IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEROME WALKER,

OPINION AND ORDER

Plaintiff,

17-cv-234-bbc

v.

N/P BONSON and J. WATERMAN,

Defendants.

- -

Pro se plaintiff Jerome Walker, who is incarcerated at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed a proposed complaint, alleging that prison medical staff violated his rights under the Eighth Amendment by failing to provide him adequate medical care for his lower back pain. Plaintiff has made an initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1), so his complaint is ready for screening under 28 U.S.C. § 1915A.

Having reviewed the complaint, I conclude that plaintiff may proceed on Eighth Amendment claims against defendants N/P Bonson and J. Waterman for withholding a medical device plaintiff needed for his lower back pain, and against defendant Waterman for failing to take reasonable measures to respond to plaintiff's requests for pain medication. He will not be allowed to proceed against defendant Bonson on a claim related to his pain medication.

The following facts are drawn from the allegations in plaintiff's complaint and the documents attached to it.

ALLEGATIONS OF FACT

Plaintiff Jerome Walker is incarcerated in a segregation unit at the Wisconsin Secure Program Facility in Boscobel, Wisconsin. Defendants are both employed at the institution: defendant N/P Bonson is a nurse practitioner and defendant Jolinda Waterman is a nurse and the health services manager.

Plaintiff has axial low back pain consistent with lumbar spondylosis. On July 31, 2015, a medical specialist recommended a transcutaneous electrical nerve stimulation (TENS) unit for plaintiff's lower back pain and the health services unit agreed to provide one to plaintiff. On October 28, 2016, the wire on plaintiff's TENS unit dislodged as he was hurrying to remove the unit to give it to a corrections officer. The corrections officer stated that he would give the unit to a nurse. Defendant Bonson took the TENS unit without seeing or examining plaintiff. Plaintiff was told that the device was not being returned to him because he had altered it.

Plaintiff completed a health service request form on October 30, 2016, stating that he had not altered the device and needed it for his back pain. On November 6, 2016, he submitted another request asking that the device be returned because he was in pain. He also asked for pain pills. Plaintiff made similar requests on November 10 and 30 and December 4 and 18, 2016, emphasizing that he was in pain and the medication that he was on was not working. On each occasion, medical staff wrote that his requests were forwarded

to the "provider" for review. On November 11, 2016, he was told that he had been scheduled to see a provider. On December 6, 2016, plaintiff wrote to health services to complain that he had not had his pain medication (Nortriptyline) for 30 days because it had not come from the pharmacy.

Defendant Waterman had the authority to force defendant Bonson to return his TENS unit but failed to do so even though she knew that plaintiff was in pain. On December 29, 2016, defendant Waterman wrote plaintiff that "[t]he TENS unit is prescribed for use 20 minutes duration, up to 3 times a day. The TENS unit is on the medication cart of each housing unit and is to be documented as a treatment on the DOC-3026 Medication/Treatment record. It is to be used at medication pass times only." Dkt. #1 at 3. On January 6, 2017, defendant Bonson notified plaintiff that his personal TENS unit was being returned stating that "[y]ou have received your TENS unit order back. Hopefully that is helping your back pain. You will be seen by Physical Therapy here and you have also been referred to physical medicine and rehabilitation through gunderson lutheran for further work up of your pain." Dkt. #1 at 3.

OPINION

I understand plaintiff to be raising the following Eighth Amendment medical care claims against defendants Bonson and Waterman: (1) defendants took the TENS unit plaintiff needed for his lower back pain and failed to return it for 69 days without consulting or examining him, even though they knew he was in pain; (2) defendants failed to take

reasonable measures to respond to plaintiff's complaints that he lacked effective pain medication, even though they knew his current medication was not alleviating his back pain; and (3) defendants failed to take reasonable measures to provide plaintiff with pain medication for 30 days when he was unable to get his regular prescription medication from the pharmacy.

To prevail on a claim under the Eighth Amendment, a prisoner must show that the defendant was "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). 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). The condition does not have to be life threatening. Id. A medical need may be serious if it "significantly affects an individual's daily activities," Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997), if it causes significant pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). Delay in treatment may constitute deliberate indifference if the delay unnecessarily prolongs the prisoner's pain. Smith v. Knox County Jail, 666 F.3d 1037, 1040 (7th Cir. 2012).

"Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). Under this standard, plaintiff's claim has three elements:

(1) Does plaintiff need medical treatment?

(2) Do defendants know that plaintiff needs treatment?

(3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

Further, § 1983 limits liability to public employees who are personally responsible for a constitutional violation. Burks v. Raemisch, 555 F.3d 592, 595-96 (7th Cir. 2009). To be liable, an individual defendant must have caused or participated in a constitutional violation. Hildebrandt v. Illinois Department of Natural Resources, 347 F.3d 1014, 1039 (7th Cir. 2003). An individual is not liable under § 1983 merely because he agrees with or defends a decision made by someone else.

A. TENS Unit

Plaintiff alleges that defendant Bonson took his TENS unit without consulting or examining him and refused to return it for 69 days, even though she knew plaintiff was in pain. Although plaintiff does not allege that defendant Waterman was involved in the initial decision not to return his TENS unit, he alleges that Waterman knew about Bonson's actions and had the authority to do something about it but failed to do so. At this stage of the proceedings, I will infer that defendants' failure to return plaintiff's TENS unit was unreasonable and could have prevented harm to plaintiff, and will allow plaintiff to proceed on a claim against defendants Waterman and Bonson under the Eighth Amendment.

B. Pain Medication

Plaintiff alleges generally that his pain medication was ineffective at addressing his pain while he did not have access to his TENS unit and that he went without any pain medication for 30 days because he could not get it from the prison pharmacy. Plaintiff filed a number of health services requests about this problem, but he alleges that the only response he received to his complaints was a general statement that his request was being forwarded to the "provider." Plaintiff does not allege who in the health services unit received his complaints or responded to them, but the documents attached to his complaint show that neither Waterman nor Bonson signed the response.

It is not clear from plaintiff's complaint what knowledge or authority Waterman had with respect to health services requests or plaintiff's pain medication, but it is reasonable to assume at the pleading stage that, as the health services supervisor, Waterman could have taken more action than she did with respect to plaintiff's complaints of ineffective and nonexistent pain medication. Therefore, I will allow plaintiff to proceed against Waterman under the Eighth Amendment. However, plaintiff's allegations are insufficient to state a claim against defendant Bonson because he does not allege that Bonson knew about his requests for pain medication or that she had any role in failing to address them and had any responsibility for doing so. 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, 555 F.3d at 596 ("[P]risoner's view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to

the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right."). Accordingly, plaintiff may not proceed against defendant Bonson without properly alleging her personal involvement. Plaintiff may amend his complaint later in the case and address this deficiency if he is able.

With respect to all of his claims, plaintiff should keep in mind that he does not have a constitutional right to demand a specific type of medical care or treatment. Forbes, 112 F.3d at 267 ("Under the Eighth Amendment, Forbes is not entitled to demand specific care. She is not entitled to the best care possible."). See also Kendrick v. Frank, 310 Fed. Appx. 34, 38 (7th Cir. 2009) ("Eighth Amendment does not confer a constitutional right to demand either a particular type of medical treatment or a certain specialist."). Whether defendants' decisions not to return his TENS unit or provide any additional response to his pain medication complaints were medically sound or so far outside the scope of accepted medical practice as to violate the Eighth Amendment is a question to be answered through further litigation. In particular, it will be plaintiff's burden to prove that (1) he had a serious medical need; (2) defendants knew his condition was serious, that it caused him pain and that his pain could be relieved by the TENS unit and pain medication; and (3) defendants deliberately ignored his need for the TENS unit and pain medication.

ORDER

IT IS ORDERED that

1. Plaintiff Jerome Walker is GRANTED leave to proceed on the following claims under the Eighth Amendment:

> a. Defendants Bonson and Waterman took the TENS unit plaintiff needed for his lower back pain and failed to return it for 69 days without consulting or examining him, even though they knew he was in pain;
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> b. Defendant Waterman failed to take reasonable measures to respond to plaintiff's complaints of ineffective pain medication, even though she knew his current medication was not alleviating his back pain; and
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> c. Defendant Waterman failed to take reasonable measures to provide plaintiff with pain medication for 30 days when he was unable to get his regular prescription medication from the pharmacy.

2. 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.

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. Once the defendants answer the complaint, the clerk of court will set a telephone conference before Magistrate Judge Stephen Crocker. At the conference, Magistrate Judge Crocker will set a schedule for the case.

5. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to plaintiff's custodian regarding the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir.1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

6. 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.

7. 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.

8. 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 22d day of June, 2017.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge