IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LADERIAN McGHEE,

OPINION AND ORDER

Plaintiff,

15-cv-258-bbc

v.

DALIA SULIENE, KAREN ANDERSON,
KEN ADLER and JOHN DOES,

Defendants.

- -

In this proposed civil action, plaintiff Laderian McGee alleges that defendants Dalia Suliene, Karen Anderson, Ken Adler and multiple unnamed defendants violated his rights under the Eighth Amendment and Wisconsin negligence law by failing to provide him appropriate treatment for his seizures. In particular, plaintiff alleges that defendants refused for years to refer him to a specialist or change his medication, which was not working. Accompanying plaintiff's complaint is a motion for a preliminary injunction in which he asks for an order requiring that all future medical decisions about his seizures be made by health care staff outside the prison.

Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by § 1915(b)(1). Because he is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be

granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). In addressing any pro se litigants complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed the complaint, I conclude that plaintiff may proceed on the following claims: (1) defendants Dalia Suliene and Karen Anderson refused to change his medication or refer him to a specialist, in violation of the Eighth Amendment and state negligence law; and (2) defendant Adler reduced the dosage of plaintiff's medication, in violation of the Eighth Amendment and state negligence law. I am dismissing all other claims for plaintiff's failure to state a claim upon which relief may be granted. I am also denying plaintiff's motion for a preliminary injunction because he concedes in his complaint that his seizures are now under control.

Plaintiff fairly alleges the following facts in his complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Laderian McGhee is an inmate at Columbia Correctional Institution, located in Portage, Wisconsin. He suffers from chronic seizure disorder and has a history of epilepsy. Since at least 2009, he has had a prescription for Carbamazepine, a seizure medication.

Defendants Dalia Suliene, Ken Adler and Karen Anderson were employed in the

health services unit at Columbia Correctional Institution during the relevant time period. Defendant Suliene was a physician and Karen Anderson was the health services manager. Ken Adler was the "substitute physician." Cpt., dkt. #1, at 2. The John Doe defendants are staff within the health services unit.

B. John Doe Defendants, Health Services Staff

In 2009 plaintiff's neurologist at University of Wisconsin Health Hospital recommended that plaintiff's seizure medication be increased to "4 mg twice a day" if his seizures became recurrent. Cpt., dkt # 1, at 3. (Plaintiff does not say what his dosage was in 2009 or how often he was supposed to take his medication.) In 2010 plaintiff's seizures became more frequent, so he notified the health services unit. From December 2010 to August 2013, plaintiff asked health services staff many times to send him to a neurologist or to change his medication, but they did not grant his requests. Instead, health services staff responded to plaintiff's letters as follows:

- December 30, 2010: "No order for neurology, let us know if you want a nursery exam."
- January 23, 2011: "Carbamazepine level will be checked next lab day[.] Your level has been low in past[.] Make sure you do not skip the meds."
- May 6, 2011: "Would you like a nursery assessment?"
- August 10, 2011: "MD Appointment scheduled."
- June 4, 2012: "Scheduled to be seen in HSU: MD."

- July 12, 2012: "You are scheduled to be seen for seizures in 6 months from last visit[.] You need to see RN for seizure activity when it happens to document your seizures[.]"
- July 20, 2012: "Scheduled to be seen in HSU."
- August 14, 2012: "UW-appointment scheduled."
- August 28, 2012: "Please continue RX Carbamazepine as ordered."
- September 30, 2012: "See your level on Carbamazapine still to[o] low per Neurology[.] Will up your medication to 3x a day."
- February 13, 2013: "Scheduled to be seen in HSU; RN."
- April 7, 2013: "Scheduled to be seen in HSU; RN."
- July 10, 2013: "Scheduled to be seen in HSU; MD."
- August 9, 2013: scheduled doctor appointment.

(With respect to most of these responses from health services staff, plaintiff does not say what happened after he received the response. However, he says that he did not receive an appointment with UW after the August 14, 2012 response.)

C. Defendant Ken Adler

On May 15, 2012 plaintiff had a seizure. (Plaintiff says this seizure was "due to his seizure medication not being available to him because of staff negligence." Id. at 4.) During this seizure, plaintiff hit his head on a table, which caused him to suffer from migraine headaches. After this incident plaintiff was seen by defendant Adler. After the exam,

defendant Adler lowered the dosage of plaintiff's seizure medication without telling plaintiff or providing any reasons.

On June 21, 2012 plaintiff asked health services staff why his seizure medication had been lowered without his being informed. Health services staff replied, "Dr. Ken Adler, the substitute MD and the Medical Director was the one who decreased your med[ication]. [It] [w]as decreased because they were controlled." Id. at 5. On June 21, 2012 plaintiff wrote health services that he "needed his seizure medication put back up to the original dose because the lower dose was causing him to have seizures." Id. From June to September 2012 plaintiff complained six times about his recurrent seizures and wrote that his seizures were "coming on a lot more." Id. Plaintiff believes that lowering his dosage caused numerous seizures and migraine headaches.

D. Defendant Dalia Suliene

From 2010 to 2013 plaintiff wrote defendant Suliene at least 16 times and "tried explaining to Suliene the severity of his seizures, the ongoing pain they cause him, and how his seizure medication is no longer preventing his seizures." Id. at 3. For example, on January 24, 2013 plaintiff asked defendant Suliene to send him to a neurologist for his "non-stop seizures and migraines that follow." Id. at 6. In response she wrote, "Painful headaches and seizures are quite consistent and migraine headaches will issue RX Sumatripten for those only!" Id.

On numerous occasions plaintiff attempted to discuss his seizures with defendant

Suliene but she refused. On one occasion defendant Suliene walked out of the room after plaintiff asked to see a neurologist. On another occasion defendant Suliene stated, "You do not need to see anyone for your seizures; you get enough treatment already." Id. at 9. Defendant Suliene told plaintiff that she would not address his seizures anymore and that additional letters about his seizures would result in a conduct report.

E. Defendant Karen Anderson

Beginning in August 2012, plaintiff wrote to defendant Anderson five times complaining about his recurrent seizures. For example, on May 25, 2013 plaintiff wrote directly to defendant Anderson complaining about the lack of medical care he was receiving for his seizures. Plaintiff informed Anderson that he "needed badly to be seen by his [n]eurologist." Id. at 7. Defendant Anderson replied by stating "MD appointment scheduled." Id. (Plaintiff does not say whether he received this appointment.) Anderson did not schedule an appointment with a neurologist or change plaintiff's medication.

F. Neurologist Appointment

In June 2013, plaintiff underwent shoulder surgery at University of Wisconsin Health Hospital. Both before surgery and during a follow up appointment, plaintiff complained about his recurrent seizures to Doctor Blake and Doctor Bayer at the hospital. In 2013, after Blake and Bayer made a recommendation, plaintiff was taken to University of Wisconsin Health Hospital for an evaluation by his neurologist, who increased the dosage

of plaintiff's seizure medication. Since the increase in his medication, plaintiff has been seizure free.

OPINION

I understand plaintiff to be raising the following claims: (1) defendants Suliene, Adler, Anderson and the unnamed defendants refused plaintiff's requests to see a specialist and to change his medication, in violation of the Eight Amendment and state negligence law; (2) defendant Adler reduced the dose of plaintiff's medication, in violation of the Eighth Amendment and state negligence law; and (3) defendant Anderson and the unnamed defendants should be held liable for negligent supervision. I will discuss each of these claims below.

Plaintiff also alleges that a May 2012 seizure was the result of "staff negligence" and that he began to suffer from migraines after he hit his head during the May 2012 seizure. However, I do not understand plaintiff to be raising separate claims with respect to either of these issues. With respect to the May 2012 seizure, he does not identify how "staff" caused his seizure and he does not identify the staff he believes are responsible. With respect to migraines, he does not allege that any of the defendants have failed to provide adequate treatment. Rather, it seems that he is discussing the migraines simply because he believes they are a consequence of defendants' failure to provide appropriate treatment for his seizures.

A. Eighth Amendment

Under the Eight Amendment, prison officials have a duty to provide medical care to those being punished by incarceration after a conviction. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Id. at 104.

1. Serious medical need

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individuals's daily activities, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 847 (1994).

Plaintiff alleges that he suffers from recurrent seizures and has a history of epilepsy. Seizures can be a serious medical condition. King v. Kramer, 68 F.3d 1013, 1018 (7th Cir. 2012) (concluding that plaintiff's seizures met the standard for serious medical condition); Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998) (concluding that plaintiff suffering from seizures had serious medical condition); Mellender v. Larson, No. 2006 WL 3091111, at *4 (W.D. Wis. Oct. 26, 2006)) ("Seizures are serious medical conditions."). Accordingly,

I conclude that plaintiff has alleged adequately that he had a serious medical need.

2. Deliberate indifference

"Deliberate indifference" means that the officials were 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). To demonstrate deliberate indifference plaintiff must show that the defendant "acted with a sufficiently culpable state of mind." Johnson, 444 F.3d at 585 (quoting Johnson v. Doughty, 433 F.3d 1001, 1010 (7th Cir. 2006)). Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Deliberate indifference may be inferred 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." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 260-61 (7th Cir. 1996).

In this case, plaintiff says that all of the defendants were deliberately indifferent to his serious medical needs because they refused for years to refer him to a specialist or change his medication, even though it was clear that the treatment they were providing was ineffective. In addition, plaintiff says that defendant Adler lowered the dose of plaintiff's medication without adequate justification.

a. Dalia Suliene

Plaintiff alleges that he complained to defendant Suliene numerous times over the years about the ineffectiveness of the treatment he was receiving for controlling his seizures, but she refused to refer him to a specialist or change his medication and she even threatened him with a conduct report if he continued to complain. It is well established that prison officials may violate the Eighth Amendment if they persist in an ineffective course of treatment while a prisoner's condition worsens. Gonzalez v. Feinerman, 663 F.3d 311, 314-15 (7th Cir. 2011); Greeno v. Daley, 414 F.3d 645, 655 (7th Cir. 2005). Because this is what plaintiff is alleging that defendant Suliene did, I will allow plaintiff to proceed on this claim.

At summary judgment or trial, it will not be enough for plaintiff to show that he disagrees with defendant Suliene's conclusions about the appropriate treatment, Norfleet v. Webster, 439 F.3d 393, 396 (7th Cir. 2006), or even that Suliene made a mistake. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). Rather, plaintiff will have to show that any medical judgment by Suliene was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted).

b. Dr. Ken Adler

Plaintiff alleges that defendant Adler reduced the dosage of his medication without telling him why. Plaintiff believes that his seizures became more frequent as a result. It may

be that Adler had good reasons for his decision, but, at the pleading stage, it is reasonable to infer that Adler was not using medical judgment. Plaintiff says that health services staff told him later that the dosage was decreased because his medication "was controlled," but it is not immediately apparent why that would be a reason for the decision unless there was evidence that plaintiff had been abusing the medication. At summary judgment or trial, it will be plaintiff's burden to prove that Adler chose to decrease the dosage of his medication without a medical justification, even though Adler knew of a substantial risk that doing so would harm plaintiff.

Also, plaintiff includes defendant Adler in the list of defendants who allegedly prevented him from seeing a neurologist. However, plaintiff does not allege that he asked Adler for a referral or that Adler otherwise knew that plaintiff needed a referral. Plaintiff acknowledges in his complaint that Adler was a "substitute physician" and plaintiff mentions only one instance in which Adler examined plaintiff. Accordingly, I am not allowing plaintiff to proceed on this aspect of his claim against defendant Adler.

c. Karen Anderson

Plaintiff's allegations against defendant Anderson are similar to those he raises against defendant Suliene. In particular, plaintiff says that he asked Anderson several times to refer him to a neurologist or change his medication, but she refused.

A threshold question is whether Anderson had authority to grant plaintiff's requests. If she did not, she cannot be held liable. Miller v. Harbaugh, 698 F.3d 956, 962 (7th Cir.

2012) ("[D]efendants cannot be [held liable under the Eighth Amendment] if the remedial step was not within their power."); Burks v. Raemisch, 555 F.3d 592, 595 (7th Cir. 2009) ("Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job."). It is not clear from plaintiff's complaint what authority Anderson had, but it is reasonable to assume at the pleading stage that, as the health services manager, Anderson could have taken more action than she did. Accordingly, I will allow plaintiff to proceed against Anderson as well. At summary judgment or trial, it will be plaintiff's burden to show not only that defendant Anderson knew that plaintiff was not receiving appropriate treatment, but also that she had authority to take steps to provide different treatment and she refused to do so.

d. John Doe defendants

With respect to health services staff, plaintiff says again that they refused to change his medication or schedule an appointment with a specialist. However, plaintiff does not allege that health services staff simply ignored him. Rather, in most instances, staff referred plaintiff to health care providers such as a nurse or a doctor. Generally, lower level staff are entitled to defer to those with more expertise. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012); Berry v. Peterman, 604 F.3d 435, 440 (7th Cir. 2010). Particularly because plaintiff does not allege that health services staff had authority to override the decisions of health care providers, I conclude that plaintiff has not stated a plausible claim against the unnamed defendants.

B. Medical Negligence

To prevail on a claim for medical negligence in Wisconsin plaintiff must prove that defendants breached their duty of care and plaintiff suffered an injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865 ("In short, a claim for medical malpractice requires a negligent act or omission that causes an injury."). I understand plaintiff to be raising the same claims under state law that he is raising under the Eighth Amendment and I reach the same conclusions with respect to the negligence claims. Plaintiff may proceed on negligence claims against defendants Suliene and Anderson for persisting in effective treatment and against Adler for reducing the dosage of plaintiff's medication. However, I am not allowing plaintiff to proceed against any of the unnamed defendants because he has not shown that they acted negligently by referring him to health care providers at the prison.

C. Negligent Supervision

To state a negligent supervision claim under Wisconsin Law a plaintiff must plead: "(1) the employer owed a duty of care to plaintiff, (2) that employer breached its duty, (3) a wrongful act or omission of the employer was a cause-in-fact of the plaintiff's injury; and (4) an actor omission of the employer was a cause-in-fact of the wrongful act of the employee." John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶ 16, 303 Wis. 2d 34, 50-51, 734 N.W.2d 827, 834. Under Wisconsin law, a "duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm

to some other person." Alvardo v. Sersch, 2003 WI 55, ¶ 14, 262 Wis. 2d 74, 662 N.W.2d 350.

Plaintiff alleges that defendant Anderson violated her duty of care to plaintiff by not carrying out her "ministerial duties" and by "continuing to facilitate and approve the ineffective course of treatment" provided by health services staff. However, because I have concluded that health services staff did not act negligently, defendant Anderson cannot be held liable for failing to supervise them.

Plaintiff includes "John Does" in the list of defendants who may be held liable for negligent supervision. However, plaintiff does not allege that the unnamed defendants had supervisory authority over any other staff, so plaintiff cannot proceed on that claim either.

D. Motion for a Preliminary Injunction

Accompanying plaintiff's complaint is what he calls a "motion for emergency preliminary injunction." Dkt. #5. In that motion, he asks for the following relief:

> (1) That defendant Dalia Suliene and all other Health Care Staff who work directly for the Department of Corrections be prohibited from making further assessments or decisions as to the treatment of McGhee's "Chronic Seizure Disorder";
>
> (2) That any and all decisions relating to McGhee's Seizures be made exclusively by staff who work for UW-Health (or other University of Wisconsin Hospitals).

I am denying plaintiff's motion for three reasons. First, plaintiff's motion does not comply with this court's procedures for obtaining a preliminary injunction, which require a party to submit admissible evidence and proposed findings of fact to support the motion.

(I am including the procedures with this order.) Second, even if I overlook plaintiff's failure to follow the procedures, plaintiff admits in his complaint that he is no longer suffering from seizures since adjustments were made to his medication. To prevail on a motion for a preliminary injunction, plaintiff must show that he is likely to suffer "irreparable harm" if he is required to wait until the conclusion of the lawsuit to obtain an injunction. River of Life Kingdom Ministries v. Village of Hazel Crest, 585 F.3d 364, 375 (7th Cir. 2009). Because plaintiff does not allege that he is facing any immediate harm, he has not made the necessary showing.

Finally, the relief plaintiff requests is extraordinary. He cites no authority for the proposition that a court may require prison officials to provide all of a prisoner's treatment for a particular condition outside the prison under circumstances similar to this case. At a minimum, plaintiff would have to show not only that defendants are violating his constitutional rights, but also that they are unwilling or unable to provide appropriate treatment even if they received a court order to do so. Because plaintiff has not made that showing, I am denying his motion.

ORDER

IT IS ORDERED that

1. Plaintiff Laderian McGhee is GRANTED leave to proceed on the following claims: (1) defendants Dalia Suliene and Karen Anderson refused to change plaintiff's medication or refer him to a specialist, in violation of the Eighth Amendment and state negligence law;

(2) defendant Adler reduced the dosage of plaintiff's medication, in violation of the Eighth Amendment and state negligence law. Plaintiff is DENIED leave to proceed on all other claims and those claims are DISMISSED for plaintiff's failure to state a claim upon which relief may be granted. The complaint is DISMISSED as to the John Doe defendants.

2. Plaintiff's motion for a preliminary injunction, dkt. #5, is DENIED.

3. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

4. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendants or the court are

unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 16th day of July, 2015.

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