IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RICHARD OATES,

OPINION and ORDER

Plaintiff,

10-cv-816-bbc

v.

LAURIE DOEHLING, SHARON MOERCHEN,
DR. HUIBREGTSE and HOLLY PUHL,

Defendants.

- -

In this civil action for monetary and injunctive relief, plaintiff Richard Oates is proceeding on claims that defendants Laurie Doehling, Sharon Moerchen, Dr. Huibregtse and Holly Puhl violated his rights under the Eighth Amendment by failing to provide adequate treatment for his back pain while he was incarcerated at the Redgranite Correctional Institution located in Redgranite, Wisconsin. Now before the court is defendants' motion for summary judgment, dkt. #55, in which they contend that no reasonable jury could find from the undisputed facts that they were deliberately indifferent to plaintiff's serious medical needs.

I am granting defendants' motion. Plaintiff has adduced no facts showing that defendants Puhl or Moerchen were involved in plaintiff's medical treatment during the relevant time period. With respect to defendants Doehling and Huibregtse, the undisputed facts show that both defendants provided ongoing care for plaintiff's back problems and

there is no evidence that their care was blatantly inappropriate.

Also before the court is plaintiff's motion for appointment of counsel. Dkt. #83. Plaintiff contends that he needs counsel because he does not have the means or knowledge to counter defendants' legal arguments or to retain an expert that can do so. However, as discussed further below, the medical records and other evidence submitted by the parties leave no room for a plausible claim that defendants' medical care was so far outside the boundaries of acceptable practice that it violated the Eighth Amendment. Therefore, plaintiff's request for counsel is moot and will be denied.

From defendants' proposed findings of fact, plaintiff's responses and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

At all times relevant to this case, plaintiff Richard Oates was an inmate at the Redgranite Correctional Institution. Defendant Charles Huibregtse was a physician at the prison and defendant Sharon Moerchen was a nurse clinician there. Defendant Holly Puhl was the health services unit manager at the prison for approximately three years until April 2009, during which time defendant Lori Doehling was a staff nurse. Since April 2009, Puhl has been employed as a nursing supervisor at the Wisconsin Resource Center in Winnebago, Wisconsin. Doehling became the health services unit manager at the Redgranite Correctional Institution in April 2009. (Defendants mistakenly told plaintiff in a response

to an interrogatory that Puhl had been the health services unit manager and member of the special needs committee at the Redgranite Correctional Institution in 2010, which is why plaintiff amended his complaint to add Puhl as a defendant. This was incorrect and defendants amended their response to plaintiff's original interrogatories to correct this mistake.)

B. Plaintiff's Request for a Special Mattress

Plaintiff has a history of back pain. In August 2008, he underwent surgery to repair a herniated disc in his lower back. He had another surgery on July 9, 2009 for the same problem. After his surgery, he was allowed an extra mattress, which he had from July 15, 2009 to August 15, 2009. He was also sent periodically to the University of Wisconsin Hospital and Clinics in Madison for followup appointments with neurosurgery.

In January 2010, plaintiff asked for a renewal of his double mattress. His request was referred to the special needs committee, which was composed of the health services unit manager, staff nurses and a physician, depending on who was on staff on a particular day. A committee convened on January 12, 2010 to consider plaintiff's request. As the health services unit manager, defendant Doehling participated in the committee meeting. (Neither side submitted evidence regarding the other committee members. Apparently, the department does not keep a record of the members and Doehling does not remember.)

The special needs committee reviewed plaintiff's medical chart for conditions that met the Department of Corrections policy regarding special medical needs. Under the policy,

medical staff "is encouraged" to approve comfort items that "have been scientifically shown to provide solid medical benefit, and to treat significant medical conditions." Dkt. #56-2. With respect to special mattresses, department policy states that staff may approve them for the following conditions:

- Severe disabling degenerative joint disease;
- Pregnancy;
- New post-op joint replacement;
- Decubitus ulcer/therapy;
- Third degree burns; and
- Paraplegia/quadriplegia.

Id.

Plaintiff's medical chart showed that he suffered from back pain, but not that he had signs of a severe disabling degenerative joint disease, pregnancy, post-op joint replacement, a decubitus ulcer, third degree burns, paraplegia or quadriplegia. Also, there was no order from any medical doctor for an extra or special mattress. The special needs committee concluded that plaintiff did not meet the criteria for a special or extra mattress and denied his request. On January 12, 2010, Doehling notified plaintiff that his request had been denied.

On January 19, plaintiff submitted a health service request asking why he did not qualify for an extra mattress. He stated that his back problems were causing nerve pain in both of his legs and that he was having trouble sleeping. Doehling responded on January 20,

stating that a committee composed of nurses and a doctor had reviewed "the facts of [his] health" and concluded that he did not qualify. Dkt. #56-3. She stated that plaintiff "work[ed] and play[ed] sports" and that "[a]ctive men don't qualify." She also said that plaintiff would have qualified if he were quadriplegic or had "skin ulcers from lack of blood flow," but "[s]ince that isn't the case," he could not have an extra mattress. Id. (Around this time, plaintiff had been performing light exercises, including stretching and passing a basketball around in the gym. He denies doing any vigorous exercises.)

C. Plaintiff's Requests for Pain Medication

On February 14, 2010, plaintiff submitted a health service request directed to defendant Huibregtse, asking him to refill a prescription for hydrocodone that was set to expire. Plaintiff stated in the request that he was scheduled to go to UW neurosurgery in Madison and that it would be difficult for him to sit for a two-hour ride without the medication. Staff from the health services unit notified plaintiff that his request would be referred to a doctor "via [the] special needs committee." Dkt. #82-1 at 6. Plaintiff responded with another health service request on February 15, stating that his request was "not a special needs issue" and that his request for medication was for Huibregtse. Defendant Doehling responded, stating that plaintiff's surgery "was many weeks ago," "narcotics usually stop in 1 week" after surgery and that plaintiff was "function[ing] well," working and playing basketball. She also told plaintiff that Huibregtse was on the special needs committee. Id. at 8.

On February 17, plaintiff was seen by Dr. Neimann at UW neurosurgery. Following the appointment, defendant Huibregtse scheduled a followup at UW, an MRI and physical therapy for core muscle strengthening.

On February 18, plaintiff submitted another health service request, asking for an appointment with a doctor about his hydrocodone prescription. An appointment was made. That same day, the special needs committee asked defendant Huibregtse about plaintiff's request for hydrocodone. Huibregtse said that he did not want to renew the prescription and that plaintiff could use Ibuprofen and Tylenol. The committee denied plaintiff's request for a renewal of his prescription, stating that "Dr. Huibregtse did not wish to renew med" and that plaintiff had been "documented to attend rec and participate in basketball vigorously without problem." The committee recommended that plaintiff take Ibuprofen and Tylenol as ordered and stated that if plaintiff "continue[d] to need narcotic[,] [it] may result in activity restriction." Id. at 11.

On February 21, 2010, plaintiff submitted a health service request responding to the denial. He stated that he had been playing basketball and exercising as part of his physical therapy for his back, but that he could perform exercises only with significant pain medication. He requested hydrocodone or Tramadol. (Tramadol is a medication used in treating severe pain. It can be addictive and cause other serious side effects.)

On February 26, 2010, Doehling spoke with plaintiff. Plaintiff complained of pain and numbness in his right leg and asked why he was not getting Vicodin. Doehling consulted with Huibregtse, who stated that he would not order Vicodin or Tramadol for

plaintiff until after he saw the results of another MRI.

On March 4, Huibregtse made a request to the Department of Health Services that plaintiff be scheduled for an MRI of his lower spine at UW radiology to determine the cause of his pain in his lower back and leg. He also requested approval for eight more visits of physical therapy for plaintiff and a followup visit at UW neurosurgery to be held after the MRI. After Doehling told plaintiff that he would not be receiving Vicodin or Tramadol, plaintiff filed another health service request on March 7, stating that the pain in his legs was not getting any better and that the Ibuprofen and Tylenol were causing him stomach problems. He asked for a prescription of Gabapentin and asked whether the MRI had been scheduled. Doehling responded, stating that the MRI had been ordered but had not yet been scheduled and that the doctor would not approve more medication until after he could review the MRI report.

On March 12, 2010, plaintiff began physical therapy sessions to treat his back pain. On March 15, defendant Huibregtse ordered the drug Gabapentin for three months. Huibregtse also changed plaintiff's dosage of Ibuprofen. He denied plaintiff's request for Tramadol in part because he was worried about the possible addictiveness (plaintiff has a history of alcohol abuse) and also because he did not think it was necessary. At the time, plaintiff's symptoms had been improving with physical therapy and plaintiff had been able to exercise regularly and work at Badger State Industries.

Plaintiff had the MRI at UW on April 30, 2010. Before the MRI, defendant Huibregtse prescribed Valium to plaintiff. On May 2 and 12, 2010, plaintiff submitted

health service requests asking about the results of his MRI, complaining about his pain and stating that he was taking too much Tylenol and Ibuprofen. Staff responded, stating that they had not received the results yet and that the doctor would "decide what to do after seeing [the] report." Dkt. #82-1 at 21.

On May 17, 2010, defendant Huibregtse ordered that plaintiff be given a low bunk restriction. On June 7, Huibregtse saw plaintiff for a check-up. Plaintiff complained of low back and leg pain and stated that his symptoms had not improved since the two back surgeries he received. He requested additional physical therapy and pain medication. Huibregtse reviewed the results of the MRI and noted that plaintiff was still suffering from a lot of low back pain. He referred plaintiff to physical therapy for his low back pain, noting that plaintiff's prior physical therapy had resulted in a 25% improvement of plaintiff's symptoms. He decided not to prescribe more pain medications to plaintiff, noting that he was "going to see UW neurosurgery in near future and management [would] be discussed further with them." Id. at 19.

On July 21, plaintiff had a followup appointment at UW neurosurgery with Dr. Daniel Resnick. Resnick wrote a letter to Huibregtse, stating that plaintiff's recent MRI scan demonstrated a recurrent herniated disk and that plaintiff had described ongoing pain in his legs. Resnick wrote that plaintiff's case would be discussed with plaintiff's previous surgeon, Dr. Trost. He also suggested that plaintiff be given Tramadol.

After plaintiff returned from UW, defendant Huibregtse requested a followup examination for plaintiff with Dr. Trost for his recurring back pain and for a review of the

status of his previous surgeries. Plaintiff sent several health service requests asking for the Tramadol that had been recommended by Dr. Resnick. Defendant Doehling responded to one of the requests, stating that the prison did not have Tramadol in stock and that it would be sent as soon as it was received. However, Huibregtse decided not to prescribe Tramadol to plaintiff. He was concerned about its addictiveness, did not think it was necessary because of plaintiff's ability to remain active without it and because he preferred to wait and see what course of treatment was ordered by UW neurosurgery.

On August 16, 2010, defendant Moerchen was notified by Huibregtse that he would not order Tramadol for plaintiff at that time. Moerchen noted this in plaintiff's progress notes and on August 17, told plaintiff that Tramadol would not be prescribed for him.

On October 4, 2010, Doehling met with plaintiff, who complained of pain and difficulty sleeping. He said that the Ibuprofen and Gabapentin were not working to relieve his back pain and he asked why the doctors at the prison were refusing to order Tramadol for him. Doehling told him that UW doctors did not understand the rules about pain medication at the prison. Doehling verified that plaintiff had a scheduled appointment with a physician.

On October 20, 2010, plaintiff went to UW neurosurgery for a followup examination. A doctor from UW neurosurgery reported to the prison that plaintiff continued to have pain in his legs and that plaintiff's symptoms had worsened since his latest MRI. The doctor ordered a repeat MRI of the lumbar spine, as well as x-rays, and stated that he wanted plaintiff to return to discuss surgical options after the MRI results. After plaintiff returned,

defendant Huibregtse filed a request for authorization for the MRI and a followup visit for plaintiff with UW neurosurgery.

On November 8, 2010, plaintiff saw Huibregtse for a followup appointment. Plaintiff complained about his pain and Huibregtse noted that plaintiff had been scheduled for another MRI and followup visits with UW and that back surgery was a possibility. Huibregtse denied plaintiff's request for Tramadol and granted plaintiff's request for a renewed low bunk restriction.

On December 7, 2010, plaintiff had another MRI of his lumbar spine at UW radiology. On December 23, plaintiff went to the UW neurosurgery clinic to discuss surgical options. Plaintiff and the doctors at UW neurosurgery decided plaintiff should undergo a transforaminal lumbar interbody fusion surgery. Defendant Huibregtse filed a request for the surgery as well as pre-op medical clearance. (Plaintiff filed this lawsuit on December 22, 2010. In a letter to the court in January 2012, plaintiff stated that he was scheduled for a fusion surgery. Dkt. #65. It is not clear whether that surgery is the same surgery for which Huibregtse sought approval in December 2010, but in any event, it is outside the scope of this lawsuit.)

OPINION

Plaintiff contends that defendants violated his rights under the Eighth Amendment by failing to provide him appropriate treatment for the pain caused by his back problems. In particular, he contends that defendants knew about his severe back pain but failed to

provide him an extra mattress or any effective medication for treating his pain. Defendants have moved for summary judgment as to plaintiff's claim against all defendants. In determining whether defendants' motion for summary judgment should be granted, I must view all facts and inferences in the light most favorable to plaintiff, the nonmoving party. Wisconsin Alumni Research Fdn. v. Xenon Pharmaceuticals, Inc., 591 F.3d 876, 882 (7th Cir. 2010). To survive summary judgment on his claim, plaintiff must present evidence supporting the conclusion that he had an "objectively serious medical need" and that defendants were aware of his serious medical need and were "deliberately indifferent" to it. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012) (citing Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)).

Defendants concedes that plaintiff's back problems and accompanying pain were a serious medical need. Thus, the question is whether plaintiff presented enough evidence of deliberate indifference to survive defendants' motion for summary judgment. "Deliberate indifference" means that the defendant was 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). When the defendant is a medical professional that has provided some treatment to the plaintiff, such as defendant Huibregtse, the question is whether that treatment is constitutionally adequate. Duckworth v. Ahmad, 532 F.3d 675, 679 (7th Cir. 2008). To prove that it is not, plaintiff must show that the treatment "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 by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). The Court of Appeals for the Seventh Circuit has explained that unless medical care evidences "intentional mistreatment likely to seriously aggravate the prisoner's condition," a prisoner's dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (citations omitted). This means that inadvertent error, negligence, gross negligence and ordinary malpractice do not constitute cruel and unusual punishment within the meaning of the Eighth Amendment. Id. at 590-91; Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996).

Plaintiff has provided no factual basis from which a jury could conclude reasonably that defendant Huibregtse's care was blatantly inappropriate or not based on medical judgment. While plaintiff was incarcerated at the Redgranite Correctional Institution, Huibregtse and other staff members met with plaintiff on a regular basis to discuss and evaluate his back problems, respond to his questions and create a treatment plan for him. Huibregtse prescribed several pain medications to plaintiff, including Ibuprofen, Tylenol and Gabapentin, ordered that plaintiff undergo physical therapy and approved a low bunk restriction for him. Additionally, Huibregtse recommended on several occasions that plaintiff be seen by outside specialists at UW neurosurgery and filed numerous authorization requests for outside appointments, tests and ultimately, surgery for plaintiff's back problems. After plaintiff's outside visits, Huibregtse examined the results and discussed them with plaintiff.

Despite this care, plaintiff contends that defendant Huibregtse violated his

constitutional rights by failing to refill his hydrocodone prescription and failing to prescribe the Tramadol that was recommended by UW doctors. However, plaintiff has not shown that any "minimally competent professional" would have prescribed those medications, and the law does not require Huibregtse to accept every recommendation offered by outside specialists. Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective 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."); Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996) (under Eighth Amendment analysis, evidence that some medical professionals would have chosen different course of treatment is insufficient to make out constitutional claim). Further, Huibregtse had rational reasons for refusing to prescribe Tramadol or hydrocodone to plaintiff. Huibregtse was concerned about the possible addictive side effects of the medications and he believed plaintiff was reasonably active without it, particularly if plaintiff was continuing physical therapy. Also, Huibregtse knew that plaintiff was being seen regularly by doctors at UW neurosurgery regarding possible surgical options. When surgery was finally recommended by UW neurosurgery, Huibregtse sought approval for it right away. Although plaintiff was dissatisfied by Huibregtse's treatment decisions, he has adduced no evidence to show that Huibregtse used anything less than proper medical judgment in providing plaintiff continual care and treatment at the Redgranite Correctional Institution. Therefore, defendant Huibregtse is entitled to summary judgment on plaintiff's claim.

Plaintiff has also adduced no evidence that defendants Puhl, Moerchen or Doehling disregarded his serious medical need. Defendant Puhl was not employed at the Redgranite Correctional Institution during any time relevant to plaintiff's claims and thus, had no involvement in his treatment during that time. Therefore, she cannot be held liable for plaintiff's claims. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003) (personal liability under 42 U.S.C. § 1983 must be based on defendant's personal involvement in constitutional violation).

There is also no evidence that defendant Moerchen was involved in plaintiff's care during the relevant time period. The only evidence in the record relating specifically to Moerchen is her August 16, 2010 note to plaintiff in which she told him that defendant Huibregtse had refused to order Tramadol. Moerchen did not have the authority to ignore Huibregtse's decision or to order the Tramadol herself. Rather, she was permitted and required to rely on the decision of plaintiff's treating physician. Greeno v. Daley, 414 F.3d 645, 655-56 (7th Cir. 2005) (officials who are not qualified to make certain medical decisions and refer complaints to medical professional are not deliberately indifferent).

Although plaintiff argues that Moerchen was a member of the special needs committees that considered his January 12, 2010 request for an additional mattress and his request on February 18, 2010 for hydrocodone, there is no evidence in the record showing that Moerchen was a member of those committees. However, even if she was a member of the committees that considered plaintiff's requests, no jury could reasonably infer that the decisions denying the requests constituted deliberate indifference. Plaintiff has adduced no

evidence suggesting that the committee knew or should have known that plaintiff needed an extra mattress to treat his serious medical problems. Plaintiff was able to remain somewhat active without the mattress. Additionally, the committee rejected plaintiff's request for a mattress because nothing in his medical records suggested that he met the Department of Corrections' criteria for an extra mattress or that an extra mattress would provide him a medical benefit. The committee rejected his request for hydrocodone in part because defendant Huibregtse told the committee members that he did not want to refill the prescription and because plaintiff was able to engage in work and exercise without it. The committee members were entitled to rely on Huibregtse's recommendation on the issue. Further, although plaintiff contends that the committee was wrong about how vigorously he was able to exercise, the undisputed evidence in the record shows that plaintiff was able to remain somewhat active through work and exercise despite his back and leg pain. Under the circumstances, the committee had no reason to believe that plaintiff needed a narcotic medication to treat his pain and allow him to remain active.

This leaves plaintiff's claim against defendant Doehling, who had frequent interactions with plaintiff. Plaintiff's claims against Doehling for her role on the special needs committee fail for the reasons discussed above. Additionally, plaintiff has adduced no evidence suggesting that Doehling disregarded plaintiff's medical needs during any of their other interactions. Rather, the evidence in the record shows that Doehling displayed concern for plaintiff's well-being by responding personally to several of plaintiff's questions and scheduling appointments for him to see his treating physician. As the health services

unit manager at the Redgranite Correctional Institution, Doehling could not evaluate plaintiff personally all of the time and had to rely on the diagnoses and medical judgments of his treating physicians. Thus, when Doehling responded to plaintiff's requests for pain medication and information, she relied on the professional judgment of defendant Huibregtse. No reasonable jury could find from these undisputed facts that Doehling's failure to do more amounted to deliberate indifference. Johnson v. Snyder, 444 F.3d 579, 586 (7th Cir. 2006) (affirming summary judgment for health administrator who relied on plaintiff's medical record and doctor's treatment decisions); Johnson v. Doughty, 433 F.3d 1001, 1015 (7th Cir. 2006) (affirming directed verdict for health care administrator who responded appropriately to inmate's complaints of worsening symptoms and relied reasonably on doctor's professional opinions).

In sum, there is no evidence that any defendant acted with deliberate indifference to plaintiff's serious back problems. Accordingly, defendants are entitled to summary judgment.

ORDER

IT IS ORDERED that

1. Plaintiff Richard Oates's motion for appointment of counsel, dkt. #83, is DENIED.

2. The motion for summary judgment filed by defendants Laurie Doehling, Sharon Moerchen, Dr. Huibregtse and Holly Puhl, dkt. #55, is GRANTED.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 24th day of September, 2012.

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