IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BRIAN PHEIL,

OPINION AND ORDER

Plaintiff,

10-cv-659-bbc

v.

TAMMY MAASSEN, DR. ADLER, DR. BRET REYNOLDS and DR. HIRSCHMAN,

Defendants.

- -

Plaintiff Brian Pheil brought this civil action for money damages under 42 U.S.C. § 1983, contending that while he was incarcerated at the Jackson Correctional Institution, defendants Tammy Maassen, Dr. Kenneth Adler, Dr. Bret Reynolds and Dr. Robert Hirschman violated his Eighth Amendment rights by failing to prescribe medications appropriate for treating his reckless leg syndrome, despite his repeated requests. The case is now before the court on defendants' motion for summary judgment.

The undisputed facts show that defendant Reynolds declined to prescribe the medication that plaintiff believed was best suited to treating his condition, but that his resistance was based on reasonable concerns about the addictive nature of the medication and associated security concerns, not on deliberate indifference to plaintiff's serious medical need. He made repeated efforts to find a medication that would relieve plaintiff's anxiety

and depression. No reasonable jury could find that his actions met the standard that applies to plaintiff's claims in this case, which is that his actions or omissions were "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate plaintiff's condition." Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996). Defendants' motion will be granted as to defendant Reynolds.

As to defendants Tammy Maassen and Robert Hirschman, plaintiff has not shown that either of them took or omitted any action that would make them liable to him. He barely mentions them in his brief in opposition to defendants' motion, except to say that he wrote them letters about his problems with defendants Adler and Reynolds and they failed to take any action. Plt.'s Opp. Br., dkt. #60, at 8-10, 32. Assuming that plaintiff is correct, their lack of response would not violate the Eighth Amendment. The undisputed facts are that neither Maassen nor Hirschman had the authority to overrule defendant Adler's or defendant Reynolds's medical decisions. I conclude therefore that defendants' motion must be granted as to these two defendants.

I will deny the motion as it relates to defendant Adler, but only so far as it relates to the two months in which he saw plaintiff (April and May 2010) and did not take any steps to treat his restless leg syndrome. Up to that point, he was responding to plaintiff's complaints and making an effort to find a means of relieving plaintiff's symptoms. Defendant Adler says that his reason for not treating plaintiff was that plaintiff never complained to him about the condition at either his April 7 or his May 21 appointment. Plaintiff has declared under penalty of perjury that his complaints continued and that he

wrote a Health Services request on March 27, 2010, saying that his restless leg problem was still out of control and he needed to see a doctor. If the jury were to believe plaintiff and conclude that defendant Adler ignored plaintiff's complaints or heard them but refused to take any steps to help plaintiff, without any good reason for doing so, it could find that defendant Adler's conduct in April and May was so blatantly inappropriate as to evidence deliberate indifference to plaintiff's serious medical need.

From the findings of fact proposed by the parties, I find the following to be both material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff Brian Pheil was incarcerated at the Jackson Correctional Institution from August 27, 2009 until sometime after this lawsuit began. He is now an inmate at the Waupun Correctional Institution.

Defendant Dr. Kenneth Adler is a physician employed by the Department of Corrections at the Jackson Correctional Institution. He has been licensed to practice medicine in Wisconsin since 1990 and is board certified in family practice. Defendant Dr. Bret Reynolds is a licensed physician, practicing in the field of psychiatry. He is employed by the department as a part-time consultant psychiatrist at Jackson. At all relevant times, defendant Tammy Maassen was the director of the Health Services Unit at the institution and Dr. Robert Hirschman was the Psychological Services Supervisor.

B. Medical Treatment by Defendants Adler and Reynolds

When plaintiff was first transferred to Jackson, he was continued on the medications he had been taking during his confinement at the Stanley Correctional Institution until he could have a medical review at Jackson. One of those medications was Clonazepam, which had been prescribed for him by his psychiatrist at Stanley, where he had been given diagnoses of anxiety disorder and major depressive disorder.

The first doctor plaintiff saw at Jackson was defendant Reynolds. At an evaluation on September 1, 2009, defendant Reynolds noted that plaintiff was taking Clonazepam for anxiety and finding it helpful for his restless leg syndrome. Defendant Reynolds told plaintiff he was concerned that taking Clonazepam put plaintiff at risk of substance abuse and advised him that there were many other psychotropic medications he could use for easing his anxiety. Defendant Reynolds was aware of Clonazepam's addictive potential and its value as an item to be sold or traded within the prison. He told plaintiff that he would not prescribe Clonazepam as part of plaintiff's psychiatric treatment and would reduce plaintiff's dosage with the goal of discontinuing it after one month.

Defendant Reynolds discussed with plaintiff several other medication options to treat his anxiety. Plaintiff chose to try 15 mg of Mirtazapine at bedtime along with continuing his previous prescription for Sertraline. Defendant told plaintiff that his restless leg syndrome was a medical problem that he should discuss with the medical staff.

Defendant Reynolds saw plaintiff again on October 6, 2009 for medication followup. Plaintiff said that the Mirtazapine was causing his restless leg syndrome to worsen.

Defendant told him that he was treating plaintiff's mood and anxiety problems and that plaintiff would have to talk to the medical staff about his leg problems. In response to plaintiff's questions about finding an alternative to Mirtazapine and discontinuing the Sertraline and Hydroxyzine he had been taking, defendant went over with plaintiff the risks and benefits of using a different drug, such as Citalopram. Plaintiff agreed to try it and to discontinue all his other psychotropic medications. Defendant Reynolds stopped all the medications and ordered 40 mg of Citalopram at bedtime. In December, after plaintiff had decided on his own to stop taking the Citalopram and had failed to show up for a scheduled appointment with defendant Reynolds, he was dropped from the Psychiatric Clinic service. (Plaintiff says that he was never notified of the appointment but does not deny stopping the medication.)

On October 7, 2009, plaintiff saw defendant Adler, who reviewed plaintiff's right shoulder pain, restless leg syndrome (left leg), chronic pain in his feet and knees, diabetes and cholesterol management. Plaintiff asked defendant to give him a prescription for Clonazepam to treat his restless leg syndrome. Defendant told plaintiff that Clonazepam was not the first drug to try for restless leg syndrome and that he should try other medications first. He added that the drug was not well suited for prison settings, because of its addictive qualities and the security problems it can create. He prescribed Sinemet for the syndrome and ordered a check of plaintiff's ferritin (iron) levels to see whether low iron levels in his bones were contributing to his leg problem. He discontinued Glyburide and increased the amount of Pioglitazone that plaintiff was taking for his diabetes and he

prescribed Simvastatin for his high cholesterol.

Plaintiff saw defendant Adler twice in November. On the tenth, he saw him for a followup of his shoulder pain and restless leg syndrome. He complained that the Sinemet had caused him nausea. Defendant refused again to prescribe Clonazepam but decreased the dosage of Sinemet. In addition, he injected plaintiff's shoulder with Lidocaine.

On November 30, plaintiff complained to defendant Adler about his restless leg syndrome, saying that his legs were worse than they had ever been. He continued to ask for Clonazepam. Defendant Adler ordered a urinalysis and a hemoccult test to screen for occult blood loss and ordered iron supplements. He prescribed an FDA approved drug, Mirapex, for plaintiff's restless leg syndrome and obtained permission from the department for permission to prescribe it.

Defendant saw plaintiff four times in the first five months of 2010: January 28, March 1, April 7 and May 21. In January, defendant Adler discontinued the Mirapex because plaintiff said it was not helping. He referred plaintiff to defendant Reynolds after plaintiff said he thought that his anxiety and depression were contributing to his reckless leg syndrome.

On March 1, 2010, plaintiff told Adler that his anxiety was better but that his restless leg syndrome was worse and was affecting his other leg. Again, defendant Adler referred plaintiff to defendant Reynolds, this time because he was concerned that the Paroxetine Reynolds had prescribed was making plaintiff's legs worse.

On March 27, 2010, plaintiff wrote a Health Services request, saying that his restless

leg problem was still out of control and he needed to see a doctor. On April 7, he saw defendant Adler, who gave plaintiff an injection for pain in his shoulder. On May 21, he saw defendant Adler for a followup on his shoulder pain. Adler did not prescribe any treatment for plaintiff's restless leg syndrome at either of these two appointments.

Defendant Adler testified at his deposition that he could have prescribed Gabapentin for plaintiff before having to resort to Clonazepam. Dep. trans., dkt. #51, at 32.

Meanwhile, plaintiff saw defendant Reynolds on February 1, 2010 on referral from the medical clinic. Reynolds went over plaintiff's past use of medication and offered to put him back on Sertraline or try Paroxetine, which is prescribed to alleviate anxiety and depression. Plaintiff chose the Paroxetine. On March 9, defendant Reynolds saw plaintiff after he had had a physical altercation with another inmate. Despite the fight, plaintiff told defendant that the Paroxetine was helping him to be more relaxed. Defendant Reynolds increased the dosage to 40 mg to help plaintiff deal with daily frustrations. On April 27, defendant Reynolds increased the dosage again after plaintiff said that the medication was helping his anxiety and making it easier for him to ward off panic attacks. He and plaintiff discussed adding Buspirone to plaintiff's medication regime and plaintiff agreed to take it twice a day. On June 14, plaintiff told defendant Reynolds that he was doing okay with the new medication regime and was happy with it. In November, plaintiff saw defendant Reynolds for medication followup. He reported a loss of motivation and said he had chronic ideas of suicide but no plans to act on them. In response to a suggestion from defendant, plaintiff agreed to try Bupropion as an augmentation to the Paroxetine he was taking.

Defendant Reynolds continued to meet with plaintiff about every 8-12 weeks until plaintiff was transferred to Waupun; his last meeting with plaintiff was on August 16, 2011. At that time, plaintiff said that everything was fine and his medications were working.

C. Treatment by Nurse Practitioner Tidquist

On May 24, 2010, plaintiff had an appointment with a nurse practitioner, Deb Tidquist, who is employed by the Department of Corrections at Jackson. Tidquist ordered a complete blood count for plaintiff and scheduled a clinic visit for him to discuss whether he needed iron supplements. On July 6, she saw plaintiff again and prescribed 0.25-0.5 mg of Clonazepam for his restless leg syndrome. Between then and December 2010, she obtained permission from the associate medical director at the institution to prescribe Clonazepam as a non-formulary medication and started plaintiff on the medication, increasing the dosage slowly to 1 mg. After May 2010, Tidquist took over plaintiff's ongoing medical management from defendant Adler.

When defendant Adler learned of Tidquist's decision to prescribe Clonazepam to plaintiff, he did not intervene or attempt to override the decision. Both he and defendant Reynolds disagreed with the decision but did not consider it outside the scope of acceptable medical practice, particularly after so many other medication options had been tried unsuccessfully. Defendant Reynolds told Tidquist he was concerned about her approval of Clonazepam for plaintiff and hoped she had weighed the benefits, risk and alternatives to it.

D. Defendants Maassen and Hirschman

In her position as manager of the Health Services Unit at the Jackson Correctional Institution, defendant Maassen provides the overall administrative support and direction of the unit and monitors nursing practice documentation in medical records. She does not have any direct supervisory authority over the physicians or psychiatrists and cannot override their medical judgment. As a general rule, she does not provide direct patient care or treatment to inmates and, as a registered nurse, she has no prescribing authority. She has no record of having received a letter from plaintiff written about December 3, 2009, although plaintiff says he wrote her at that time. The records do show that whenever plaintiff filled out a Health Services Request form, he was scheduled for an appointment with a medical practitioner. Defendant Maassen was not the person who responded to any of these requests; she never provided any direct care to plaintiff; and she never performed any rounds in the institution at which plaintiff reported having any medical concerns. At no time did anyone in the Health Services Unit bring to her attention any concerns about how plaintiff's care was being managed by defendant Adler. Her only involvement with the case was providing medical information from plaintiff's records to the Inmate Complaint Examiner who was investigating a complaint by plaintiff of not getting necessary medical treatment.

Defendant Hirschman was the recipient of three letters from plaintiff about defendant Reynolds's refusal to prescribe Clonazepam for his restless leg syndrome. He responded to plaintiff's November 17, 2009 letter by telling plaintiff that he should take up any questions

about medical conditions with defendant Adler. In response to a January 11, 2010 letter from plaintiff complaining again about defendant Reynolds's not calling him back for a followup appointment, Hirschman referred the letter to defendant Reynolds. Reynolds wrote plaintiff directly, explaining that he had not called plaintiff back because he had not shown up for a scheduled appointment and had discontinued his Citalopram on his own.

In response to a third letter sent by plaintiff on January 26, 2010, defendant Hirschman met with plaintiff and reviewed his medical history with him. Plaintiff complained that he had a history of restless leg syndrome, that the only medication that he had found helpful was Clonazepam and that both defendants Adler and Reynolds were refusing to prescribe it for him. He said that the medications prescribed for him had not helped and he said he had tried relaxation, psychotherapy and other coping skills without success. Defendant Hirschman concluded from the discussion that plaintiff did not seem to have any acute need for psychological services and that he was willing to continue working with defendants Adler and Reynolds, so he left it up to plaintiff to see the doctors for followup appointments.

Defendant Hirschman did not take any other action after he confirmed that plaintiff was receiving adequate medical care. He is not trained or qualified to override the medical judgment of doctors providing medical care to inmates. Had he been concerned about the care provided to plaintiff, he would have talked to the person providing the care and, if necessary, to that person's supervisor.

E. Plaintiff's Expert Witness

During discovery, plaintiff obtained the opinion of a neurologist, Dr. Robert Graebner. Graebner reviewed plaintiff's medical records from Jackson and provided an expert opinion on the care given to plaintiff for his restless leg syndrome. Graebner Rep., dkt. #52. Graebner wrote that the causes of the syndrome are unknown, but are seen with increased frequency in patients with diabetes mellitus and "in relationship to therapy with antidepressant medications." Id. at 2. He said that medications for this condition include benzodiazepine, anti-Parkinsonian and occasionally opioid. In his opinion, it would have been "reasonable and good care" to reinstitute the Clonazepam that plaintiff had been taking in the past after the trial with a non-benzodiazepine medication had failed. Alternatively, the doctor could have arranged a consultation with a sleep disorder specialist "to help in the pharmacological management." Id.

OPINION

The Eighth Amendment gives incarcerated persons a right to humane conditions, including adequate medical care. Without the opportunity to seek their own medical care, prisoners are dependent on prison and jail officials for the care they need for their serious medical needs. Under the Eighth Amendment, prison officials are not required to provide any and all kinds of care a prisoner wants, but they can be held liable to a prisoner if they are aware of a substantial risk of serious harm to that prisoner and act or fail to act with deliberate indifference to that risk. Farmer v. Brennan, 511 U.S. 825, 836 (1993).

For the purpose of summary judgment, defendants have agreed that plaintiff's anxiety and restless leg syndrome were serious medical needs in 2009 and 2010. However, plaintiff has not argued that his anxiety was not adequately treated, so the only question to be decided is whether any of the defendants acted or failed to act with deliberate indifference to plaintiff's restless leg syndrome.

A. Defendants Maassen and Hirschman

Plaintiff has made no showing that either defendant Maassen or defendant Hirschman could be held liable under this standard. It is undisputed that defendant Hirschman knew about plaintiff's complaints; it is disputed whether defendant Maassen knew of them. Assuming that she did, plaintiff has not shown that either of these two defendants had the authority to override defendants Adler's and Reynolds's medical decisions if they had believed that the decisions were faulty. Neither of them is a medical doctor or possessed with the legal authority to second-guess the medical decisions of doctors. Therefore, the motion for summary judgment must be granted as to defendants Maassen and Hirschman.

B. Defendant Reynolds

As to defendant Reynolds, plaintiff has failed to show that any of defendant Reynolds's actions were blatantly inappropriate or indicative of deliberate indifference. Plaintiff has produced no expert evidence to that effect or cited anything in the record to

support a finding of deliberate indifference. It is undisputed that defendant Reynolds preferred not to prescribe benzodiazepine medication (Clonezapam) for inmates because of its potential for addiction and the security concerns associated with having such medication in the prison. However, he went to great lengths to find a medication that would ease plaintiff's anxiety, alone or in combination with other medications. On at least three occasions, plaintiff told defendant Reynolds that the medications were working and that he was "doing okay." Defendant Reynolds continued to see plaintiff on a fairly regular basis throughout his time at the prison, with the exception of a short period when he thought plaintiff had failed deliberatively to show up for an appointment and after plaintiff had stopped taking his prescribed medication of his own volition.

Plaintiff's claim against defendant Reynolds is based only on defendant's refusal to prescribe Clonazepam when plaintiff asked for it. A disagreement over a treatment decision is rarely enough to show deliberate indifference or blatantly inappropriate treatment. Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) ("a difference of opinion among physicians as to how an inmate should be treated cannot support a finding of deliberate indifference"). The plaintiff must show that the treatment decision is "so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." Id. The fact that other doctors prescribed plaintiff Clonezapam for his restless leg syndrome is not evidence in itself that defendant Reynolds's refusal to do so was such a substantial departure from accepted professional standards as to constitute deliberate indifference. Id. Reynolds had valid reasons for his position and he continued to treat

plaintiff with drugs that did not pose the same risks as Clonezapam. Plaintiff has not shown that all of these drugs were ineffective. In fact, the evidence is that defendant Reynolds was able to find drugs and drug combinations that proved to be helpful to plaintiff in relieving his anxiety. Because defendant Reynolds did not ignore plaintiff's serious medical needs or treat them in a "blatantly inappropriate way," defendants' motion for summary judgment will be granted as to this defendant.

C. Defendant Adler

Although the undisputed facts show that defendant Adler evaluated plaintiff carefully, ordered tests to determine whether the condition was the result of low iron levels, prescribed medication he thought was appropriate, offered plaintiff opportunities for physical therapy and other treatments and referred him to defendant Reynolds when plaintiff said that he thought his anxiety was contributing to the problem, it is disputed whether he abandoned plaintiff in March 2010, so far as plaintiff's restless leg syndrome was concerned.

Plaintiff has argued that defendant Adler failed to take any action to respond to his complaints after January 28, 2010, but no reasonable jury could make this finding. It is true that defendant Adler did not prescribe any medication to plaintiff after that day, but he did refer plaintiff to defendant Reynolds when plaintiff told him at a March 1 appointment that his legs were worse than ever. Plaintiff calls this whipsawing him from one doctor to the other, neither of whom was going to prescribe the medication he wanted, but I have found it undisputed that defendant Adler made the referral because he thought plaintiff's use of

the Paroxetine prescribed for him by Reynolds might be making his legs worse. Plaintiff has adduced no evidence to suggest that this was a blatantly inappropriate decision on Adler's part.

Plaintiff's claim against defendant Adler comes down to the lack of treatment he provided plaintiff for his restless leg syndrome for the three-month period from March 1, 2010 through late May that plaintiff remained in Adler's care. For the purpose of deciding this motion, I will assume that plaintiff is correct when he says he raised the issue with defendant Adler in advance of his April 7 appointment and at the appointment itself. It is undisputed that although defendant Adler treated plaintiff's shoulder at that appointment, he did nothing about plaintiff's restless leg syndrome. It is also undisputed that he did not do anything about the problem when plaintiff saw him for the last time on May 21, 2010, for a followup on his shoulder.

Defendant Adler admitted in his deposition testimony that he could have prescribed Gabapentin for plaintiff before having to resort to Clonazepam. Plaintiff's expert has said that it would have been reasonable for defendant to prescribe Clonazepam to plaintiff "when other medications had failed to provide him relief" or to arrange for a consultation with a sleep disorder specialist. Instead, defendant Adler did nothing at plaintiff's April and May visits about his restless leg syndrome, although he treated plaintiff's sore shoulder.

For the purpose of deciding defendants' motion for summary judgment, I have assumed that plaintiff could prove at trial that his restless leg syndrome was a serious medical need. At trial, however, he would have to show that this is true in fact. In addition,

he will have to prove that he complained about his restless leg syndrome to defendant Adler when he saw defendant in April and May and that defendant ignored those complaints when he could have done something to ease plaintiff's pain. Finally, he will have to adduce evidence that defendant's failure to take any such measure was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate [plaintiff's] serious medical condition," Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996), or that "no minimally competent professional" would have responded as defendant did. Sain v. Wood, 512 F.3d 886, 894-95 (7th Cir. 2008). If he can make these showings, a reasonable jury could find that defendant Adler violated plaintiff's rights under the Eighth Amendment.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Tammy Maassen, Dr. Adler, Dr. Bret Reynolds and Dr. Hirschman, dkt. #53, is GRANTED with respect to the claims against defendants Maassen, Reynolds and Hirschman. It is DENIED with respect to the claims against defendant Adler.

Entered this 4th day of December, 2012.

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