IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GEORGE J. LAZARIS,

Petitioner, ORDER

v. 04-C-156-C

DR. FERN SPRINGS, WARDEN TOM KARLIN,
CAPTAIN TEGEL, OFFICER HALE,
OFFICER CARLSON, R.N. MEYER and
R.N. HOLNICK,

Respondents.

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This is a proposed civil action for monetary and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Petitioner George Lazaris, an inmate at the Waupun Correctional Institution in Waupun, Wisconsin, requests leave to proceed in forma pauperis under 28 U.S.C. § 1915. He alleges that respondents violated his right to be free from cruel and unusual punishment when they failed to provide him with adequate medical care and forced him to stand without the aid of his leg brace or crutches during a strip search.

From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the 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. See 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.

I conclude that petitioner has stated a claim under the Eighth Amendment with respect to each of his claims. In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Medical Care

Petitioner George Lazaris arrived at "JCI" in January 2002. (Although petitioner does not identify the full name of "JCI," I presume he means Jackson Correctional Institution, in Black River Falls, Wisconsin. Also, I note that petitioner is now incarcerated at the Waupun Correctional Institution. Petitioner does not identify the date of his transfer, but I will assume that all of the events alleged in his complaint occurred while he was still at Jackson

Correctional Institution.) At the time of his arrival, petitioner was in need of reconstructive surgery for his ankle. (Petitioner does not explain why the surgery was needed.) Dr. Gruehlstore, petitioner's surgeon, recommended that the surgery be performed "right away." Respondent Fern Springs, a doctor, told petitioner that she had sent a request for him to be seen at the University of Wisconsin Hospital, but he did not receive any treatment. Springs continued to give petitioner excuses for the delay for 21 months, after which she told him that the doctors at the university hospital refused to perform the surgery because they did not perform the "original surgery." (Petitioner does not say what the "original surgery" was.) Gruehlstore also ordered petitioner to use an "electronic bone stimulizer" to help heal the bone fusion. However, the "stimulizer" was broken and respondent Springs would not allow petitioner to use it once it was repaired.

In October or November 2002, an x-ray report was prepared for petitioner. The report revealed that petitioner had developed pulmonary edema and various heart and lung-related problems. These conditions were caused by respondent Springs's failure to treat an infection that petitioner had in his ankle. Petitioner did not learn of this report until a year later.

Petitioner's ankle condition required him to use crutches and a leg brace. When he was placed in segregation on October 22, 2002, respondent Springs authorized respondent Tegel, a correctional officer, to take away his brace and crutches, even though both Springs

and Tegel knew doing so would exacerbate his condition. Three days later, a screw in petitioner's ankle "re-shifted," causing it to stick out 2 1/2 inches. Petitioner was taken to the university hospital, where he was given no treatment.

Respondents Meyer and Holnick are nurses. They required petitioner to wait "long periods of time" before they would refill his prescriptions for pain and anti-inflammatory medication.

Respondent Tom Karlin, the warden of Jackson Correctional Institution, was informed about petitioner's inadequate medical care, but he took no corrective action.

B. Strip Search

Respondents Hale and Carlson are correctional officers. On September 24, 2003, Hale and Carlson pushed petitioner into a strip search cage. They ordered petitioner to remove his clothing without the aid of his leg brace or crutches, even though he told them that he had severe heart and ankle conditions. Respondents laughed at him, stating, "You can do it. Your heart is not that bad." When petitioner protested, respondents threatened him with a conduct report for disrespect and disruptive conduct. Petitioner was forced to stand on his right ankle, which caused him unbearable pain.

DISCUSSION

I understand petitioner to allege that the following conditions violated his right to be free from cruel and unusual punishment under the Eighth Amendment: (1) respondent Springs's refusal to arrange for reconstructive surgery on petitioner's ankle; (2) respondent Springs's refusal to allow petitioner to use electronic stimulation to aid the healing of his bone fusion; (3) respondent Springs's failure to treat an infection in petitioner's ankle, which led to heart and lung problems; (4) respondents Springs's and Tegel's refusal to allow petitioner to keep his brace and crutches while in segregation, causing serious injury to his ankle that required hospitalization; (5) respondents Meyer's and Holnick's refusal to refill his prescriptions for medication in a timely manner; (6) respondent Karlin's failure to intervene to insure petitioner received proper medical care; (7) respondents Hale's and Carson's order to petitioner to stand without the aid of his leg brace or crutches, which caused him "unbearable" pain. Although petitioner does not allege whether respondents are employed by the state, I will assume at this stage that each of the respondents acted "under color of law" within the meaning of 42 U.S.C. § 1983. West v. Atkins, 487 U.S. 42, 56 (1988) (physician employee of state acts "under color of law" for purpose of § 1983 whether "physician is on the state payroll or is paid by contract").

A. Adequate Medical Care

Petitioner's first six claims each involve allegations that respondents did not provide

him with adequate medical care. “[T]he 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 establish 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). In 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, 1373. (" 'serious' medical need is one that has been diagnosed by a physician as mandating treatment").

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. 824, 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; Franzen, 780 F.2d at 652-53. Deliberate indifference in the denial or delay of medical care can be shown by a defendant's actual intent or reckless disregard. Reckless disregard is 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).

The question is whether the denial of 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, giving rise to a claim of deliberate indifference. See also Estelle, 429 U.S. at 104 (holding that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed").

I will allow petitioner to proceed on each of his claims. If true, petitioner's allegations support a conclusion that he had serious medical needs related to his ankle and his heart and lungs. Further, I cannot conclude that there is no set of facts that petitioner could prove that would show that each of the respondents was deliberately indifferent to a substantial risk of serious harm to petitioner's health or safety. However, to aid petitioner in deciding whether he has sufficient facts to prove his claims, I make the following observations.

With respect to his first claim, petitioner alleges that respondent Springs failed to arrange for reconstructive surgery on his ankle, even though his surgeon recommended immediate action. However, not every delay in treatment demonstrates that a prison official is deliberately indifferent to the inmate's health. E.g., 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). Even a failure to treat will not be a basis for Eighth Amendment liability if the official made reasonable attempts to arrange for treatment. Although two years is a long time to wait for surgery, petitioner alleges that it was the hospital doctors and not respondent Springs who refused to perform the surgery. At a minimum, to prove his claim against respondent Springs, petitioner will have to show that Springs had the authority to arrange for surgery at another location and that she failed to take reasonable steps in finding an alternative. Similarly, with respect to petitioner's claim against respondents Meyer and Holnick, petitioner will have to show that they had authority to refill his prescriptions more quickly than they did.

With respect to all of his medical claims, petitioner will have to submit "verifying medical evidence" that the failure to provide the desired treatment subjected him to a substantial risk of further injury. Walker v. Benjamin, 293 F.3d 1030, 1038 (7th Cir. 2002); Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996). Petitioner's belief that his treatment was inappropriate or unduly delayed will not be sufficient. Abdul-Wadood v.

Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996). Even a doctor's recommendation may not be sufficient to show that the treatment was required by the Eighth Amendment. Doctors recommend many courses of treatment that are beneficial to the patient's health, but not every failure to follow one doctor's recommendation will subject the patient to a substantial risk of serious harm.

In addition, petitioner will have to show that each of the respondents *knew* that his or her actions or inactions would subject petitioner to a substantial risk of serious harm. For example, it will not be enough for petitioner to show that respondent Springs *should have known* that failing to treat his infection would lead to serious health problems. The Eighth Amendment provides a remedy for intentional and reckless acts, not negligent ones.

With respect to petitioner's claim against the warden, respondent Karlin, petitioner should know that Karlin cannot be held liable simply because he has supervisory authority over the other respondents. Rather, petitioner will have to show that Karlin was personally involved in the alleged violations, meaning that he knew about the conduct and facilitated it, approved it, condoned it, or turned a blind eye for fear of what he might see. Morfin v. City of East Chicago, 349 F.3d 989 (7th Cir. 2003).

B. Strip Search

I do not understand petitioner to be challenging Hale's and Carlson's decision to strip

search him, but only the manner in which they performed the search. When an inmate challenges the constitutionality of a strip search or the manner in which it was performed, it is not enough for him to show that the officers were deliberately indifferent to the inmate's health or safety. Rather, the inmate must show that the officers' actions were "totally without penological justification," that their conduct involved "gratuitous infliction of pain." Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003). This is similar to the standard for excessive force, which requires an inmate to show that the officer acted sadistically and maliciously for the very purpose of causing harm. Hudson v. McMillian, 503 U.S. 1, 9 (1992), cited in Calhoun, 319 F.3d at 939. See also Whitley v. Albers, 475 U.S. 312, 320 (1986) (reasoning that heightened mental state requirement is appropriate in excessive force context because corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance"). However, if the inmate can show that the search was conducted "in a harassing manner" and with the intention to inflict pain, it is unnecessary for him to show that he was seriously injured. Calhoun, 319 F.3d at 939.

I conclude that petitioner has stated a claim under this standard. Petitioner alleges that respondents Hale and Carlson knew that he could not stand without the aid of his crutches or leg brace but they forced him to do so anyway while laughing at him. At this stage of the proceedings, I will assume that respondents could have conducted the strip search without requiring him to stand unaided. If petitioner can prove this to be the case,

he may be able to show that respondents inflicted pain on him gratuitously.

ORDER

IT IS ORDERED that

1. Petitioner George Lazaris is GRANTED leave to proceed under 28 U.S.C. § 1915 on his claims that

(1) respondent Fern Springs refused to arrange for reconstructive surgery on his ankle, in violation of the Eighth Amendment;

(2) respondent Springs refused to allow him to use an electronic bone stimulizer to help his healing, in violation of the Eighth Amendment;

(3) respondent Springs failed to treat an infection in petitioner's ankle, in violation of the Eighth Amendment;

(4) respondents Springs and Tegels took away his crutches and leg brace while he was in segregation, in violation of the Eighth Amendment;

(5) respondent Meyer and Holnick refused to refill his prescriptions in a timely manner, in violation of the Eighth Amendment;

(6) respondent Karlin knew that petitioner was receiving inadequate medical care but failed to take corrective action, in violation of the Eighth Amendment;

(7) respondents Hale and Carlson forced petitioner to stand on injured ankle without

any penological justification, in violation of the Eighth Amendment.

2. The unpaid balance of petitioner's filing fee is $ 138.62; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2).

3. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing the respondents, he should serve the lawyer directly rather than respondents. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondents or to respondents' attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 14th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge