

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

JUAN VILLANUEVA-MONROY,

Petitioner,

v.

STEPHEN HOBART, Warden,

Respondent.

ORDER

05-C-214-C

This is a proposed civil action for injunctive relief, brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. Petitioner, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. 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 the prisoner has had three or more lawsuits or appeals 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 asks for money damages from a defendant who by law cannot be sued for money damages. This court will not dismiss petitioner's case on its own motion for lack of administrative exhaustion, but if respondents believe 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). 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).

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Juan Villanueva-Monroy is presently confined at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Stephen Hobart is Warden at the prison.

In the fall of 2003, petitioner developed a fungus on his fingers and toes. Petitioner presented his medical problem to the health services staff at the prison, who provided him with ointment to treat the fungus. The ointment failed to treat the fungus, which continued to spread through petitioner's nails and skin around his hands and feet.

Petitioner learned of an oral medication that could treat his fungus successfully. However, the Federal Bureau of Prisons would not allow petitioner to purchase the medication, even after petitioner offered to pay for the treatment with his own funds. The Bureau of Prisons states that petitioner's medical problem is cosmetic and does not pose a threat to his health. However, the fungus continues to eat away at petitioner's nails on both of his hands and feet, as well as the skin around the affected areas. Petitioner attempted to address respondent's failure to treat his fungus adequately through the prison's administrative remedies, but to no avail. Respondent's failure to treat the fungus is causing petitioner to be stigmatized and suffer from emotional harm.

DISCUSSION

Petitioner alleges that by failing to treat the fungus on his hands and feet, respondent is not meeting the reasonable community standards of health care and therefore is violating his rights under the Eighth Amendment. However, it is unlikely that the Warden of the Federal Correctional Institution in Oxford is personally involved in petitioner's medical care. Liability under Bivens must be based on an individual defendant's personal involvement in the deprivation of a plaintiff's constitutional rights. Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994).

Even if petitioner had named a proper respondent, I could not grant him leave to

proceed on his Eighth Amendment claim. Although 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)), prisoners are not entitled to whatever medical treatment they desire. 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 prison officials were deliberately indifferent to this need (subjective component). Id. at 104; 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).

In this case, it is questionable whether petitioner’s nail fungus constitutes a serious

medical need. Prison health officials have deemed petitioner's condition cosmetic and petitioner has not alleged any facts suggesting that the condition is more serious than that. Second, an inference of deliberate indifference cannot be inferred from petitioner's allegations. Petitioner alleges that prison health officials prescribed a topical ointment to treat the fungus but that the treatment has not worked. Because of this, petitioner has decided that his condition is best treated with an oral medication. However, it is the job of medical personnel and not petitioner to determine what additional steps, if any, can be taken to treat his condition in light of its severity. According to The Harvard Medical School Family Health Guide, Feb. 2003, the oral treatments for nail fungus can have serious side effects, such as liver damage resulting in liver failure and death or congestive heart failure.

Deliberate indifference in the denial of medical care is evidenced by a respondent'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). Here, reckless disregard for petitioner's health cannot be inferred simply because prison health services refuse to allow petitioner to have the medication he wants. It is wholly within the purview of health officials to weigh the risks of prescribing a medication with serious side effects against the potential benefit of improving a relatively minor medical condition. Because petitioner has not alleged facts to suggest that prison officials have been deliberately indifferent to a serious medical need, his claim under the Eighth Amendment is legally

meritless. I will deny petitioner leave to proceed in forma pauperis on his Eighth Amendment claim against respondent.

ORDER

IT IS ORDERED that:

1. Petitioner Juan Villanueva-Monroy's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED with prejudice for petitioner's failure to state claim upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$171.77; 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 pursuant to § 1915(g); and
4. The clerk of court is directed to close the file.

Entered this 7th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge