IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DIEGO GIL,

Plaintiff,

v.

JAMES REED; JAMIE PENAFLOR and UNITED STATES OF AMERICA,

Defendants.

OPINION AND ORDER

00-C-0724-C

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This is a civil action for monetary relief brought pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. §§ 2671 – 2860. Plaintiff Gil is an inmate at the Federal Correctional Institution in Oxford, Wisconsin. He is proceeding in forma pauperis in this action on his claims that between March 1998 and August 7, 2000, defendant United States of America negligently breached a duty of care to provide him with adequate medical care and that defendants Reed and Penaflor were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. With regard to the Eighth Amendment claims, plaintiff specifically alleges that defendant Penaflor refused to give him a prescribed antibiotic when

plaintiff tried to pick up the drug at the appointed medication line, even though the prescription was ready; and that defendant Reed revised a prescription from plaintiff's surgeon and made plaintiff wait an hour in great pain to be seen for treatment. Presently before the court is defendants' motion for summary judgment. Because I find that plaintiff has failed to produce any expert evidence that would enable a jury to determine whether his treating physicians did not exercise the requisite degree of care and skill in treating him and because a reasonable jury could not conclude that defendants Penaflor and Reed were deliberately indifferent to his serious medical needs, defendants' motion for summary judgment will be granted.

From the facts proposed by the parties and the record, I find the following to be undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Diego Gil has been confined at the Federal Correctional Institution in Oxford, Wisconsin since July 1, 1994. Defendants are employed by the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Oxford, Wisconsin. Defendant James Reed is the prison's clinical director and oversees the administration of clinical care to the prison's inmates. Defendant Jamie

Penaflor is a physician assistant at the prison.

B. Defendant Penaflor

On March 23, 1998, plaintiff was seen by prison medical staff because he was experiencing fever, chills and pain and tenderness at the site of a surgical incision. The incision had been made approximately two weeks earlier when plaintiff had an operation to correct a rectal prolapse. The prison medical staff determined that plaintiff had an incisional abscess. Physician assistant Jose Au-Lay drained the abscess and prescribed both an antibiotic, Cephalexin, to fight further infection and Tylenol III for pain. The prison medical staff told plaintiff the Cephalexin and Tylenol would be available that same day and that he should begin taking them immediately. The medical staff gave plaintiff written authorization to pick up the Cephalexin and Tylenol at that evening's 8:30 pm medication line. Later on March 23, 1998, Jose Au-Lay, the physician assistant who prescribed the antibiotic for plaintiff, became concerned that plaintiff's allergy to penicillin might make the prescription inappropriate. Au-Lay raised his concerns with Dr. Muhammad Aslam, a physician at the prison. At around noon, Dr. Aslam determined that plaintiff should indeed be given the antibiotic and monitored daily by prison medical staff.

When plaintiff arrived at the 8:30 pm medication line on March 23, 1998, defendant Penaflor was the staff member dispensing inmate medication. Plaintiff gave defendant

Penaflor the note authorizing him to pick up his prescriptions for Cephalexin and Tylenol III. In response, defendant Penaflor grabbed two bottles, looked at their labels and handed plaintiff one bottle containing Tylenol III. Defendant Penaflor held onto the other bottle and told plaintiff in a hostile tone of voice that he could not have it. When plaintiff asked defendant Penaflor why he was being denied the antibiotic, Penaflor refused to answer and told plaintiff to go back to his housing unit. When plaintiff returned to his unit he related the events that took place at the medication line to the duty officer. The duty officer called defendant Penaflor to investigate, but Penaflor told the officer he was too busy to talk and hung up. The duty officer then called his lieutenant and reported the incident in the unit's log book, noting that plaintiff was told to go to the medication line scheduled for the next morning. Plaintiff went again to the medication line on the morning of March 24, 1998 and received the prescribed antibiotic. The label on the bottle of antibiotics carried the date March 23, 1998. On March 25, 1998, plaintiff told prison medical staff that his incision felt much better after taking the antibiotics.

C. Defendant Reed

On May 1, 2000, plaintiff underwent a second surgical procedure to correct his rectal prolapse. The surgery was performed by a Dr. Michael S. Kim, a colorectal specialist not employed by the Bureau of Prisons. After plaintiff returned to the prison that same day, he

was prescribed a sitz bath, Metamucil and Milk of Magnesia (both laxatives) and Colace (a stool softener), pursuant to Dr. Kim's recommendations. Plaintiff was also prescribed Tylenol III, even though Dr. Kim had recommended Vicodin and plaintiff had told defendant Reed that Dr. Kim had warned against the use of Tylenol III because of its potential to cause constipation, which in turn could cause a reoccurrence of the rectal prolapse. Vicodin is not included in the national formulary of drugs utilized by the Bureau of Prisons but has a therapeutic effect similar to Tylenol III. On May 2, defendant Reed cancelled Dr. Kim's post-operative prescriptions of Metamucil and Milk of Magnesia. Defendant Reed discontinued the prescriptions for Metamucil and Milk of Magnesia even though he knew plaintiff was experiencing constipation. Defendant Reed believed Metamucil and Milk of Magnesia increased the possibility of severe dehydration due to the increased frequency of loose stools. Defendant Reed continued Dr. Kim's post-operative prescription of the stool softener Colace to prevent fecal impaction. On May 5, 2000, when plaintiff again complained of constipation, defendant Reed prescribed Milk of Magnesia, but continued the Tylenol III prescription. Plaintiff did not receive the Milk of Magnesia until the evening medication line on May 8, 2000.

On May 9, 2000, plaintiff was still constipated, could not urinate and was in great pain. Plaintiff made an appointment to see defendant Reed, who knew of plaintiff's long period of constipation. Plaintiff arrived at the prison hospital at the time of the scheduled

appointment, but was told he would have to wait for defendant Reed to see him. After one hour plaintiff was in severe pain and bleeding from the rectum. He told prison medical staff that he could no longer wait to see defendant Reed. Plaintiff returned to his cell to change clothes and lie down. Because Gil left before his appointment, prison medical records indicate that he was a "no show" for the appointment. Plaintiff continued to experience great pain until May 10, 2000, when he was seen by a prison physician who drained his urine with a catheter and administered two enemas because plaintiff was seriously constipated. Plaintiff was told to stop taking Tylenol III because of its constipating effect and was prescribed Motrin instead. On May 11, 2000, plaintiff again saw Dr. Kim. Dr. Kim was upset that his post-operative instructions had not been followed and rewrote them. On May 12, 2000, plaintiff received Metamucil from prison medical staff.

OPINION

A. Federal Tort Claims Act

The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, provides in part that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Because a claim brought under the FTCA is governed by "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), the substantive law of

Wisconsin governs plaintiff's claim that defendant United States of America negligently or recklessly breached a duty of care to provide him with adequate medical care for his rectal prolapse and associated symptoms. Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). Wisconsin recognizes the tort of medical malpractice as having three elements: 1) the care provider acted negligently by failing to use the required degree of care and skill that a reasonable care provider in the same class would exercise in the same or similar circumstances; 2) the patient was harmed; and 3) there is a causal connection between the provider's negligence and the harm the patient suffered. Wis J-I Civil 1023. The burden is on the plaintiff to prove that the care provider was negligent. Id. In addition, the Bureau of Prisons has a statutory duty to provide federal prisoners with "safekeeping, care, and subsistence" independent of any inconsistent state rule governing the duty of care owed by state correctional officials to state prisoners. 18 U.S.C. § 4042(2); United States v. Muniz, 374 U.S. 150, 164-65 (1963). However, the FTCA relieves the United States from liability on "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation." 28 U.S.C. § 2680(a).

Defendant United States has not proposed findings of fact regarding the specifics of plaintiff's medical malpractice claims (except when they overlap with plaintiff's Eighth Amendment claims). Rather, defendant United States notes that "plaintiff has failed to provide any expert testimony or evidence that any of the care provided him by the defendant

United States was not within the standard of practice in the community at the time the treatment was provided." Defs.' Am. Proposed Findings of Fact and Conclusions of Law, dkt. #55, ¶ 3; Decl. of Steven Pray O'Connor, dkt. #36, ¶ 5. Defendant United States argues that Wisconsin law requires the plaintiff in a medical malpractice case to produce expert medical evidence in order to avoid losing on summary judgment. Generally this is true and some cases state this proposition unequivocally. See Zintek v. Perchik, 163 Wis. 2d 439, 455, 471 N.W.2d 522, 528 (Ct. App. 1991) ("medical negligence *cannot* be established without expert testimony")(overruled on other grounds); Lech v. St. Luke's Samaritan Hosp., 921 F.2d 714, 716 (7th Cir. 1990) ("Wisconsin law . . . requires expert testimony to establish the standard of care for a physician in a medical malpractice case."). However, it is also true that the Supreme Court of Wisconsin has invoked the doctrine of *res ipsa loquitur* and relaxed the rule requiring expert evidence in medical malpractice cases "in situations where [a physician's] errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care." Richards v. Mendivil, 200 Wis. 2d 665, 673, 548 N.W.2d 85, 89 (Ct. App. 1996) (citing Fehrman v. Smirl, 20 Wis. 2d 1, 21-22, 121 N.W.2d 255, 266 (1963)). Nevertheless, I conclude that this is not "the unusual case" where expert testimony is unnecessary. Kasbaum v. Lucia, 127 Wis. 2d 15, 20 n.3, 377 N.W.2d 183, 185 (Ct. App. 1985).

In Fehrman, the state supreme court summarized the typical situations in which the common knowledge of a layperson would suffice in a medical malpractice case, rendering expert evidence unnecessary. These include the failure to remove a sponge or instrument from a patient's body cavity; the removal of an inappropriate part of a patient's anatomy; the failure of a physician to sterilize instruments; and injury to an inappropriate part of the anatomy "lying without the operative field," such as inflicting injury on a patient's shoulder during an appendectomy. Fehrman, 20 Wis. 2d at 22-23, 121 N.W.2d at 266-67. In contrast to these relatively straightforward cases, plaintiff's malpractice claims involve more complicated questions regarding the diagnosis of his rectal prolapse, the choice of procedures used to correct it, the timing of those procedures and other medical treatment the plaintiff received and the propriety of certain combinations of medicines. Accordingly, plaintiff's malpractice claims cannot be proved without expert evidence that "enables [a jury] to determine whether [the] defendant failed to exercise the degree of care and skill required of the defendant." Zintek, 163 Wis. 2d at 455, 71 N.W.2d at 528.

As defendant United States points out, beyond listing the names of his treating physicians (who are all either defendants in this case or employees or contractors of defendant United States), plaintiff has failed to produce any expert evidence supporting his malpractice claims. Plaintiff does not dispute this. Instead, in his response to defendants' proposed findings of facts, which plaintiff filed with the court on November 29, 2001,

plaintiff asks for an additional 30 days in which to find an expert. I note first that I specifically warned plaintiff two months earlier, on September 21, 2001, that he would need to find a medical expert willing to testify on his behalf. Order dated September 21, 2001, dkt. #27, at 2. I note also that well over thirty days have now passed since plaintiff asked for a thirty day extension, yet plaintiff has not informed the court that he has made any progress in his search for an expert. "When expert testimony is required and is lacking, the evidence is insufficient to support a claim" and summary judgment is appropriate. Kinnick v. Schierl, Inc., 197 Wis. 2d 855, 862, 541 N.W.2d 803, 806 (Ct. App. 1995); see also Sitts v. United States, 811 F.2d 736 (2nd Cir. 1987) (affidavit of government attorney declaring that FTCA medical malpractice plaintiff had submitted no expert evidence was sufficient to support Fed. R. Civ. P. 56 summary judgment motion). A plaintiff in a medical malpractice case cannot simply "list several physicians' names without having any inkling as to what their opinions might be, and, eventually, to proceed to trial on that basis." Albert v. Waelti, 133 Wis. 2d 142, 145-48, 394 N.W.2d 752, 754-55 (Ct. App. 1986). Accordingly, defendant United States' summary judgment motion will be granted.

B. Eighth Amendment

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996)

(quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that prison officials were deliberately indifferent to this need (subjective component). Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define "serious medical needs," the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371.

The Supreme Court has held that deliberate indifference requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91. Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. Reckless disregard is characterized by highly unreasonable conduct or

a gross departure from ordinary care in a situation in which a high degree of danger is readily apparent. Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985). However, courts must "examine the totality of an inmate's care when considering whether that care evidences deliberate indifference to his serious medical needs." Gutierrez, 111 F.3d at 1375.

1. Defendant Penaflor

Plaintiff was granted leave to proceed on his claim that defendant Penaflor refused "in a hostile tone" to give plaintiff his prescribed antibiotic, even though the antibiotic had been made available for him to pick up at the medication line. Order dated December 21, 2000, dkt. #2, at 23. Plaintiff appears to have carefully worded his responses to defendants' proposed findings of fact regarding this incident. Plaintiff maintains that he saw defendant Penaflor grab two bottles, inspect them, then hand plaintiff only one bottle that contained Tylenol. Plaintiff never alleges that he saw the label on the second bottle or could otherwise deduce with certainty that the second bottle contained his antibiotics. Rather, plaintiff simply goes on to state that "Penaflor held onto [sic] the bottle of antibiotic medication." Pl.'s Resp. To Defs.' Proposed Findings of Fact and Conclusions of Law, dkt. #51, ¶ 7. For his part, defendant Penaflor suggests that the second bottle he grabbed may not have been plaintiff's prescription or that like the physician assistant who wrote the prescription, he

might have had second thoughts about providing the antibiotic Cephalexin to plaintiff, who is allergic to penicillin. Nevertheless, because defendant Penaflor admits he has no specific recollection of the encounter and because I must examine the facts in the light most favorable to the plaintiff, I will assume for the purpose of deciding this motion that the second bottle defendant Penaflor grabbed contained plaintiff's antibiotic prescription.

The Seventh Circuit has noted that "'a serious medical need is one that has been diagnosed by a physician as mandating treatment." Gutierrez, 111 F.3d at 1373 (citing Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977)). On the day plaintiff was denied the antibiotic by defendant Penaflor, he had been diagnosed with an incisional abscess that, in the medical staff's opinion, required draining and the prescription of an antibiotic to fight further infection. This was a serious medical need. However, I conclude that, from the facts alleged by plaintiff, a jury could not reasonably conclude that plaintiff was the victim of deliberate indifference.

Courts "examine the totality of an inmate's medical care when determining whether prison officials have been deliberately indifferent to an inmate's serious medical needs." Walker v. Peters, 233 F.3d 494, 501 (7th Cir. 2000); Gutierrez, 111 F.3d at 1375. In this case, plaintiff was made to wait a matter of hours before receiving the antibiotic prescription defendant Penaflor withheld from him. Plaintiff made his unsuccessful attempt to pick up

his prescription at the 8:30 pm medication line on March 23, 1998. Instead, he received his prescription on the morning of March 24, 1998. Occasional delays or "isolated instances of neglect . . . taken alone or collectively cannot support a finding of deliberate indifference." Gutierrez, 111 F.3d at 1375 (fourteen day delay in receiving treatment, including antibiotics, for an infected cyst not deliberate indifference in view of overall treatment record).

Further, plaintiff has provided no evidence that he was harmed by being forced to wait overnight for his antibiotics. Plaintiff argues that because he told prison medical staff on March 25, 1998 that his incision was feeling better since starting on the antibiotics, he must have been harmed by the setback in his recovery brought about by the overnight delay. In response, defendant Penaflor submitted the declaration of Dr. Muhammad Aslam, one of plaintiff's treating physicians, to the effect that the delay did not inhibit the antibiotics' effect. A plaintiff who "cannot show injury . . . cannot make out a claim of deliberate indifference relating to his treatment." Walker, 233 F.3d at 502. In Walker, an inmate with hemophilia was occasionally denied a clotting protein when he claimed to be suffering internal bleeding. His hematologist stated that the inmate's inability to walk could be related to untreated internal bleeding in his joints or could be the result of muscles atrophied from disuse. The court determined that because the hematologist was speculating as to the cause of the inmate's injuries, the inmate had produced no evidence suggesting the

occasional denials of the clotting protein injured him. Because the inmate had no evidence of injury, his deliberate indifference claim could not survive a motion for summary judgment. Id. Similarly, plaintiff has done nothing more than speculate that he was injured by the overnight delay of his antibiotics. Because I find that the overnight delay of antibiotics was an isolated incident and because plaintiff has failed to produce evidence other than his own speculation that he was injured by the delay, defendant Penaflor's motion for summary judgment will be granted.

2. Defendant Reed

Plaintiff was granted leave to proceed on his Eighth Amendment claim that defendant Reed cancelled or altered certain prescriptions that Dr. Kim provided plaintiff following his second rectal prolapse operation, specifically, the Metamucil and Milk of Magnesia prescribed by Dr. Kim and the Vicodin he recommended. Plaintiff also challenges as a violation of the Eighth Amendment the fact that he was made to wait for an hour in great pain after arriving for his scheduled appointment with Dr. Reed.

Defendant Reed maintains that he cancelled the Metamucil and Milk of Magnesia prescriptions because he feared that they might cause plaintiff to become deyhdrated as a result of increased loose stools. According to defendant Reed, to avoid fecal impaction or

constipation, he continued Dr. Kim's prescription of the stool softener Colace. Defendant Reed also notes that Vicodin is not included in the national formulary of drugs utilized by the Bureau of Prisons and that plaintiff was prescribed Tylenol III because it has a similar therapeutic effect. Defendant Reed argues that these decisions were based on an exercise of his medical judgment and that he cannot be found to have been deliberately indifferent to plaintiff's medical needs simply because he preferred a slightly different post-operative treatment than that recommended by Dr. Kim and because plaintiff had to wait one hour to be seen when he was in great pain. I agree.

Plaintiff argues that defendant Reed knew he was constipated and caused him to remain so by cancelling the Milk of Magnesia and Metamucil prescriptions and by prescribing pain medication (Tylenol III) that could cause constipation. At best this states a claim for malpractice. "[M]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106. Furthermore, although plaintiff alleges that defendant Reed knew he was constipated, he provides no evidence, expert or otherwise, that defendant Reed knew or should have known that discontinuing two laxatives (Metamucil and Milk of Magnesia), while continuing a stool softener (Colace) in conjunction with a pain killer that can cause constipation (Tylenol III) would result in a substantial risk of serious harm to plaintiff. I note also that three days after defendant Reed cancelled the Metamucil and Milk of Magnesia, he reinstated the Milk of Magnesia when

plaintiff continued to complain of constipation. This suggests that although the original cancellation of the Milk of Magnesia and Metamucil might have been poor judgment, defendant Reed was not deliberately indifferent to plaintiff's constipation.

The fact that Dr. Kim preferred a different course of post-operative treatment does not suffice to make out an Eighth Amendment claim. "Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Further, "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 judgment." Id. at 261-62 (emphasis added). Plaintiff has produced no evidence, other than his own opinion, suggesting that defendant Reed's post-operative treatment was such a substantial departure from accepted practices that he could not have based his treatment decisions on his medical judgment. This does not suffice to create a genuine issue of material fact for trial.

Finally, plaintiff argues that defendant Reed was deliberately indifferent when he made plaintiff wait an hour for a scheduled appointment, even though plaintiff had been constipated for nine days, could not urinate and was in great pain. Plaintiff maintains that

he arrived for his appointment on time, but left after an hour because he was weak and needed to lie down and change his clothes because he was bleeding from his rectum. Defendant Reed notes that prison records indicate plaintiff was a "no show" for his appointment. These two facts are not necessarily inconsistent, as plaintiff may have been on time for the appointment even if he was absent when defendant Reed was ultimately ready to see him. Examining the facts in the light most favorable to the non-moving party, I assume for the purpose of deciding defendant Reed's motion that plaintiff showed up for his appointment and waited to be seen for an hour before leaving. Even so, defendant Reed's motion must be granted. I do not doubt that plaintiff was in great pain while waiting to see defendant Reed and was understandably upset by the delay, but a wait of one hour simply does not amount to deliberate indifference. Gutierrez, 111 F.3d at 1375 (isolated delays cannot support a finding of deliberate indifference).

ORDER

IT IS ORDERED that

1. The motion of defendants United States of America, Jamie Penaflor and James Reed for summary judgment is GRANTED. The clerk of court is directed to enter judgment

for defendants and close this case.

Entered this 28th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge