IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JEFFREY E. HIBBARD,

Petitioner, ORDER

v. 01-C-565-C

CHARLENE REITZ; LINDA
OLSON-O'DONOVAN; BETH
DITTMANM; GARY McCAUGHTRY;
JOHN RAY; and JON LITSCHER,

Respondents.

- -

This is a proposed civil action for injunctive and monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner Jeffrey E. Hibbard, who is presently confined at the Waupun Correctional Institution in Waupun, Wisconsin, alleges that respondents were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment and that they violated his Fourteenth Amendment right to due process and conspired against him. He seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to

prepay the full fees and costs of instituting this lawsuit. Petitioner has submitted the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if on three or more previous occasions the prisoner has had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

Because I find that petitioner has failed to allege facts sufficient to state a claim for deliberate indifference to serious medical needs, I will deny petitioner's request for leave to proceed in forma pauperis for failure to state a claim. I will deny petitioner's claims for due process and conspiracy because these claims are legally frivolous.

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

A. Deliberate Indifference to Serious Medical Need

On October 11, 2000, petitioner asked Waupun health services unit nurse Sid Smith for immediate medical attention for a serious cough and lung congestion. Smith denied the request and told petitioner to put in a written request. Petitioner made two written requests to Waupun health services unit and the acting "NCH" sergeant, Johnston, made a telephone call.

On October 16, 2000, petitioner saw respondent nurse Charlene Reitz and told her that he was "as sick as a dog." Petitioner told her that he was coughing constantly and coughing up mucus, he had a constant headache, his lungs felt like they were raw and every muscle in his body hurt. Petitioner also told respondent Reitz that he had not slept for 48 hours because of the illness. Petitioner asked for an antibiotic and told respondent Reitz that he had had pneumonia on the outside. At that time, the doctor had told petitioner that if he ever gets a cold or flu and has lung congestion, he should see a doctor right away. When petitioner relayed this information to respondent Reitz, she responded that petitioner was "self-diagnosing" and that she does not accept self-diagnosis. Petitioner then told respondent Reitz that he had had the same problem one year earlier, that he had seen nurse

Smith who gave him antibiotics and that the problem cleared up in three or four days. Petitioner asked respondent Reitz to check his medical record, but she refused. Respondent Reitz stated, "That was then, this is now."

After giving petitioner a cursory examination, respondent Reitz stated that she was going to give petitioner a one-day sick cell, some cough syrup and some Advil. Petitioner told respondent Reitz that he was not working, so he was "involuntary unassigned" and that he would not need sick cell. At this point, petitioner realized that respondent Reitz was not taking him seriously. Petitioner told her that he was so sick and tired that if he fell down on the nurse's floor at that moment and fell asleep, it would be all right with him.

Respondent Reitz sent petitioner back to his cell without antibiotics. Petitioner remained sick throughout the week. On October 20, 2000, petitioner started to lose his voice from coughing. The next day, petitioner started gasping for breath every time he coughed. On October 22, early in the morning, petitioner told the third shift correctional officer that he was gasping for breath. The correctional officer told petitioner that he would make a note of it and give it to the first shift sergeant. Petitioner saw the sergeant and was sent to health services unit. There, nurse Gail Waltz checked petitioner, saw that he was seriously ill, called the institution doctor and had him sent to the Waupun Memorial Hospital emergency room. Petitioner was immediately given an antibiotic and within the hour was rushed by ambulance to the University of Wisconsin-Madison Hospital, about 70

miles away. Petitioner almost died on the way to Madison and lost control of his bowels. Petitioner was told by the admitting physician that he could have died. Petitioner stayed at the UW Hospital under oxygen for eleven days, until November 1, 2000. Doctors found traces of E. coli in petitioner's lungs. Doctors told petitioner that as a result of his pneumonia, he would suffer permanent lung damage - emphysema - and wanted to make a future appointment for testing. In January 2001, petitioner was tested and the emphysema was confirmed.

B. Due Process and Conspiracy

On November 3, 2000, petitioner submitted an inmate complaint to the Waupun inmate complaint examiner to complain about the alleged deliberate indifference to his serious medical need. On November 7, 2000, petitioner's complaint was dismissed; the complaint examiner did not question petitioner or respondent Reitz. The examiner, respondent Linda Olson-O'Donovan, did not address the alleged mistreatment that petitioner received from respondent Reitz but gave a chronological account of some of the events that took place. This chronology was based upon a review of petitioner's medical records by respondent health services unit manager Beth Dittman. Petitioner does not believe that this method of review is fair or impartial. Petitioner believes that respondent Dittman did not talk with petitioner or respondent Reitz about the complaint because she

realized that petitioner had a serious medical concern and decided to marginalize the parts of the story that she could in order to cover up respondent Reitz's constitutional violations. Petitioner also believes that respondents Dittman and O'Donovan worked together in a conspiracy in order to protect respondent Reitz.

Respondent warden Gary McCaughtry is the final decisionmaker in the institution phase of the inmate complaint review system. Respondent McCaughtry could have made his own investigation or could have ordered respondent O'Donovan to interview petitioner and respondent Reitz but he failed to do so.

On November 14, 2000, petitioner appealed his complaint from the warden's decision to the corrections complaint examiner for review in Madison. The corrections complaint examiner, John Ray, dismissed the appeal summarily. Respondent Ray failed to investigate petitioner's complaint and dismissed the complaint in one brief sentence.

Respondent Jon Litscher, as Secretary of the Department of Corrections, is the final decision maker at this phase of the inmate complaint system. He is responsible for the decision not to investigate petitioner's complaint.

DISCUSSION

A. Deliberate Indifference to a Serious Medical Need

Petitioner contends that respondent Charlene Reitz violated his Eighth Amendment

right to be free from cruel and unusual punishment by refusing to provide him antibiotics, resulting in permanent lung damage. 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 respondent was deliberately indifferent to this need (subjective component). See 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. See Gutierrez, 111 F.3d at 1371. For the purpose of deciding this claim, I will assume that petitioner's lung damage constitutes a serious medical need. Thus, petitioner has alleged sufficient facts to meet the objective component of the Eighth Amendment requirement.

Even assuming that petitioner's lung condition constitutes a serious medical need, the record does not contain any evidence demonstrating that respondent Reitz exhibited

deliberate indifference to petitioner's condition. The Supreme Court has held that the subjective component of 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). It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. See Higgins v. Correctional Med. Servs. of Ill., 178 F.3d 508, 511 (7th Cir. 1999). 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).

The facts petitioner alleges show that respondent Reitz was not deliberately indifferent toward him or his coughing. Respondent examined petitioner, then gave him "one day sick cell," some cough syrup and some Advil. Under Snipes, respondent Reitz's medical assessment and course of treatment is not so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate petitioner's condition. The allegation that petitioner told respondent that he had had pneumonia in the past or that respondent did not review petitioner's medical record does not change this conclusion. Even though petitioner may disagree with the course of treatment he received, such a disagreement does not rise to the level of deliberate indifference. Snipes, 95 F.3d at 590. "A prisoner's

dissatisfaction with a doctor's prescribed course of treatment does not give rise to a constitutional claim unless the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition.'" Id. at 592. Petitioner was not entitled to whatever treatment he desired; he is entitled only to the level of treatment that meets the standards of the Eighth Amendment. He received such treatment. 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. Accordingly, his request to proceed in forma pauperis on his Eighth Amendment claim will be denied for failure to state a claim upon which relief can be granted.

B. Due Process

I understand petitioner to allege that respondents Olson-O'Donovan, McCaughtry, Ray and Litscher violated his right to due process under the Fourteenth Amendment by not following proper procedures in the inmate complaint review system. Petitioner alleges that respondent Olson-O'Donovan failed to investigate petitioner's complaint about his medical problems, instead relying on his medical records as interpreted by respondent Dittman. Further, petitioner alleges that respondents McCaughtry, Ray and Litscher each participated in the due process violation by affirming the decisions.

Petitioner's allegations do not establish that he was deprived of a protected liberty interest. A procedural due process violation against government officials requires proof of inadequate procedures and interference with a liberty or property interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In Sandin v. Conner, 515 U.S. 472, 483-484 (1995), the Supreme Court held that liberty interests "will be generally limited to freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The adoption of mere procedural guidelines does not give rise to a protected liberty interest. Culbert v. Young, 834 F.2d 624, 628 (7th Cir. 1987), cert. denied, 485 U.S. 990 (1988); Studway v. Feltman, 764 F. Supp. 133, 134 (W.D. Wis. 1991). Because respondents' acts do not implicate a liberty interest, petitioner's right to due process has not been violated. His request for leave to proceed as to his due process claim will be denied.

C. Conspiracy

To establish a claim of civil conspiracy, petitioner must show "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Rotermund v. United

States Steel Corp., 474 F.2d 1139 (8th Cir. 1973)). Petitioner alleges that respondent inmate complaint examiner Olson-O'Donovan conspired with respondent Dittman to protect and condone the acts of respondent Reitz. In a conspiracy claim, two or more persons must act in concert to commit an unlawful act or to commit a lawful act by unlawful means. Neither scenario is present in this case. Despite petitioner's bald assertion that O'Donovan and Dittman acted in conspiracy, the alleged facts do not suggest that they either acted unlawfully or committed a lawful act through unlawful means. Thus, petitioner will be denied leave to proceed in forma pauperis on his conspiracy claim because the claim is legally frivolous.

ORDER

IT IS ORDERED that

1. Petitioner Jeffrey E. Hibbard's request for leave to proceed in forma pauperis on his Eighth Amendment claim of inadequate medical care is DENIED for failure to state a claim upon which relief can be granted.

2. Petitioner's request for leave to proceed in forma pauperis on his Fourteenth Amendment due process claim and his conspiracy claim is DENIED because the claims are legally frivolous.

3. 28 U.S.C. § 1915(g) directs the court to enter a strike when an " action" is

dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." A strike will be recorded against petitioner under § 1915(g).

4. The unpaid balance of petitioner's filing fee is $137.13; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

5. This action is dismissed and the clerk of court is directed to close the file.

Entered this 20th day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge