

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

TROY MICHAEL KRATZ,

Plaintiff,

v.

DR. BURTON COX,

Defendant.

OPINION AND ORDER

10-cv-630-wmc

Plaintiff Troy Michael Kratz moves this court to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). (Dkt. #48.) On August 27, 2012, the court granted defendant's motion for summary judgment finding that plaintiff had failed to submit evidence from which a reasonable jury could find that the defendant, Dr. Burton Cox, was deliberately indifferent to a serious medical condition in violation of plaintiff's Eighth Amendment rights. (Dkt. #46.) That same day, judgment was entered in favor of defendant. (Dkt. #47.)

On September 19, 2012, Kratz filed the present, timely motion to amend the judgment on two grounds. First, Kratz contends that April and August 2012 medical records from a podiatrist at UW Hospital, which were not available at the time Kratz responded to defendant's motion for summary judgment warrant vacating the court's decision. (Pl.'s Rule 59(e) Mot. (dkt. #48) pp.1-2.) Second, Kratz contends that the court erred in granting defendant's summary judgment because the court failed to consider "the fact that Dr. Cox made a decision based merely and solely on the conditions of my confinement, rather than based on the medical needs of my person."

(*Id.* at p.3.) The court rejects both purported bases for relief and will deny Kratz's Rule 59(e) motion.

First, as to the purported new evidence, the court considered Kratz's representation at summary judgment that the podiatrist at UW Hospital indicated that "surgery is possible to correct this injury and eliminate the pain." (8/27/12 Opinion & Order (dkt. #46) 11 (citing Pl.'s Resp. to Def.'s PFOFs (dkt. #41) 51).) The April 16, 2012, notes from Elizabeth J. Plovovich, DPM simply confirm Kratz's representation of that appointment. Dr. Plovovich noted that "the bony exostosis riding to the dorsal and lateral aspect of the 5th metatarsal base . . . likely represent[s] old healed fracture of the base of the 5th metatarsal." (Kratz Aff., Ex. 1 (dkt. #50-1) 1.) Dr. Plovovich assessed Kratz with "[m]alunion, 5th metatarsal base fracture," recommending that Kratz be fitted with appropriate shoes and ordering an MRI to determine whether surgery is required. (*Id.* at 2.) Nothing about Dr. Plovovich's care of Kratz bolsters his claim of deliberate indifference. As explained in this court's summary judgment opinion, the fact that Cox eventually acquiesced to Kratz's various requests for such a referral does not demonstrate deliberate indifference on Cox's part for his initial reluctance. "It is possible that another doctor could have treated plaintiff more successfully, but that is not the test." *Murillo v. Cox*, No. 08-cv-676-slc, 2010 WL 148682, at *1 (W.D. Wis. Jan. 14, 2010).

Kratz also submits documentation showing an order for medically-approved personal shoes. (Kratz Aff., Exs. 3, 4 (dkt. ##50-3, 50-4).) Kratz further represents in his affidavit that he had an additional appointment at UW Hospital on August 8, 2012,

and the doctor at that appointment submitted an additional order for medical personal shoes. (Kratz Aff. (dkt. #50), ¶¶ 8-10.) Kratz argues that this new evidence is material because Dr. Cox previously refused his request for orthotics based on Cox's belief that such shoes would not be allowed in segregation.

The fact that Kratz eventually received orthotics while in segregation -- a fact that is not definitively established by Kratz's subsequent submission -- does not support a finding that Cox was deliberately indifferent to Kratz's medical condition. *See Gayton v. McCoy*, 593 F.3d 610 (7th Cir. 2010) (“[D]eliberate indifference is simply a synonym for intentional or reckless conduct, and that ‘reckless’ describes conduct so dangerous that the deliberate nature of the defendant’s actions can be inferred.”).

Second, Kratz also contends that the judgment should be vacated because the evidence demonstrates that Dr. Cox treated Kratz based on his conditions of confinement, rather than his medical needs. As the court explained in its summary judgment opinion, “Cox took Kratz’s complaints of pain seriously, prescribing him a variety of pain medications and timely renewing prescriptions. He also counseled him to not engage in activities which aggravated the injury, notably jumping jacks and jogging. Cox also referred Kratz to a physical therapist and approved six sessions.” (8/27/12 Order (dkt. #46) 15.) Based on the undisputed facts, no reasonable jury could find that Dr. Cox failed to treat Kratz’s medical needs in such a way as to constitute deliberate indifference under the Eighth Amendment.

Accordingly,

ORDER

IT IS ORDERED that plaintiff Troy Michael Kratz's motion to alter or amend judgment (dkt. #48) is DENIED.

Entered this 13th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge