunction. Under these procedures, petitioner must file with the court and serve on respondents proposed findings of fact supporting his claim. He should submit his proposed findings of fact and any underlying evidence he has no later than June 9, 2008. (Petitioner has submitted a brief to the court, which will be forwarded to respondents, so he need not file or serve a brief in support of his motion.) Respondents may have 15 days from the date they file their answer in which to file a response to petitioner's brief and any proposed findings of fact.

ORDER

IT IS ORDERED that

1. Petitioner Willie Simpson is GRANTED leave to proceed on his claim that respondents Dalia Suliene and Lori Alsum are denying him treatment for pancytopenia, in violation of his Eighth Amendment right to medical care.

2. Petitioner is DENIED leave to proceed on his claim that respondents are denying him double food portions for his failure to state a claim upon which relief may be granted. The complaint is DISMISSED with prejudice as to this claim.

3. Petitioner is DENIED leave to proceed on his claims that (1) respondents refused to transport petitioner to a see a specialist in person when he complained of side effects from HIV medication; (2) respondents failed to renew one of his prescriptions for three weeks. These claims do not fall within the “imminent danger” exception to § 1915(g). As to these claims, the complaint is DISMISSED without prejudice to petitioner’s refiling them in another lawsuit after petitioner pays the \$350 filing fee.

4. Petitioner’s “motion for status,” dkt. #23, is DENIED as unnecessary. Any questions petitioner has about the status of his case should be answered by this order.

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. Petitioner is obligated to pay the remaining balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2).

7. Petitioner's "motion [for] proceeding pursuant to Fed. R. Civ. P. 4(d)(4)," dkt. #24, is DENIED as unnecessary. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's amended complaint, dkt. #12, his motion for a preliminary injunction, dkt. #18, supporting affidavit, dkt. #27, and this order are being sent today to the Attorney General for service on the state respondents.

8. Petitioner may have until June 9, 2008 to file and serve proposed findings of fact and any evidence he has supporting his motion for a preliminary injunction with respect to his claim that respondents are denying treatment for pancytopenia. Respondents may have 15 days from the day they file their answer to file a response to petitioner's motion.

Entered this 8th day of May, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge