

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KURTIS BINDER,

Petitioner,

v.

GARY BRIDGWATER and
PAT SIEDSCHLAG,

Respondents.

ORDER

01-C-660-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Wisconsin Resource Center in Winnebago, Wisconsin, 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 liberally it is construed,

petitioner's proposed complaint fails to state a claim that respondents were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Therefore, he will be denied leave to proceed. In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner is a prisoner confined at the Wisconsin Resource Center in Winnebago, Wisconsin. He was formerly confined at the Columbia Correctional Institution in Portage, Wisconsin. Petitioner is HIV positive and has AIDS. Respondent Gary Bridgwater is a physician at the Columbia Correctional Institution. Respondent Pat Siedschlag is health services manager at the same institution.

While at Columbia, petitioner gave himself a testicular examination and found a small lump on his right testicle, which was tender and enlarged. On December 18, 1999, petitioner was examined by respondent Bridgwater, who also found the lump. Respondent Bridgwater told petitioner he had nothing to worry about, that he had seen many inmates with lumps on their testicles and that the problem could be a build-up of sperm. Respondent Bridgwater advised petitioner to masturbate.

On January 14, 2000, petitioner went to the Immunology and Infectious Disease Clinic at the University of Wisconsin Hospital to see Dr. James Sosman, the physician who

treats petitioner for his AIDS. Petitioner wanted to show Dr. Sosman the lump on his testicle, but could not find it because the testicle was swollen and tender. Dr. Sosman told petitioner to keep an eye on the lump to see whether it got bigger. During the next several months, petitioner placed requests with health services at Columbia Correctional Institution to see a doctor about the lump. Petitioner was told he would see a doctor in the weeks to come, but many times he never did even though he told health services that he feared the lump was getting bigger.

On September 12, 2000, respondent Bridgwater called petitioner to the health services unit and checked the lump on petitioner's right testicle by hand. Respondent Bridgwater told petitioner to put ice on his testicles and ordered petitioner a hard plastic athletic cup. No further tests were performed to check for cancer, which is what petitioner feared he had. On September 25, In response to a request from petitioner, respondent Bridgwater again checked petitioner's testicle by hand and told him that he had nothing to worry about. No further tests were done.

On February 12, 2001, petitioner asked again to see a doctor and was seen by respondent Bridgwater and a nurse. This time, petitioner brought his lab papers with him. The papers contained the word "flag" which means warning. In addition to his concerns about the lump on his testicle, petitioner told respondent Bridgwater and the nurse that his lab papers showed that his cholesterol level was 431 and that anything over 240 indicated

a high risk for a heart attack. Petitioner also pointed out that his triglycerides level was very high. When petitioner tried to explain his concerns about the lab results and the lump, respondent Bridgwater started to walk out of the room, saying he did not want to hear anything about the lab results and only wanted to know what he could do for petitioner at that moment. When petitioner again tried to explain his concerns, respondent Bridgwater told him he needed to see a psychiatrist, not a medical doctor. Concerned for his health, petitioner did see a psychiatrist and related what respondent Bridgwater had said. Petitioner also had his sister write to respondent Bridgwater.

On May 1, 2001, petitioner filed an inmate complaint, explaining that he had found a lump on his right testicle, that it was getting bigger and that no steps were being taken to determine whether it was cancerous or infected. The complaint was dismissed as was petitioner's appeal. On May 30, 2001, an appointment was made to have petitioner's testicle examined at the University of Wisconsin hospital. Following the hospital examination, petitioner was told "they don't 'think' it's this and that." For 20 months respondent Bridgwater did not perform any tests to see whether petitioner had an infection.

At some point during the course of these events, petitioner wrote a letter to respondent Siedschlag explaining his concerns and asking to speak with her about respondent Bridgwater. Respondent Siedschlag had a nurse answer petitioner's letter, which respondent Siedschlag only initialed. When an inmate complaint examiner contacted

respondent Siedschlag about petitioner's complaint, Siedschlag falsely told the examiner that in addition to respondent Bridgwater, a University of Wisconsin hospital doctor had checked the lump on several occasions. Respondent Siedschlag is responsible for overseeing health service staff. Respondent Siedschlag refused to listen to petitioner's concerns. Petitioner wrote different hospitals and was told he should be checked by a urologist.

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) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim under the Eighth Amendment, "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.

From my reading of petitioner’s complaint, I find it questionable whether he has alleged a serious medical need. The Court of Appeals for the Seventh Circuit considers the following to be indicative of a serious medical need: “[t]he existence of an injury that a reasonable doctor or patient would find important or worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.” Id. at 1373 (quoting McGuckin v. Smith,

974 F.2d 1050, 1059-60 (9th Cir. 1992)). Petitioner does not allege that he has been diagnosed with testicular cancer or that his right testicle was ever infected. Also, I do not understand petitioner to allege that he has an undiagnosed case of testicular cancer or an infection. (This understanding is bolstered by petitioner's request for relief; he does not seek an injunction ordering more testing or the provision of adequate medical care, but rather seeks only money damages in the amount of \$75,000.) Although petitioner notes that at times his right testicle was "tender and enlarged," he never alleges that he suffered any significant pain from this condition. Even if petitioner's allegations supported an inference that he suffered from a serious medical condition, I conclude that petitioner has not alleged facts sufficient to state a claim that respondents were deliberately indifferent to his serious medical need.

To demonstrate deliberate indifference, petitioner must show that respondents were "aware of [a] risk and consciously disregarded it nonetheless." Chapman v. Keltner, 241 F.3d 842, 845 (7th Cir. 2001). The facts alleged in petitioner's complaint demonstrate that respondents did not consciously disregard the lump on petitioner's testicle. See Gutierrez, 111 F.3d at 1374 ("a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts."). Petitioner's testicle was first examined by respondent Bridgewater on December 18, 1999. On January 14, 2000, while visiting the immunology clinic at the University of Wisconsin hospital,

petitioner told the doctor who treats his AIDS about the lump. Although petitioner could not find the lump on that occasion, the doctor told him to keep an eye on it. Between January and September 2000, petitioner alleges that he frequently requested to see a doctor about the lump but that “many times it never happened,” suggesting that he was not refused all treatment during this period. Petitioner was seen by respondent Bridgwater again on September 12, and two weeks later on September 25. Although petitioner complains that respondent Bridgwater conducted no tests, his complaint states that during each of these visits respondent Bridgwater manually examined petitioner’s testicle. In February 2001, petitioner asked again to see a doctor and was seen by respondent Bridgwater, although petitioner’s allegations suggest that respondent Bridgwater did not do anything for petitioner on this occasion. Finally, on May 30, 2001, petitioner’s testicle was examined by a doctor at the University of Wisconsin hospital. This history demonstrates that prison officials did not consciously disregard the lump on plaintiff’s testicle. Rather, both respondent Bridgwater and an outside physician examined petitioner’s testicle and both concluded that petitioner did not have cancer or an infection.

In addition, it is unclear what harm petitioner suffered. If petitioner “cannot show injury, he cannot make out a claim of deliberate indifference.” Walker v. Peters, 233 F.3d 494, 502 (7th Cir. 2000). Petitioner alleges that he had a lump on his testicle, that it was occasionally tender and enlarged, that it was manually examined several times by respondent

Bridgwater who told petitioner he had nothing to worry about and that an examination of the testicle at the University of Wisconsin hospital did not turn up evidence of cancer or an infection. Although petitioner suffered anxiety because he believed respondents were not diagnosing or treating his problem properly, he has not alleged any injury. “[D]ifferences in opinion between the patient and the doctor [regarding medical treatment] never give rise to a constitutional claim.” Higgins v. Correctional Medical Services of Ill., Inc., 8 F. Supp 2d. 821, 830 (N.D. Ill. 1998). Accordingly, petitioner’s Eighth Amendment claim will be dismissed for his failure to state a claim upon which relief may be granted.

ORDER

IT IS ORDERED that

1. Petitioner's request for leave to proceed in forma pauperis on his claims is DENIED and the action is DISMISSED with prejudice.
2. The unpaid balance of petitioner's filing fee is \$127.13; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner in accordance with 28 U.S.C. § 1915(g).

4. The clerk of court is directed to close the file.

Entered this 28th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge