IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JUSTIN D. DeBOER,

Plaintiff,

v.

DR. LUY,

Defendant.

OPINION and ORDER

01-C-382-C

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff Justin DeBoer seeks monetary relief for defendant Dr. Luy's refusal to prescribe him pain medication strong enough to relieve the pain he suffers as the result of a serious condition affecting his ear that has been diagnosed as chronic mastoiditis. Presently before the court are defendant's motion for summary judgment and plaintiff's motion to strike defendant's affidavit. Because I find that no reasonable jury could conclude that defendant was deliberately indifferent to plaintiff's pain and that plaintiff has failed to support his motion to strike adequately, defendant's motion will be granted and plaintiff's motion will be denied.

An initial comment is necessary on plaintiff's responses to defendant's proposed findings of fact. Plaintiff's responses fail largely to comply with this court's procedures to

be followed on motions for summary judgment. This is so even though plaintiff was twice reminded that he must conform his responses to the court's procedures, once in September 2001, in the preliminary pretrial conference order, dkt. #10, at 3, and again in March 2002, dkt. #25, at 4-5, when plaintiff was granted a second extension of time in which to respond to defendant's summary judgment motion. At that time, plaintiff was reminded specifically that, among other things, he "must follow this court's 'Procedures to be Followed on Motions for Summary Judgment' by, for instance, citing to evidence such as affidavits when responding to defendant's proposed findings of fact." Despite these reminders, plaintiff's responses are still deficient. In particular, in a number of instances plaintiff fails to cite evidence in the record supporting his version of disputed facts. In other instances, he cites generally a bundle of over 30 exhibits he submitted in opposition to defendant's motion, rather than citing to specific exhibits. At other times, plaintiff does cite specific exhibits. However, some of these exhibits do not appear anywhere in plaintiff's submissions (for example, Exhibits "4/B" and "3/U") and other exhibits are undated and their significance is unclear. Accordingly, most of defendant's proposed findings of fact must be considered undisputed.

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

UNDISPUTED FACTS

Plaintiff Justin DeBoer is an inmate incarcerated at Fox Lake Correctional Institution in Fox Lake, Wisconsin. Defendant Enrique M. Luy, M.D., is employed as a physician at the Fox Lake facility, where he attends to the medical needs of inmates by diagnosing and treating illnesses and injuries and arranging for professional consultation when warranted.

On October 24, 2000, plaintiff informed the Fox Lake Correctional Institution's health services unit that he had a history of a chronic right ear infection with drainage, that he had undergone many courses of antibiotics in an attempt to treat the infection and that in 1990 he had a right mastoidectomy. According to Stedman's Medical Dictionary 1071 (27th ed. 2000), a mastoidectomy is an operation "on the mastoid process of the temporal bone and middle ear to drain, expose, or remove an infectious, inflammatory, or neoplastic lesion." On October 26, 2000, defendant requested and received approval for plaintiff to be evaluated by the University of Wisconsin ear, nose and throat clinic concerning his chronic right ear drainage. On November 2, 2000, plaintiff went to the UW clinic where it was determined that he had recurrent right mastoiditis, a condition that caused plaintiff to experience severe pain and periodic bleeding from his ear. During this visit, a UW physician, Dr. Hodges, prescribed Vicodin for plaintiff's pain. When plaintiff returned to the prison with his Vicodin prescription, no Vicodin was available because it is not carried regularly at the prison and had to be ordered from the central pharmacy in Madison, Wisconsin. Instead, the Vicodin prescription was discontinued by Dr. Springs (presumably

another physician at the prison) in favor of Tylenol #3.

On November 3, 2000, plaintiff told defendant he was still experiencing pain. Defendant arranged for plaintiff to see Dr. Hodges again at the UW clinic. On November 20, 2000, plaintiff saw Dr. Hodges, who diagnosed him as suffering from chronic mastoiditis and prescribed Percocet for his continued pain. On November 27, 2000, plaintiff finished the Percocet prescription. Rather than refilling the Percocet prescription, defendant prescribed Darvocet N100 for plaintiff. Both Percocet and Darvocet are controlled drugs that can become habit forming. Defendant believed that prescribing Darvocet, the less addictive of the two, was in plaintiff's best interest. Also at this time, defendant requested a follow-up visit for plaintiff at the UW clinic. The follow-up visit took place on December 22, 2000. Plaintiff was prescribed Percocet for his pain, which was provided to him at the prison.

When the Percocet ran out on January 2, 2001, defendant again prescribed Darvocet N100 for plaintiff. On January 26, 2001, plaintiff was seen again at the UW clinic. More surgery for his right ear was recommended and he was prescribed Vicodin for pain. Upon his return to the prison, Vicodin was issued for plaintiff to be taken as needed for pain. On January 29, 2001, defendant arranged for plaintiff to visit the UW clinic for a pre-operative evaluation. On February 1, 2001, plaintiff finished the Vicodin prescription and defendant prescribed Darvocet N100 for plaintiff for one month. Plaintiff appeared to defendant to

be comfortable while taking this medicine and he did not complain of not receiving enough medication.

On March 2, 2001, plaintiff was experiencing continuing pain that he reported to a nurse at the prison. The nurse attempted to contact the UW clinic but never received a response to several messages she left there. In an effort to treat the pain, defendant discontinued the Darvocet N100 and prescribed Vicodin instead. On March 21, 2001, plaintiff underwent a pre-operative evaluation at the UW clinic and the next day defendant put in a request that plaintiff undergo the recommended surgery, which was performed on March 26, 2001. Plaintiff was discharged from the UW clinic on March 27, 2001, and was prescribed Percocet for pain. Because plaintiff's pain was expected to decrease as his ear began to heal in the wake of the surgery, only a one-week supply of Percocet was issued for him. On April 3, 2001, after plaintiff finished his course of Percocet, defendant prescribed plaintiff 600 mg of Ibuprofen. Defendant believed this was enough medicine to get plaintiff through any pain because post-operative healing had begun.

On April 27, 2001, plaintiff went to the UW clinic for a follow-up visit. Plaintiff's ear appeared to be healing normally and the UW clinic did not prescribe any pain medication. On June 1, 2001, plaintiff went to the UW clinic for another follow-up evaluation. Plaintiff reported that he was experiencing pain and was prescribed Percocet. Plaintiff was issued Percocet by another physician at the prison (Dr. Belgado). Defendant

wanted to monitor plaintiff's pain medications closely because at this point plaintiff's surgery was completed and defendant believed he should be healing comfortably. In addition, defendant did not want plaintiff to become addicted to powerful pain killers such as Percocet or Vicodin.

On June 29, 2001, defendant requested another follow-up visit for plaintiff at the UW clinic and prescribed 800 mg of Ibuprofen for plaintiff's pain. On August 10, 2001, plaintiff was seen at the UW clinic where he was prescribed Tylenol #3 for pain. Instead of Tylenol #3, defendant issued plaintiff Tylenol, which is not considered a narcotic and is not as strong as Vicodin, Percocet or Tylenol #3. On August 13, 2001, defendant requested another follow-up visit for plaintiff. On October 12, 2001, plaintiff was seen at the UW clinic where he was prescribed Celebrex, a mild, non-steroidal pain reliever. October 18, 2001, defendant prescribed Tylenol #3 for plaintiff to be taken before irrigating his ear. This was the last time defendant saw plaintiff because plaintiff was transferred to another prison.

OPINION

A. Defendant's Motion for Summary Judgment

Plaintiff contends that defendant was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment when he altered pain medication prescriptions

provided to plaintiff by physicians at the University of Wisconsin ear, nose and throat clinic and failed to prescribe medication sufficient to relieve pain associated with his chronic ear disease. Defendant argues that he is entitled to summary judgment on plaintiff's claim because the undisputed facts demonstrate that he was not deliberately indifferent to the pain plaintiff suffered as a result of his ear condition.

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. I am satisfied that plaintiff's condition and the resulting pain he suffered were sufficiently serious to satisfy the Eighth

Amendment's objective component. Defendant does not argue to the contrary.

As for the Eighth Amendment's subjective component, 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). Finally, 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.

Viewing the evidence in the light most favorable to plaintiff, I am convinced that no reasonable jury could find that defendant was deliberately indifferent to his pain. Plaintiff's main argument is that although the physicians at the UW clinic routinely prescribed him Percocet or Vicodin for his pain, defendant altered these prescriptions frequently in favor of less powerful pain killers such as Tylenol #3, Darvocet N100, Ibuprofen or "propoxy."

See Plt.'s Resp. to Aff. of Enrique Luy M.D., dkt. #29, at ¶¶ 10, 13, 16-17, 21, 29, 35. For instance, on November 2, 2000, a UW clinic physician prescribed Vicodin for plaintiff's pain but, because it was not readily available at the prison, he was given Tylenol #3 instead. And on April 3, 2001, when plaintiff finished a one-week prescription of Percocet that he received at the UW clinic, defendant switched him to 600 mg of Ibuprofen. Plaintiff argues that these medications were "a less [efficacious] course of treatment" or that they had "very little pain relieving substance[] in" them. Plt.'s Resp. to Dft.'s Proposed Findings of Fact, dkt. #27, at ¶¶ 11, 30. Even assuming that these alternative drugs were less effective at ameliorating plaintiff's pain, defendant's decision to substitute them for the more powerful pain killers recommended by the UW physicians is insufficient to show that he was deliberately indifferent to plaintiff's pain in violation of the Eighth Amendment. "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); Snipes v. DeTella, 95 F.3d 586, 591 (7th Cir. 1996) (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview").

Plaintiff has presented no evidence that defendant gave him nothing to relieve his pain. Rather, plaintiff is unhappy with the strength of the pain relievers he received, as when he complains that on one occasion he was put on "propoxy" tablets rather than on Darvocet

N100. (I note that this may be a distinction without a difference, as the Physician's Desk Reference 1708 (55th ed. 2001), indicates that Darvocet N100 is a brand name for propoxyphene napsylate and acetaminophen tablets). Indeed, plaintiff admits that at times, defendant allowed him to take even powerful pain killers such as Percocet. See Plt.'s Resp. to Dft.'s Proposed Findings of Fact, dkt. #27, at ¶16 ("DeBoer did receive Percocett [sic] from this visit to the ENT Clinic . . . .") and at ¶29 ("The Percocett [sic] was issued for one week . . . ."). In short, plaintiff was receiving some medication for his pain even if, in his opinion, he was getting "a cheaper and less [efficacious] course of treatment." Id. at ¶18. The Court of Appeals for the Seventh Circuit has held that "[w]hether and how pain associated with medical treatment should be mitigated is for doctors to decide free from judicial interference, except in the most extreme situations." Snipes, 95 F.3d at 592. This is because "[t]he administration of pain killers requires medical expertise and judgment. Using them entails risks that doctors must consider in light of the benefits." Id. at 591. Defendant was concerned that plaintiff (who, according to the record, was taking some variety of pain killers on a more or less constant basis for nearly a year) might become addicted to powerful pain killers such as Percocet or Vicodin and adjusted plaintiff's prescriptions accordingly. Dft.'s Proposed Findings of Fact, dkt. #19, at ¶¶ 14, 33, 34. This kind of delicate balancing between the benefits of pain relief and the risk of addiction can be characterized fairly as "a classic example of a matter for medical judgment" that falls

outside the purview of the Eighth Amendment. Estelle, 429 U.S. at 107. The evidence presented by the parties certainly does not suggest that this is one of those extreme situations warranting judicial interference with a physician's pain management decisions.

Finally, "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." Estate of Cole, 94 F.3d at 261-62. Plaintiff has submitted no evidence, expert or otherwise, from which a jury could infer that defendant's choices regarding the treatment of plaintiff's pain were medically inappropriate or based upon something other than his sound medical judgment. Accordingly, defendant's motion for summary judgment will be granted.

B. Plaintiff's Motion to Strike Defendant's Affidavit

Plaintiff has moved to strike the affidavit defendant submitted in support of his motion for summary judgment. As the ground for the motion, plaintiff maintains that defendant's affidavit contains false and misleading statements. However, in his motion plaintiff does not point to any particular statement in the affidavit that is allegedly false. Accordingly, his motion will be denied.

ORDER

IT IS ORDERED that defendant Dr. Luy's motion for summary judgment is GRANTED and plaintiff Justin D. DeBoer's motion to strike defendant's affidavit is DENIED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 13th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge