

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

JEREMIAH J. LAMBERT,

Petitioner,

OPINION and ORDER

v.

09-cv-212-bbc

CORRECTIONAL OFFICER KUTINA,
CORRECTIONAL OFFICER RAYMER
and Nurse KOREEN FRISK,

Respondents.

In this proposed prisoner civil rights action brought under 42 U.S.C. § 1983, petitioner Jeremiah Lambert contends that respondents Kutina, Raymer and Frisk violated his rights under the Eighth Amendment by failing to provide him with treatment for his asthma. Petitioner requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. In a previous order, I concluded that petitioner was indigent and directed him to make an initial partial payment in accordance with § 1915(b)(1), which the court has received.

Because plaintiff 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. Having reviewed petitioner's complaint, I conclude that he has stated a claim upon which relief may be granted under the Eighth Amendment with respect to each of the respondents.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). In his complaint, petitioner fairly alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Jerimiah Lambert has suffered from asthma since he was a child. On December 5, 2008, he was incarcerated at the New Lisbon Correctional Institution in temporary lockup. Before dinner, petitioner "began to wheeze and had slight difficulty breathing." He spoke to an officer, who told petitioner that he would "see" whether he could get petitioner's inhaler, but the officer did not return.

Petitioner fell asleep. When he woke up, he was wheezing again and he felt "his chest getting tight." He pressed the emergency call button in his cell. When an officer answered the call, petitioner said that he needed his inhaler. The officer told petitioner that he would "check on it."

Respondent Kutina, a correctional officer, came to petitioner's cell "sometime later," telling petitioner, "The nurse says your medication prescription is expired." (Respondent

Koreen Frisk is the nurse to whom Kutina was referring.) When petitioner told Kutina he had received a new inhaler “not too long ago,” Kutina said he would “look into it.” Kutina returned later, stating, “There’s nothing I can do for you. If you want an inhaler, the nurse says you have to fill out an HSU slip.” When petitioner asked to see the nurse, Kutina said that she had left at 10:30 pm. (Frisk was “aware” of petitioner’s “medical situation,” but she left anyway.) Petitioner informed Kutina that he “really need[ed]” his inhaler, but Kutina repeated that there was nothing he could do.

Petitioner asked for an “HSU form,” which Kutina provided at 11:57 pm. When Kutina picked up the completed form about an hour later, petitioner said, “My asthma is not just going to get better and it’s not going to go away on its own.” Kutina said, “I understand,” before walking away.

During the night, petitioner had greater difficulty breathing. He had to lie on the floor, placing his mouth against the air vent so that he could breathe. Petitioner was afraid that he would die alone in his cell.

In the morning, petitioner spoke with respondent Raymer, another correctional officer, as he was passing out medication. When petitioner said, “I really need my inhaler,” Raymer said that a nurse would arrive between 8 am and 9 am. (Petitioner does not say what time he spoke with Raymer.) Petitioner “briefly explained the prior events of the night,” but Raymer said, “There’s nothing I can do for you,” and walked away.

Petitioner received a new inhaler at 11:15 am on December 6.

As a result of respondents' actions, petitioner suffered "physical pain and mental anguish." He still experiences "panic attacks and recurring nightmares."

DISCUSSION

I understand petitioner to contend that respondents violated his right to medical care by failing to help him when he was having an asthma attack. 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 significant 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 are aware that the prisoner needs medical treatment, but are disregarding 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?

I conclude that petitioner has alleged the minimum facts necessary to state a claim under the Eighth Amendment against respondents. With respect to the question whether petitioner had a serious medical need, asthma "can be, and frequently is, a serious medical condition, depending on the severity of the attacks." Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005); see also Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir. 2001) ("Asthma, depending upon its degree, can be a serious medical condition."). In this case, petitioner alleges that it was so difficult for him to breathe that he had to place his mouth up against the air vent, which supports a conclusion that he had a serious medical need.

It is a closer question whether petitioner has alleged enough facts to suggest that each of the respondents *knew* that petitioner's situation was so urgent that it could not wait until the next morning or until the nurse arrived. Petitioner alleges that respondents were "aware" of his "medical situation" or that he told them he "needed" (or "really needed") his inhaler. Although petitioner leaves out many details that would be helpful in assessing his claim, under Fed. R. Civ. P. 9(b), "knowledge and intent may be pleaded generally (which is to say,

in a conclusory fashion).” Burks v. Raemisch, 555 F.3d 592, 594 (7th Cir. 2009). Accordingly, I conclude that it is plausible to infer from petitioner’s allegations that respondents knew he needed immediate treatment, or at least that they failed to investigate a situation that they knew could be serious. Farmer v. Brennan, 511 U.S. 825, 843 (1994) (defendant may “not escape liability if the evidence show[s] that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist”); McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991)(“Going out of your way to avoid acquiring unwelcome knowledge is a species of intent.”)

Of course, stating a claim is much easier than proving a claim. At summary judgment or trial, it will not be enough for petitioner to say that he had difficulty breathing and asked for his inhaler. Rather, petitioner will have to come forward with specific evidence showing that his asthma attack was so serious that it required immediate treatment *and* that respondents were aware of the need and disregarded it. E.g., Williams v. Rodriguez, 509 F.3d 392, 402 (7th Cir. 2007) (at summary judgment, asthmatic plaintiff’s statements that he “needed [his] medication,” and “can’t breathe” were not enough to show that defendants knew he had a serious medical need in light of plaintiff’s failure to adduce evidence that he “was exhibiting physical symptoms reflective of an asthma attack”).

Finally, accompanying petitioner’s complaint is a motion for appointment of counsel.

The Court of Appeals for the Seventh Circuit has held that before a district court can consider such motions, it must first find that the petitioner made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). To prove that he has made reasonable efforts to find a lawyer, petitioner must give the court the names and addresses of at least three lawyers who he asked to represent him in this case and who turned him down. Because petitioner has not complied with that requirement, his motion will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Jerimiah Lambert is GRANTED leave to proceed on his claim that respondents Kutina, Raymer and Koreen Frisk failed to provide him with medical care in violation of the Eighth Amendment.

2. 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 learns the name of the lawyer who will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to respondents or to respondents' attorney.

3. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of their documents.

4. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on defendants.

Entered this 30th day of April, 2009.

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