

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

JEREMIAH LAMBERT,

Plaintiff,

v.

DR. KENNETH ADLER,

Defendant.

OPINION AND ORDER

11-cv-418-bbc

In this civil case, plaintiff Jeremiah Lambert proceeded under 42 U.S.C. § 1983, arguing that defendant Dr. Kenneth Adler had been deliberately indifferent to his serious ear problems in violation of the Eighth Amendment. The parties agreed to a bench trial, and judgment was entered in favor of defendant on the ground that plaintiff had failed to prove deliberate indifference. Dkt. ##66, 67. Now before the court is plaintiff's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Dkt. #76. Plaintiff argues that the court committed clear error when it concluded that defendant was not deliberately indifferent. Because plaintiff has not shown that the judgment is erroneous, his motion will be denied.

BACKGROUND

While incarcerated at the New Lisbon Correctional Institution in Wisconsin, plaintiff

Jeremiah Lambert experienced significant pain in his ear. Over the course of a year and a half, plaintiff made multiple requests for medical attention to address this pain. He was seen by a nurse for each request. Midway through this ordeal, he was seen by defendant Dr. Kenneth Adler. Dr. Adler declined to make a recommendation to send plaintiff to an ear, nose and throat specialist. After several months, another doctor saw plaintiff, and he recommended three times that plaintiff be seen by a specialist. A prior authorization committee chaired by defendant declined two of the requests and granted the third. (The committee is made up of doctors and nurse practitioners to review requests for specialist visits.) When plaintiff finally saw a specialist, the doctor determined that plaintiff's ear drum had deteriorated as a result of a long term infection and inflammation in his ear. Plaintiff required two surgeries and now suffers hearing loss that requires use of a hearing aid.

After a bench trial, I granted judgment for defendant. While acknowledging the seriousness of plaintiff's injuries, I determined that plaintiff had not proved that defendant's actions met the standard for deliberate indifference under the Eighth Amendment at the time he decided that plaintiff did not require a visit to a specialist for his ear problems. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

OPINION

"To prevail on a Rule 59(e) motion, the moving party 'must clearly establish (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment.'" Edgewood Manor Apartment Homes, LLC v. RSUI

Indemnity Co., 733 F.3d 761, 770 (7th Cir. 2013) (quoting Blue v. Hartford Life & Accident Insurance Co., 698 F.3d 587, 598 (7th Cir. 2012)). Plaintiff has not pointed to any newly discovered evidence; rather, he argues that the court made “manifest legal error.” Plt.’s Br., dkt. # 76, at 1. Plaintiff’s arguments focus on defendant’s actions as a member of the two prior authorization committees that voted against sending plaintiff to a specialist. Plaintiff says the court should have found deliberate indifference because (1) defendant did not review plaintiff’s medical file before the committee made its decision on whether plaintiff could see a specialist; (2) defendant ignored the treating physician’s assessment without justification when the committee made its decisions; (3) defendant did not consult uptodate.com or other medical secondary sources before the committee made its decisions; (4) the only reasons for the committee to decide not to refer plaintiff to a specialist were impermissible ones, such as saving money or avoiding effort; and (5) defendant might have made a different decision had he known plaintiff’s infection was as serious as it turned out to be. Plaintiff says these facts show that defendant failed to use professional judgment in determining that he need not see a specialist. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996) (“The answer is that deliberate indifference may be inferred based upon a medical professional’s erroneous treatment decision only when the medical professional’s 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.”).

The first four of plaintiff’s arguments ignore the court’s findings, specifically that defendant *did* have medically relevant reasons to deny plaintiff’s request to see a specialist.

Professional judgment means judgment based on medical expertise. Estelle v. Gamble, 429 U.S. 97, 107 (1976) (“[T]he question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.”). The committee voted that plaintiff did not yet need a specialist because it determined that he should be treated first with a stronger antibiotic and then by calling and consulting the specialist before having plaintiff visit the specialist. Because these are judgments based on medical evidence, I found that “the evidence in the record shows that the committee members acted independently and in reliance on their own professional judgment. The entire group considered each request and did so without any financial limitations on its decisions.” Dkt. #66, at 13. In other words, defendant’s decisions were not financially or emotionally motivated but were based on his professional medical expertise, not some other motivation. Therefore, plaintiff’s first four arguments are nonstarters because, even assuming plaintiff’s allegations are true, defendant made his decision with professional judgment by using his medical training and his knowledge of plaintiff’s symptoms, not out of animus or recklessness.

Finally, plaintiff says that because, in hindsight, defendant might have decided to allow plaintiff to see the specialist sooner, defendant must not have used professional judgment in the first instance. However, professional judgment does not require perfect or even non-negligent judgment, so the mere fact that defendant’s decision was less than ideal is not enough to say defendant acted with deliberate indifference. 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.”); Estate of Cole by Pardue, 94 F.3d at 259 (“A prisoner . . . cannot establish a § 1983 claim based upon inadequate medical care when the care provided is negligent.”).

Plaintiff has therefore failed to show that the court’s opinion ordering judgment for defendant exhibited manifest error.

ORDER

IT IS ORDERED that plaintiff Jeremiah Lambert’s motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), dkt. #76, is DENIED.

Entered this 30th day of April, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge