IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDUARDO M. PEREZ,

Plaintiff,

v.

MICHAEL J. SULLIVAN, WENDY DEMOTT[1] and SHARON ZUNKER,

Defendants.

OPINION AND ORDER

01-C-519-C

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In this civil action for monetary relief brought pursuant to 42 U.S.C. § 1983, plaintiff Eduardo M. Perez contends that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by interfering with medical treatment for his back injury while he was incarcerated in a Texas county jail, by delaying treatment for his back injury and by not authorizing back surgery despite the fact that his initial treating physician had recommended surgery. Jurisdiction is present under 28 U.S.C. § 1331.

The case is presently before the court on plaintiff's and defendants' cross-motions for

[1] Defendant Wendy DeMott is more correctly identified as Wendy De Motts and will be referred to as such in this opinion.

summary judgment. Because I find that no reasonable jury could conclude that defendants were deliberately indifferent to plaintiff's serious medical need, defendants' motion for summary judgment will be granted and plaintiff's motion for summary judgment will be denied.

A review of plaintiff's and defendants' proposed findings of fact reveals that both sides failed to comply with this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on October 11, 2001. Rule 1 of the court procedures states that "[all] facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact." Rule I.D.2 provides: "At the close of each numbered paragraph, the movant must cite to references in the record supporting the fact proposed in the paragraph." For several of his proposed findings of fact, plaintiff failed to cite to references in the record that supported the proposed fact. Defendants submitted a document entitled "proposed findings of fact" but the three numbered paragraphs propose ultimate facts to be found by the jury rather than facts supported by references in the record. For example, defendants propose as a fact that "plaintiff received adequate and reasonable medical care" from defendants. Dfts.' Proposed Findings of Fact, dkt. # 33, at 1. Although a jury could find this statement to be true after applying preliminary facts to the legal standard, such an ultimate fact does not lend itself to this court's proposed findings of fact procedure. For this

reason, defendants' proposed findings of fact were not considered. Despite the deficiencies in defendants' submissions, because plaintiff carries the ultimate burden of showing that he could adduce evidence at trial sufficient to allow a jury to find in his favor, defendants' inattention to court procedures is not fatal to their motion for summary judgment.

In making the following findings of material and undisputed fact, I have disregarded any proposals that do not comply with this court's summary judgment procedures.

UNDISPUTED FACTS

A. Parties

Plaintiff Eduardo M. Perez is an inmate at Oshkosh Correctional Institution in Oshkosh, Wisconsin. At all times relevant to this suit, defendant Michael Sullivan was secretary of the Department of Corrections, defendant Wendy De Motts was a nurse clinician and defendant Sharon Zunker was the director of the Department of Corrections Bureau of Health Services.

B. Texas County Jails Agreement

In April 1997, defendant Sullivan entered into a contract with several Texas county jails under which the Department of Corrections began housing Wisconsin inmates in Texas jails in order to reduce overcrowding in Wisconsin prisons. Section 7(A) of the agreement,

entitled "Medical Services," provides in part:

> Except in the case of an emergency, the Counties shall contact the designated coordinator, identified in Attachment 1, for prior written approval for the medical, psychiatric, or dental expenses for which the Department is responsible under the terms of this contract.

Attachment 1 states that defendant Zunker is the designated contact person for the Bureau of Correctional Health Services.

C. Plaintiff's Incarceration in Texas

After being selected for transfer on April 4, 1997, plaintiff was sent to Bowie County Correctional Center in Texarkana, Texas.

On July 26, 1997, plaintiff fell in the shower area of the Bowie County Correctional Center. As a result of the fall, plaintiff suffered injuries to his back, hip and knee. At approximately 10 p.m. on July 27, 1997, plaintiff went to the infirmary for medical attention because of his pain. At approximately 11 p.m., plaintiff was seen by the nurses on staff, who placed plaintiff in a holding cell for observation and provided him with Tylenol #3.

On July 28, 1997, plaintiff was seen by Dr. Stringfellow, who ordered x-rays and an MRI of plaintiff's back, hip and knee. The x-rays of plaintiff's back revealed a dislocated disk. On August 11, 1997, plaintiff underwent an MRI of his back that revealed a pinched

nerve. On August 14, plaintiff was seen at the Bowie County Correctional Center infirmary and was given Tylenol #3. (According to plaintiff, Dr. Stringfellow told him about the results of the MRI and informed him that the pinched nerve would require surgery to correct the nerve root damage.) On the night of August 16, plaintiff went to the infirmary again, asking to be taken to the hospital because of the severe back pain he was experiencing. Plaintiff also asked to be seen by professional medical personnel. Plaintiff's request to be taken to the hospital was denied because the infirmary staff needed approval from the Department of Corrections Bureau of Health Services.

On August 17, 1997 at approximately 3:00 a.m., plaintiff was sent to the infirmary because of the severe pain in his back, hip and knee. On August 21, 1997, plaintiff returned to the infirmary to get medication for his severe back pain. He was told that the appointment that had been scheduled for him with the Neurosurgery Clinic had not been authorized by the Department of Corrections Bureau of Health Services, so it had been postponed. In a fax dated August 26, 1997, defendant De Motts noted that officials from the Wisconsin Department of Corrections were "having a problem getting [plaintiff] back to Wisconsin." In the same fax, defendant De Motts provided Bowie County Correctional Center authorization to schedule an appointment with a neurologist.

On September 10, 1997, plaintiff was examined by Dr. Joel Patterson at St. Michael's Hospital Neurosurgery Clinic. In his report, Dr. Patterson indicated that he had reviewed

plaintiff's MRI that "demonstrates a sequestered free fragment superior to the L 4-5 disc space. This looks like it is really causing some serious nerve root compression." He stated further:

> I think [plaintiff] would definitely benefit from laminectomy and discectomy. I have offered this to him and discussed the indications for operation, treatment alternatives, risks, benefits and complications as outlined on the consent form. The biggest risk to him, is that he will not get any better in that he sustained some chronic nerve root damage but I think his chances for success are very good. . . . We will contact the Bowie County Jail and obtain appropriate authorization and set him up for surgery."

The report indicates that copies were sent to Bowie County Correctional Center and Jerry B. Stringfellow, M.D.

C. Plaintiff's Treatment in Wisconsin

On September 12, 1997, defendant De Motts and other Department of Corrections officials traveled to Texas to transfer plaintiff back to Wisconsin. On the same day, plaintiff was placed in the health services unit located in Dodge Correctional Institution. On September 15, 1997, plaintiff was seen by Dr. Tregoning, who indicated that an appointment either had been made or would be made at the University of Wisconsin Hospital's Neurosurgery Outpatient Clinic.

While at Dodge Correctional Institution, plaintiff did not receive any neurosurgery treatment for his back until October 22, 1997. On that day, plaintiff was taken to the

University of Wisconsin Neurosurgery Clinic, where he was examined by Dr. Trost, a neurologist. In his report dated October 24, 1997, Dr. Trost indicated that the MRI scan that was performed in Texas was not available for his review. The report provides: "We will obtain an MRI scan of his lumbar spine and see him back in follow-up after that is completed, and I see no reason for an emergency MRI or emergency surgery on this man at this time. Continue with your pain plan as you are currently doing, and we will see him back and keep you informed of his progress."

On December 17, 1997, plaintiff returned to the Neurosurgery Clinic. Dr. Trost examined plaintiff and the MRI scan that was taken on that day. In his report dated December 20, 1997, Dr. Trost noted:

> MRI scan today of his lumbar spine demonstrates an extremely small central L4-5 disk herniation without signs of nerve root impingement. I suspect that his pain is being generated from a tear in the annulus at L4-5 with referred pain in to the left L5 distribution. I suspect that in several weeks to several months his pain will improve as his annular tear heals.
>
> These annular tears can be extremely painful, and I would recommend that you continue analgesia for this man as you see fit. Other than that, I have no tremendous recommendations to make for you. I will be happy to see him back on a p.r.n. basis; however, I suspect that there is nothing to do for this man surgically, as he has an extremely small annular tear, and I would recommend continued conservative therapy for several months.

OPINION

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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). This does not mean that prisoners are entitled to whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle, 429 U.S. at 104.

Although the Constitution is not a "charter of protection for hypochondriacs," Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996), courts should recognize that inmates have serious medical needs if they are suffering from medical conditions generally considered as life- threatening or as carrying risks of permanent, serious impairment if left untreated. Even if inmates are not facing death or permanent harm, prison officials have an obligation to provide medical treatment to inmates suffering such significant pain that denial of assistance would result in needless pain and suffering. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997); but see Snipes, 95 F.3d at 592 (Eighth Amendment does not require prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment).

Unquestionably, a spinal injury is a serious medical condition that carries a risk of grave and permanent impairment. See Estelle, 429 U.S. at 107 (claim of lack of diagnosis and inadequate treatment of back injury alleged serious medical need). Defendants do not

contest that a back injury consisting of a herniated disk and a pinched nerve constitutes a serious medical need. Nonetheless, defendants contend that plaintiff cannot establish the subjective element of his Eighth Amendment claim because the undisputed facts do not show that defendants interfered with plaintiff's treatment in Texas, that they delayed treatment unreasonably or that they denied him surgery unreasonably. In defendants' view, no reasonable jury could find from the undisputed facts that they were deliberately different to plaintiff's medical needs. I agree.

Plaintiff contends that defendants were deliberately indifferent to his serious medical need in three instances: by interfering with his medical treatment in Texas, by delaying treatment of his back for several months and by not performing surgery on his back. First, plaintiff asserts that defendants interfered with the medical services that he was receiving in Texas. However, the undisputed facts do not support this assertion. Approximately three weeks after plaintiff's injury, staff at the Texas infirmary denied his request to be taken to the hospital because officials at the Department of Corrections had not approved such an appointment. A few days later, on August 21, 1997, plaintiff was told the same thing. One week later, on August 26, 1997, defendant De Motts notified staff at the Texas infirmary that the Department of Corrections had authorized plaintiff's appointment with a neurologist. Two days after plaintiff's first MRI, plaintiff was returned to Wisconsin. There are simply no undisputed facts that suggest that defendants "both [were] aware of facts from

which the inference could be drawn that a substantial risk of serious harm exist[ed], and . . . also [drew] the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). It is not enough that defendants "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. See Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999). At most, the undisputed facts show that defendants approved plaintiff's appointment with a neurologist one month after his injury. They do not establish that defendants interfered with plaintiff's receipt of medical treatment while in Texas. Defendants' motion for summary judgment as to this aspect of defendants' acts will be granted and plaintiff's motion for summary judgment will be denied.

As for the second instance of alleged deliberate indifference, plaintiff alleges that defendants delayed his medical treatment for several months. Plaintiff is correct that almost five months passed between his injury and the second MRI on which defendants based their decision not to perform surgery on his back. Although plaintiff's second MRI may have been delayed, the undisputed facts do not establish that plaintiff was without medical care in the meantime. When plaintiff was returned to Wisconsin on September 12, 1997, he was not placed in a regular cell with standard medical care but instead was placed in a health services unit. Although plaintiff asserts that he did not receive any neurosurgery treatment at Dodge, he does not allege that he was denied all medical services, such as Tylenol #3 or other forms of pain medication or conservative therapy. Instead, plaintiff saw a medical doctor a few

days after his arrival and a neurologist at the University of Wisconsin Hospitals just over one month after his arrival. In the neurologist's preliminary opinion, neither an emergency MRI nor emergency surgery was necessary. Several weeks later, plaintiff underwent a second MRI that led the neurologist to conclude that no surgery, emergency or otherwise, was necessary. This sequence of events does not support plaintiff's assertion that defendants' delay establishes deliberate indifference. Deliberate indifference may be found where "the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Snipes, 95 F. 3d at 592 (citations omitted).

Moreover, in determining whether a delay rises to the level of a constitutional violation, the Court of Appeals for the Seventh Circuit has held that a plaintiff "must place *verifying medical evidence* in the record to establish the detrimental effect of delay in medical treatment to succeed." Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996) (emphasis in original) (citation omitted). In this case, plaintiff has not produced medical evidence establishing that any delay caused his condition to deteriorate. To the contrary, the later medical evidence suggests that because of the nature of plaintiff's injury, no amount of intervention would have improved plaintiff's outcome. Indeed, the neurologist at the University of Wisconsin, Dr. Trost, concluded that plaintiff had an annular tear that would heal on its own over time. On the basis of Dr. Trost's report, any delay in treatment on defendants' part did not have a detrimental effect on plaintiff's condition. From the

undisputed facts, no reasonable jury could conclude that the delay in neurological treatment on the part of defendants rose to the level of deliberate indifference necessary to meet the subjective component of plaintiff's Eighth Amendment claim.

As for the third instance of allegedly unconstitutional conduct, plaintiff contends that defendants were deliberately indifferent to his back pain by not performing surgery on his back. It is undisputed that plaintiff received conflicting medical opinions about the optimal treatment for his back: an initial recommendation for surgery and a later recommendation for conservative therapy with pain management. It is well established that prisoners do not have a right to the treatment that they desire but only to treatment that is not "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." Snipes, 95 F.3d at 590. Inadvertent error, 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. Because of the conflicting opinions of the two neurologists who treated plaintiff, plaintiff's complaint about defendants' not authorizing surgery on his back amounts only to plaintiff's dissatisfaction with his medical treatment. Such dissatisfaction standing alone does not rise to the level of an Eighth Amendment violation. I conclude that no reasonable jury could find that defendants were deliberately indifferent to plaintiff's back condition in deciding not to authorize surgery. Summary judgment will be granted to defendants and denied to

plaintiff on the Eighth Amendment claims as it relates to defendants' failure to approve surgery for his back condition.

ORDER

IT IS ORDERED that

1. Plaintiff Eduardo M. Perez's motion for summary judgment is DENIED;

2. The motion for summary judgment filed by defendants Michael J. Sullivan, Wendy De Motts and Sharon Zunker is GRANTED; and

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 30th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge