IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

JOEL FLAKES,

ORDER

Plaintiff,

04-C-189-C

v.

MATTHEW J. FRANK,
CORRECTIONS CORPORATION OF AMERICA,
JANE SONDALLE, PEGGY MEYERS,
DANIEL BENIK, SGT. LAWRENCE DAKEN and
CYNTHIA NEUHAUSER,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Plaintiff Joel Flakes is proceeding on a number of claims in this lawsuit, including three claims relating to his allegation that he has severe osteoarthritis in his hips: 1) defendant Cynthia Neuhauser deliberately refused to arrange for plaintiff to have hip surgery despite Dr. Daley's approval of the surgery; 2) defendant Corrections Corporation of America had a policy of denying plaintiff a cane, double mattresses and a chair and refused to arrange for hip replacement surgery; and 3) defendant Frank a) allowed plaintiff to be confined to a handicap cell at the Stanley Correctional Institution that lacked the amenities of a regular cell; b) failed to arrange for recreational activities and programming for

handicapped individuals; and c) failed to arrange for plaintiff to receive the services of an aide while he was confined at the Oshkosh Correctional Institution. Now before the court is plaintiff's "Notice of Motion and Motion for Physical Examination under Fed. R. Civ. P. Rule #35 and Motion for Court Appointed Expert FRE Rule 706." Both motions will be denied.

Fed. R. Civ. P. 35 allows a court to order the government to pay for a mental or physical examination of a party, but not in circumstances such as this. Rule 35 provides in part:

> (a) Order for Examination. When the mental or physical condition (including the blood group) of a party or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the person or persons by whom it is to be made.

Under this rule, the court could order plaintiff to submit to an examination at the request of the *opposing party*. Also, under proper circumstances, this rule would allow the court to compel a party who has a person in his or her custody or under his or her legal control to produce that person for a physical examination, on motion by an opposing party. For

example, a father suing to recover for injuries to his infant son allegedly sustained as the result of a defendant's negligence may be required to produce the son for a physical examination, on motion by the defendant.

The rule is not intended to cover a situation such as the one here, where plaintiff wishes an examination of himself. Obtaining evidence to prove his case is plaintiff's responsibility, not the government's. Plaintiff suggests no basis for an order compelling the government to pay for a physical examination, presumably by a doctor who is not working for the Department of Corrections. In any event, plaintiff does not explain why he needs a physical examination in order to prove his claims. Presumably, his own medical records will show his history of treatment for osteoarthritis, including the fact that he has been confined to a wheelchair for more than six years.

Fed. R. Evid. 706 states that "[t]he court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed." Generally, "if scientific, technical, or other specialized knowledge will assist the [court] to understand the evidence or decide a fact in issue, a court will utilize expert witnesses." Ledford v. Sullivan, 105 F.3d 354, 358-59 (7th Cir. 1997) (citing Fed. R. Evid. 702).

Plaintiff says he needs a medical expert to contradict the opinion of defendants' expert that plaintiff is too young for hip replacement surgery. However, plaintiff cannot succeed on his claim that defendants Neuhauser and Corrections Corporation of America

were deliberately indifferent to his serious medical needs simply by introducing evidence that in another doctor's opinion, plaintiff is not too young for surgery. A difference of opinion about the type of care provided does not constitute deliberate indifference. Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996). Rather, in order to prove defendants' deliberate indifference, plaintiff will have to show that at the time relevant to this lawsuit, an orthopedic specialist or other doctor had already determined that plaintiff needed hip replacement surgery and that defendants ignored the doctor's orders, knowing that plaintiff would suffer significant pain that could be easily ameliorated by the surgery. If such proof of a previous determination that plaintiff required surgery exists, it should be available in plaintiff's medical records. Therefore, I decline to appoint an expert witness to assist the court in understanding the evidence or deciding whether defendants were deliberately indifferent to plaintiff's serious medical needs pursuant to Fed. R. Evid. 706.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for a medical examination at government expense under Fed. R. Civ. P. 35 is DENIED; and

2. Plaintiff's motion for appointment of an expert witness under Fed. R. Evid. 706 is DENIED.

Entered this 6th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge