IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD CHARLES WILSON,

Plaintiff,

OPINION AND ORDER

14-cv-222-bbc

v.

DR. LORI ADAMS, DR. PATRICK MURPHY
and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

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In this civil action, plaintiff Donald Wilson is proceeding on claims that defendants Lori Adams and Patrick Murphy provided him inadequate medical care for his Alzheimer's disease and neck problems and that the Wisconsin Department of Corrections failed to accommodate his disability. Now before the court is plaintiff's motion "for a writ of mandamus pursuant to 28 U.S.C. § 1651(a) or other appropriate relief" authorizing plaintiff's transport out of prison to be examined by Dr. Paul Baek, a neurosurgeon who has treated plaintiff in the past. Dkt. #44. In an order dated April 6, 2015, I denied plaintiff's first motion on this issue, in which he asked for relief under Fed. R. Civ. P. 35, dkt. #41, because Fed. R. Civ. P. 35 was not an appropriate vehicle for the relief plaintiff sought and he cited no other authority under which I could order his transport, especially at a cost to defendants.

Plaintiff now moves for a writ of mandamus ordering his transport out of the prison

for an examination by Dr. Baek under the authority of 28 U.S.C. § 1651(a), which grants courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The United States Supreme Court has instructed district courts to use § 1651(a) only in "exceptional circumstances" not covered by other statutes, Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985), but "[t]he power conferred by the Act extends, under appropriate circumstances, to persons who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice." United States v. New York Telephone Co., 434 U.S. 159, 174 (1977).

Both parties acknowledge that plaintiff has a constitutional right of access to the courts and such access includes the gathering of necessary evidence for his case. Bounds v. Smith, 430 U.S. 817, 822 (1977). See also Henderson v. Ghosh, 755 F.3d 559, 566-67 (7th Cir. 2014) (reversing summary judgment when expert medical advice was required to prove part of plaintiff's claim and "appointed counsel could have obtained this evidence that Henderson could not"). By all accounts, plaintiff's case will require evidence of his medical conditions. Plaintiff argues that this evidence must come in part from a physical examination. Through his lawyers, plaintiff has offered to pay the cost of his transport and security to and from the examination, contending that this is necessary because neither Dr. Baek nor any other local doctor is willing to examine him in the prison. Dr. Baek conducts examinations in his facility only and plaintiff's lawyers say they talked to at least three other providers for service, all of whom have the same policy.

As I noted in the order entered April 6, 2015, Ivey v. Harney, 47 F.3d 181, 186 (7th Cir. 1995), holds that 28 U.S.C. § 2241(c) does not give courts authority to issue writs of habeas corpus ad testificandum and that § 1651(a) does not permit a court to "order a custodian to transport the prisoner outside the prison to acquire evidence in a suit to which the custodian is not a party." However, in Ivey, the custodian was not a party and the plaintiff was asking to be taken a considerable distance. The court of appeals added that "[i]f expert assistance is essential, [plaintiff's] lawyers should find a willing physician in [a nearby location]. Or they should offer to compensate the Department of Corrections for the cost of transportation and security." Id. In this case, plaintiff has done both. Although, in Ivey, the court of appeals also held that the prison could not be compelled to transport the prisoner because doctors or lawyers could come to the prison, id., in this case, plaintiff argues that no neurosurgeon in the area is willing to come to the prison to examine him and he has evidence of at least four who have refused to do so. Defendants have no contradictory evidence of any neurology experts who would be willing to examine plaintiff in the prison.

Defendants argue that plaintiff has no clear right to a physical examination because he can develop his case through other evidence, in particular, through experts who develop their testimony from reviewing plaintiff's medical records, rather than by examining him. As examples of records on which experts could rely, defendants cite a range of visits plaintiff has made to the University of Wisconsin Hospital, including one for an evaluation of his neck problems in November 2013 and another for a bronchoscopy in February 2015.

Although the February 2015 bronchoscopy might provide an expert some information

about plaintiff's neck condition, defendants have not shown that those records could substitute for a physical examination of his current condition and possible need for surgery. The remaining records relate to examinations that were completed too long ago to provide adequate information on plaintiff's present condition to determine his entitlement to injunctive relief, although they may be appropriate in assessing his damages claims, if those claims are reached.

I conclude that plaintiff has made a sufficient showing that he has no other adequate means of obtaining an expert opinion. Accordingly, his motion for a writ under § 1651(a) will be granted.

The parties have not identified the date or time when plaintiff will be transported to Dr. Baek's office. Once the parties advise the court of that information, I will issue a writ under § 1651(a) ordering plaintiff's transport to and from Dr. Baek's office for a physical examination. Plaintiff is to compensate defendants for the transportation and security costs, as agreed by the parties.

ORDER

Plaintiff Donald Charles Wilson's motion "for a writ of mandamus pursuant to 28 U.S.C. § 1651(a) or other appropriate relief," dkt. #44, is GRANTED. The parties are directed to inform the court in writing of the date and time of plaintiff's examination, at least 14 days before the scheduled appointment. Upon receipt of this information, the clerk of court is directed to issue a writ of mandamus under 28 U.S.C. § 1651(a) as set forth in

this opinion.

Entered this 2d day of June, 2015.

BY THE COURT:
/s/

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BARBARA B. CRABB
District Judge