

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

JIMMY BRIDGES,

Plaintiff,

v.

HOLLY GUNDERSON, DR. PAUL
SUMNIGHT, BELINDA SCHRUBBE,
CYNTHIA THORPE, and RICK
RAEMISCH,

Defendants.

OPINION AND ORDER

10-cv-534-bbc

Plaintiff Jimmy Bridges filed this civil action under 42 U.S.C. § 1983, alleging that defendants Holly Gunderson, Dr. Paul Sumnicht, Belinda Schrubbe, Cynthia Thorpe, and Rick Raemisch denied him adequate medical treatment for chronic knee pain while incarcerated at the Waupun Correctional Institution. Now before the court is defendants' motion for summary judgment, in which defendants contend that no reasonable finder of fact could conclude from the evidence in the record that they were deliberately indifferent to plaintiff's serious medical needs. Dkt. #32. Plaintiff has not filed a response and his extended deadline to do so has expired.

Plaintiff filed his civil rights complaint on September 17, 2010, and was granted leave to proceed in forma pauperis on his claims against defendants Sumnicht, Schrubbe, Thorpe, Gunderson and Raemisch on November 3, 2010. Dkt. #6. Plaintiff alleged that these defendants were liable for civil rights violations under 42 U.S.C. § 1983 for the following reasons: (1) by refusing to authorize knee surgery in April 2010, defendant Sumnicht denied him adequate care for a serious medical condition; (2) as health services manager at Waupun Correctional Institution, defendant Schrubbe was aware of plaintiff's need for surgery, but failed to intervene on his behalf; (3) defendants Thorpe and Gunderson rejected his grievances regarding the denial of surgery and refused to help him; and (4) defendant Raemisch was responsible for the denial of adequate medical care because, in deciding plaintiff's administrative appeal, he simply affirmed the adverse decisions made by Thorpe and Gunderson.

I conclude that defendants' motion must be granted. The record does not contain evidence showing that plaintiff was denied adequate care or that any defendant exhibited deliberate indifference to any serious medical need he had. Therefore, defendants are entitled to summary judgment on all of plaintiff's claims. Fed. R. Civ. P. 56(a) (summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

Before turning to the facts, a word about procedure is in order. Plaintiff was provided

a set of written instructions on how to respond to a motion for summary judgment. Those instructions informed plaintiff that he had “30 calendar days” to file a response to any motion for summary judgment in this case. Preliminary Pretrial Conference Order, at 5, dkt. #13. After defendants moved for summary judgment, plaintiff requested and received an extension of time in which to respond, up to and including January 28, 2012. Dkt. #41. To date, plaintiff has not filed a response or disputed any of the facts proposed by defendants. Plaintiff was advised that, if he failed to respond to a fact proposed by the opposing party, I would accept the opposing party’s proposed fact as undisputed. Memorandum to Pro Se Litigants Regarding Summary Judgment Motions, attached to Preliminary Pretrial Conference Order, dkt. #13.

From the pleadings, the records and proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Between 2005 and 2010, plaintiff Jimmy Bridges was in and out of the custody of several different facilities operated by the Wisconsin Department of Corrections. The issue in this case concerns plaintiff’s allegation that he was denied adequate medical care for chronic knee pain while he was in custody at the Waupun Correctional Institution in 2010.

Defendant Dr. Paul Sumnicht is a board certified physician who has been employed

by the Department of Corrections at the Waupun Correctional Institution since 2007. Defendant Belinda Schrubbe is a registered nurse who has been employed by the Department of Corrections as a health services manager at the Waupun Correctional Institution Health Services Unit or infirmary since 1996. At all times relevant to the complaint, defendants Cynthia Thorpe and Holly Gunderson worked as nursing coordinators for the Department of Corrections Bureau of Health Services. Defendant Rick Raemisch was Secretary of the Department of Corrections from September 2007 through January 2011.

Medical records show that plaintiff began to complain of pain in his right knee in early 2005, while he was incarcerated at the Wisconsin Secure Program Facility in Boscobel. On June 21, 2005, plaintiff had a consultation for his knee pain with a specialist at the University of Wisconsin Orthopedic Clinic. The specialist noted a small bone spur at the knee joint, characterizing the problem as “a 3-mm long bony outgrowth at the tibial tubercle which may represent old Osgood-Schlatter disease or chronic traction spurring.” Osgood-Schlatter disease is characterized by “inflammation of the growth center . . . that forms the tibial tubercle.” Stedman’s Medical Dictionary 562 (28th ed. 2006). The specialist recommended stretching exercises and prescribed anti-inflammatory medication “as needed” for pain.

Plaintiff had a followup consultation at the UW Orthopedic Clinic on December 6,

2005. The specialist prescribed ibuprofen and suggested that plaintiff “consider” an MRI of the right knee. The specialist also suggested that plaintiff consider surgery to remove the “overgrowth of tibial tuberosity” on that knee. In response to this recommendation, the Department of Corrections approved surgery for plaintiff’s knee on December 19, 2005.

Although the procedure was approved, plaintiff was not scheduled for surgery immediately. It is not unusual for patients to wait substantial periods of time for “non-emergency” appointments in light of the demand for services and the availability of clinicians at the UW Hospital and the Orthopedic Clinic in Madison. Because the surgical procedure was classified as a non-emergency, plaintiff’s next consultation at the UW Orthopedic Clinic did not occur until August 18, 2006. At that appointment, the specialist recommended medication and physical therapy before performing any surgery. Plaintiff agreed and expressed a desire to pursue “conservative treatment first and physical therapy before having to undergo surgery.”

Plaintiff began physical therapy in September 2006 and completed six sessions at Boscobel Area Health Care. He returned to the UW Orthopedic Clinic on December 8, 2006, where the specialist ordered diagnostic testing in the form of magnetic resonance imaging (an MRI) to prepare for “probable surgery.” The MRI revealed no tears or ligament damage, but disclosed a “small focus of enthesopathy of the tibial tuberosity.” Enthesopathy is a “disease process occurring at the site of insertion of muscle tendons and ligaments into

bones or joint capsules.” Stedman’s Medical Dictionary at 649. Because there was “no adjacent bone marrow edema” or swelling, the specialist concluded that this finding was “incidental,” and was “probably not the cause of the patient’s pain.” The specialist observed no other defects and concluded further that it was an “[o]therwise unremarkable MRI of the knee.”

Plaintiff returned for a followup consultation at the UW Orthopedic Clinic on March 16, 2007. Noting that plaintiff had completed conservative treatment without significant improvement, the examining physician opined that it would be “reasonable to consider a surgical debridement.” The physician said he would review plaintiff’s case with a sports specialist and that, if surgical intervention was deemed appropriate by the specialist, the UW Orthopedic Clinic would “go ahead and schedule [plaintiff] for a return visit for preoperative work up.”

Thereafter, on March 19, 2007, plaintiff resumed physical therapy at Boscobel Area Health Care, where he completed four additional sessions in April 2007, including therapeutic exercises and manual therapy. During this time, plaintiff also received treatment for pain, including a cortisone injection, on May 4, 2007. On May 21, 2007, plaintiff submitted a Health Services Request to inquire about surgery. Plaintiff’s treating physician at the prison responded that he had not heard from the UW Orthopedic Clinic and that he did not “know what the hold-up was.”

Eventually, a preoperative appointment was scheduled for plaintiff at the UW Orthopedic Clinic. That preoperative appointment was set to take place on September 21, 2007, with surgery projected to occur on October 19, 2007. On July 7, 2007, plaintiff was released from prison onto parole supervision. Plaintiff pursued further treatment for his knee at the UW Orthopedic Clinic after his release from prison and he met with a physician on September 13, 2007 regarding the surgery. Plaintiff canceled his preoperative appointment, however, and did not have the surgery for reasons that plaintiff does not disclose.

Plaintiff returned to prison the following year, in August 2008, upon the revocation of his parole. Upon his return to custody, plaintiff promptly submitted several Health Service Requests at the Green Bay Correctional Institution, where he was housed. In particular, plaintiff requested medical care for his right knee and asked that surgery be rescheduled at the UW Orthopedic Clinic. Health care personnel at the Green Bay Correctional Institution advised him that because he had recently returned to custody, he would have to schedule an appointment with a physician for a new evaluation. This response was consistent with administrative policy.

Records reflect that plaintiff's knee was evaluated anew by health care personnel at the Green Bay Correctional Institution. An x-ray of plaintiff's right knee on November 20, 2008 revealed no fracture or problem with alignment and the soft tissues appeared normal.

Plaintiff did not request additional treatment for his knee. He was released on parole again on March 3, 2009. The record contains no evidence showing that plaintiff pursued any treatment for his knee following this release from custody.

On November 20, 2009, plaintiff's parole was revoked again and he returned to prison. On December 21, 2009, plaintiff requested medical treatment for a foot injury that he had suffered at the Dodge Correctional Institution, where he was assigned at the time. Plaintiff reportedly injured his foot when he "landed wrong" while playing basketball. Plaintiff was given acetaminophen and ice for pain, along with an ace wrap bandage, and he was instructed to elevate his sore foot. Plaintiff did not mention knee pain at this time.

Plaintiff received additional treatment for his injured foot on January 2, 2010. On this occasion, plaintiff complained that he had pain in his foot and knee as the result of his basketball injury. Plaintiff was given Tylenol for pain, a crutch to help him walk and instructed to request a followup appointment with a physician if pain continued. In early February, staff at the Dodge Correctional Institution observed plaintiff playing basketball.

Plaintiff was transferred to the Waupun Correctional Institution on February 22, 2010. A nurse examined him there on February 26, 2010, after he complained of pain in his right knee, and referred him to a physician for further evaluation. Defendant Sumnicht examined plaintiff on March 18, 2010. Plaintiff told Sumnicht that he had hurt his knee playing basketball and mentioned the injury that had occurred on December 21, 2009.

Sumnicht evaluated the knee for traumatic injury, but found no torn internal knee ligaments and no patellar grating or other deformities. He ordered an x-ray and further evaluation for physical therapy. The x-ray was taken on March 22, 2010. It was normal, showing no fractures, dislocations, or lesions (“lystic or blastic”) on plaintiff’s right knee or any “intraarticular calcifications, foreign bodies, or any soft tissue abnormalities, and the joint space [was] well maintained.”

Plaintiff returned to the clinic with complaints of knee pain on April 9, 2010. A nurse referred plaintiff to defendant Sumnicht and extended plaintiff’s crutch restriction. Sumnicht saw plaintiff on April 14, 2010. He discussed the the results of plaintiff’s recent x-ray and reevaluated his knee. Sumnicht observed no damage to the interior or exterior knee ligaments. He ordered a series of lab tests to rule out arthritis, infections, nutritional deficiency and muscle disease as the source of plaintiff’s pain. In addition, Sumnicht prescribed Voltran gel, Tylenol and ice for pain. Sumnicht also continued plaintiff’s restriction for crutches, although he noted that plaintiff’s gait was “good.”

On April 19, 2010, plaintiff completed the physical therapy evaluation requested by defendant Sumnicht. The physical therapist noted that plaintiff walked with a “significant limp,” but he observed no deformity, dislocation or swelling. The therapist determined that plaintiff’s right knee dysfunction was consistent with patellar tendinitis.

On April 28, 2010, plaintiff filed an administrative grievance against defendant

Sumnicht through the Inmate Complaint Review System, objecting objected to Sumnicht's purported refusal to approve orthopedic surgery on plaintiff's right knee. On April 29, 2010, plaintiff filed an identical grievance, which was treated as a duplicate.

Plaintiff's grievances against defendant Sumnicht were assigned to an Institution Complaint Examiner at the Waupun prison facility. While his grievances were being investigated, plaintiff saw Sumnicht again on May 3, 2010, for a followup examination. During that appointment, Sumnicht advised plaintiff that the results of his lab tests were normal. Sumnicht reexamined plaintiff's right knee on that occasion and observed that the tendons were "thick [and] inflamed," but that the knee was "otherwise stable."

On May 12, 2010, the Institution Complaint Examiner recommended dismissing plaintiff's administrative grievances against defendant Sumnicht. In a written report to the reviewing authority, the Institution Complaint Examiner observed that plaintiff was receiving care and that, although plaintiff was not satisfied with the care being offered, the type of specific care or treatment that "must be offered is a matter of professional medical judgment." The report noted also that Sumnicht continued to address plaintiff's concerns and "would schedule surgery if and when it is medically necessary."

The Institution Complaint Examiner forwarded his report to a supervisory official designated as an appropriate reviewing authority. Because plaintiff's administrative grievances against defendant Sumnicht concerned a medical issue, defendant Cynthia

Thorpe was designated as the appropriate reviewing authority. On May 17, 2012, Thorpe followed the Institution Complaint Examiner's recommendation and dismissed plaintiff's grievances.

Plaintiff promptly appealed Thorpe's adverse decision to the next level of administrative authority, the Corrections Complaint Examiner. While his appeal was pending, plaintiff continued to receive care at the Waupun Correctional Institution Health Services Unit. Plaintiff saw defendant Sumnicht again on May 26, 2010. During that examination, Sumnicht recommended more physical therapy and he prescribed vitamin D with magnesium oxide. Sumnicht also requested an updated MRI of plaintiff's right knee.

On June 2, 2010, the Corrections Complaint Examiner rejected plaintiff's appeal and recommended dismissing plaintiff's administrative grievances against defendant Sumnicht. The Correctional Complaint Examiner transferred this recommendation along with a copy of plaintiff's administrative grievances for consideration by the Office of Secretary for the Department of Corrections.

Plaintiff reported to the Waupun Correctional Institution Health Services Unit again on June 8, 2010, complaining that the Voltran gel was causing pain and swelling. The nurse instructed plaintiff to discontinue using Voltran gel and she issued an analgesic balm instead. The nurse also scheduled a followup appointment for plaintiff with defendant Sumnicht. Meanwhile, plaintiff completed six physical therapy sessions in June and July of 2010. After

plaintiff's final session on July 9, 2010, the physical therapist observed that plaintiff's knee pain remained persistent. The physical therapist also referred plaintiff to Sumnicht for further treatment.

Defendant Sumnicht conducted a followup examination with plaintiff on July 16, 2010. During that appointment, plaintiff demanded surgery on his right knee. Sumnicht acknowledged that physical therapy had not helped and he discontinued the prescription for vitamin D, but he declined plaintiff's request for surgery. Instead, he ordered a chest x-ray and lab tests to rule out inflammatory arthritis and sarcoidosis, which is an autoimmune disease that can attack connective tissue and large lymph nodes, causing body aches.

On July 24, 2010, a deputy secretary of the Department of Corrections adopted the Corrections Complaint Examiner's recommendation and dismissed plaintiff's administrative grievances against defendant Sumnicht. Shortly thereafter, plaintiff had a followup examination with Sumnicht on August 17, 2010. Sumnicht did not order any new treatment at that time because he had not received the results of plaintiff's lab tests for sarcoidosis. Shortly after the August 17, 2010 appointment, plaintiff's lab tests came back normal. The results of plaintiff's chest x-ray also were normal. Plaintiff was released from prison on November 9, 2010.

OPINION

Plaintiff complains that the defendants denied him adequate medical care in violation of the Eighth Amendment to the United States Constitution. Prison officials violate the Eighth Amendment if they are “deliberately indifferent to prisoners’ serious medical needs.” Arnett v. Webster, 658 F.3d 742, 750 (7th Cir. 2011) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The Eighth Amendment deliberate indifference standard has both an objective and subjective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). To survive summary judgment on his Eighth Amendment claim, plaintiff must submit evidence showing: (1) that his knee pain constituted an objectively serious medical condition; and (2) that defendants were subjectively “aware of the condition and knowingly disregarded it.” Ortiz v. Webster, 655 F.3d 731, 734 (7th Cir. 2011) (citing Farmer, 511 U.S. at 837; Duckworth v. Ahmad, 532 F.3d 675, 679 (7th Cir. 2008)).

It is undisputed that chronic pain presents an objectively serious medical condition. Gonzalez v. Feinerman, 553 F.3d 311, 314 (7th Cir. 2011) (citations omitted). Defendants contend, however, that there is no evidence of deliberate indifference to plaintiff’s medical needs. In particular, defendants maintain that Sumnicht’s decision to order diagnostic tests and additional physical therapy was reasonable and not deliberately indifferent to plaintiff’s condition. Thus, the inquiry focuses on the subjective prong of the Eighth Amendment deliberate indifference standard.

To meet the subjective component of the deliberate indifference standard, “a plaintiff must show that the defendant ‘acted with a sufficiently culpable state of mind,’ something akin to recklessness.” Arnett, 648 F.3d at 751 (quoting Johnson v. Snyder, 444 F.3d 579, 584 (7th Cir. 2006)). “A prison official acts with a sufficiently culpable state of mind when he either knows of a substantial risk of harm to an inmate and either acts or fails to act in disregard of that risk.” Arnett, 648 F.3d at 751 (citing Roe v. Elyea, 631 F.3d 843, 857 (7th Cir. 2011)). Allegations of mere negligence or medical malpractice are not enough; rather, “deliberate indifference ‘is more than negligence and approaches intentional wrongdoing.’” Arnett, 648 F.3d at 751 (quoting Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998)). “A jury can infer deliberate indifference on the basis of a physician’s treatment decision [when] the decision [is] so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment.” Arnett, 648 F.3d at 751 (quoting Duckworth v. Ahmad, 532 F.3d 675, 679 (7th Cir. 2008)) (alterations in original). A plaintiff satisfies this showing if he establishes that a physician’s response was “so inadequate that it demonstrated an absence of professional judgment, that is, that ‘no minimally competent professional would have so responded under those circumstances.’” Arnett, 658 F.3d at 751 (quoting Roe, 631 F.3d at 857). In this context, a plaintiff can prevail “if the treatment received was ‘so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition.’” Arnett, 658 F.3d at 751 (quoting

Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005)). Plaintiff has not made that showing.

Plaintiff contends that defendant Sumnicht was deliberately indifferent by pursuing diagnostic tests and a physical therapy evaluation, rather than authorizing the knee surgery that had been approved by the Department of Corrections in 2005, upon the recommendation of a consulting specialist at the UW Orthopedic Clinic. Plaintiff must show more than this to prove that defendant Sumnicht was deliberately indifferent to his serious medical need. A mere disagreement about treatment does not amount to deliberate indifference. Ciarpaglini v. Saini, 352 F.3d 328, 331 (7th Cir. 2003) (prisoner who alleged deliberate indifference had no Eighth Amendment claim when he had been seen by doctor ten times in three months). At the most, it might constitute medical malpractice, in which case plaintiff could sue in state court. Estelle v. Gamble, 429 U.S. 97, 107 (1976). The Department of Corrections does not require physicians to follow the recommendations of consulting physicians; the doctors must make their own judgments about treatment. Sumnicht Aff., dkt. #38, at ¶ 8. “A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.” Id. In this case, defendant Sumnicht made a medical judgment that knee surgery was not warranted for plaintiff. Plaintiff has not shown that this judgment was so utterly lacking in support as to constitute deliberate indifference under the Eighth Amendment.

On March 18, 2010, plaintiff told Sumnicht him that “he hit his knee playing

basketball a few months back, and was given a crutch to use while walking.” Although the reference to playing basketball might have given Sumnicht reason to think that the surgery recommended in 2005 had never been necessary, he examined plaintiff’s knee for obvious signs of traumatic injury and ordered diagnostic tests, including an x-ray and a physical therapy evaluation. He reevaluated plaintiff’s knee at a followup appointment on April 14, 2010. Because plaintiff’s x-ray was normal and he observed no signs of a traumatic knee injury, Sumnicht ordered blood and other lab tests to rule out other conditions that could have been the source of plaintiff’s knee pain, such as arthritis, infections, nutritional deficiency and muscle disease. While waiting for the test results, Sumnicht prescribed medication, ice and crutches for pain relief. Later, in July of 2010, Sumnicht authorized additional tests to rule out sarcoidosis and other inflammatory diseases that could have been the cause of plaintiff’s problem. Sumnicht explains in his affidavit that he could not render a “[c]hronic pain diagnosis . . . until all treatable diseases had been evaluated first.” Sumnicht insists that, “[b]ased on [his] professional judgment and expertise, surgery was not medically necessary for the treatment of [plaintiff’s] knee pain because his knee was functioning well without deformity or instability.” Sumnicht contends further that he did not refuse plaintiff medical treatment for his knee and that he used his “best medical judgment to decide upon a course of treatment” to address plaintiff’s complaints of pain.

The record forecloses any finding that plaintiff’s treatment was constitutionally

inadequate. Much as plaintiff argues that defendant Sumnicht should have authorized surgery, he cannot point to anything in the record that could establish that Sumnicht's decision to conduct additional diagnostic tests was blatantly inappropriate or far below the general standard of care. Plaintiff's own say-so about what qualifies as appropriate medical treatment is not enough. It follows that plaintiff cannot prevail on his Eighth Amendment claim against Sumnicht.

The defendants argue correctly that plaintiff's remaining claims fail because neither defendant Schrubbe nor defendant Thorpe had authority to intervene with the level of care provided by defendant Sumnicht. The defendants note also that the record contains no evidence showing that defendants Gunderson or Raemisch had any personal involvement in plaintiff's medical care or the investigation of his grievances. Plaintiff does not dispute defendants' arguments or proposed findings of fact. Even assuming that these defendants had the requisite personal involvement with plaintiff's medical treatment or the authority to intervene, plaintiff fails at the outset because he has not shown that defendant Sumnicht exhibited deliberate indifference to his medical needs in violation of the Eighth Amendment. This is fatal to plaintiff's claims against the remaining defendants. Fillmore v. Page, 358 F.3d 496, 506 (7th Cir. 2004) (reasoning that "there was no constitutionally impermissible failure to intervene because there was no violation that compelled intervention"). Accordingly, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that motion for summary judgment, dkt. #32, filed by defendants Holly Gunderson, Dr. Paul Sumnicht, Belinda Schrubbe, Cynthia Thorpe and Rick Raemisch is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 11th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge