

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

DEAN SNODGRASS,

Petitioner,

v.

DR. GLEN HEINZL;
CANDANCE WARNER, M.G.R.;
C.O. BOOTH; JAMES GREER;
CATHERINE FERREY; MATT FRANK;
STEVEN CASPERSON; LIZZIE TEGELS
and SHARON ZUNKER,¹

Respondents.

ORDER

05-C-608-C

This is a proposed civil action for injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the New Lisbon Correctional Institution in New Lisbon, 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.

¹Plaintiff misspelled respondent Ferrey's name in the caption and allegations of his complaint. I have corrected the caption and his allegations to reflect the proper spelling.

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).

Petitioner contends that respondents violated his rights under the Eighth Amendment by failing to provide him with two hearing aids and by failing to refill prescriptions for his asthma medication. In addition, petitioner contends that respondent Ferrey retaliated against him and interfered with his right of access to courts by refusing to respond to one of his inmate complaints.

The allegations of petitioner's complaint are difficult to interpret and appear to conflict in important respects with information contained in the documents petitioner has attached to his complaint. Therefore, I have recited verbatim the factual statements petitioner made in the complaint about his medical care and the treatment of his inmate complaints, as well as the responses prison officials made to his inmate complaints concerning the same subjects.

ALLEGATIONS OF FACT

A. Parties

Petitioner Dean Snodgrass is presently confined at the New Lisbon Correctional Institution in New Lisbon, Wisconsin. Respondent Dr. Glen Heinzl is a doctor at the institution. Respondent Candance Warner is manager of the institution's Health Services Unit. Respondent Booth is a correctional officer at the institution. Respondent Catherine Ferrey is warden and respondent Lizzie Tegels is deputy warden at the institution.

Respondent Matt Frank is Secretary of the Wisconsin Department of Corrections. Respondent Steve Casperson is employed by the department as an administrator. Respondent James Greer is Director of the department's Bureau of Health Services. Respondent Sharon Zunker works under respondent Greer as a team worker and coordinator in the Bureau of Health Services.

B. Petitioner's Factual Allegations

This suit is about being denied medical treatment "over" 3 yrs [Defs] deliberated denied me to have hearing aids so that I could hear, but I lost my hearing which became permanent.

On about 7/12/05 I was told on a Wednesday. that I would be going to an outside clinic. For my hearing condition, which I have been complaining over (a couple year) about me not having two hearing aids, and why I keep getting hearing aid for one ear. And it keep (going out) on me! I asked the Def Md. Heinzl (several) times about getting two hearing aids. He told me that the policy of D.O.C. was only allowable for one, but Hon. Ct. My medical (rights) were violated. When I went to the outside Hospital clinic to see the specialist for my hearing she told me, or should I say stated, that if this Hon. Ct. Need to "testify" please send an "subpoena" to her office in Mauston. However she stated that I have lost over (70 percent) of my hearing because [Defs] failed to provide me with two hearing aids. And when it was mentioned that I needed two hearing aids c/o booth officer made the comment that the (Dept. of Corr.) Would only allow me one hearing aid. The Doctor specialist then stated "that MR plaintiff, needed two because of the lost of my hearing has become permanent!! Def. Booth interfered with medical treatment. he tried to delay the process with me and the specialist. they got to arguing, about what I must obtain. he continued to make commend of the D.O.C. is not going to give me two hearing aids. The specialist informed c/o booth that no matter how hard you and D.O.C. try to block MR Snodgrass from getting two hearing aids that she is personally are going to see it through that I no doubt received (two) hearing aids!!

Def. Booth would not allow Ms. Md. To properly treat me while being there, until she made it clear that she are the one who is providing the (medical need) treatment "order" for her patient. The specialist informed Pt. That he would be receiving "copys" of these "order" and yet, HSU have prevent me in receiving them! Def. Warner, is the HSU mgr. She overseer all medical compt. She "knew" that I needed hearing (aids) in both of my ears, "not" one but two. She as well as Def. Heinzl deliberately, recklessly, grossly, maliciously, criminally, caused permanent damage to my hearing lost! She is very much liable of any permanent injuries as well. C. Warner M.G.R. HSU

here!

(Also lost the aid. Marathon County) jail, and (WCI) only would provide one hearing aid. This policy must change. [Def.] [Heinzl] was the (same doctor) for me (at Dodge). He did it their, never gave me two hearing aids. I need hearing aids for both ears. "Why" did D.O.C. for (3 yrs) denied me all that time? Some one is liable for (70 percent) of my hearing lost permanent damage. The doctor in Waupun order (two) for me. And yet no one never gave it to me at my request, and his medical order, that's so cruel! A-Wright said she will testify for documents missing out of my file.

Jame Greer, D.O.C. dir. (bureau of Health) and Sharon Zunker, knew better did not to act on my hearing lost. they knew my conditions cause they was (contacted) by co/ defendants to question why pt. could not get (2 hearing) aids. which both denied the pt. D. Snodgrass. I should had been about to receive two hearing aids not one this act was deliberately (indiff) by both [defs.][Defs] Catherine Ferrey and Tegel, Lizzie would not allow me to have two hearing (aids) when I arrived here a year or so ago. I was not even allow the one with (batteries) it did not work. They knew this cause HSU m.g.r. Def. Warner and Def. Heinzl had contacted them about this problem, they said No! So they was also personally (involved)! Matthew Frank, head of D.O.C. Steven Casperson, Adm. D.O.C. for (Rules) "both" had an (opportunity) to "change" the "rules" discretionarily, when they found out Pt. const. rights was being violated. they knew that the other (Defs) was violating Pt.'s rights, and did nothing, so yes, all [Defs] plays a major role, into my "permanent" hearing lost (injuries) of 70 percent! I only have 30 percent of hearing left. which could have been seriously prevent. All because [Defs.] Above (failed) to use (discretion) within my case, and make sure that my medical (needs) was being met. "they [Defs.] lack an affirmative duties. they (did not) take reasonable (measures) to prevent what has (happened) to my life. I "suffered" severely - on the account of these [Defs.] and Now Please (I beg you) Hon. Ct. Please do not allow them (Defs.) to get away? this was a deliberate, criminal act of defendants.

Def. Catherine Ferrey (warden) won't respond to my medical emergencys. Pt. Snodgrass, could not breath on date of 7-24-05 He was told by [Defs.] HSU. dept. that he must see a doctor first. before receiving his Inhalar, to help him

breath. NC2 Greger. “knew” HSU m.g.r. Def. Warner, also was aware of this, so I wrote another request stating that I need something to help me “breath.” Still no avail, so after 23 days later, Pt. Had an “asthma” attack spasm, and had to be rushed to HSU dept. in a wheel chair. Which once, got to HSU here (NLCI) NC2 Greger, and other nurses, stated why (did not) no one call you, to give you medications. She looked at my medical records, and stated yes, someone messed up, for delaying you to get over here. She continued to say, my (requests) had been put into the back of the medical file. This is why no one had not called me over, nor gave me any asthma medicine. dated 8-15-05. from. 7-24-05 to 8-15-05 I had been out of asthma meds. This should have (occurred) accute asthma, is a very, very, serious condition. And as a result I had an asthma attack! And almost died!! Estelle v. Gamble. 429 U.S. 97, 104-05 (1976) U.S. Const. VIII Pt. believe this was an deliberate Act because they knew I had accute asthma, and yet, (disregarded) my health and safety. Just as that permanent injury toward my (70) percent) hearing to both of his ears. This is very cruel acts. (Defs) put my life at “risk” of other (inmates) who threaten me. I could not hear!! Which is physical danger!! I should have been provided hearing aids.

I filed ICE compt. Def. Ferrey still want respons to no avail. Please Hon. Ct. Defendant Ferrey, are trying to block me from filing my civil suit. She will not respond to any of my request regarding my medical condition, nor will she respond to my rejected (compt. No #24271.) It have been over (50 days,) over (35 days.) I had sent request asking her to make sure she get me hearing aids, my asthma condition-prior to me having an asthma attack. Every since I “informed” (Def.) Ferrey, that the D.O.C. members in Madison are really “responsible” for not providing me with (2 hearing aids), and that they’re liable for my hearing lost. Through request and Def. Heinzl, and Def. Warner, that’s when medical documents have been missing out of my file and Def. Ferrey will not respond at all. She respond to other inmates, why not I? I’ve a disability here! Now she is Def. Ferrey are trying to protect Defs. in Madison. James Greer, Frank, Zunker, Tegels, Casperson. they denied me from having two hearing aids in the first place. So Def. Ferrey “knew” that I.C.E compt. (No #rejected 24271) is about D.O.C. members. So she want even – respond to the rejected compt. The only complaint I need to exhaust my adm. Remedies before filing my civil action. but Def. Ferrey don’t care. She will not respond. She received my Rejected -> compt. on 8-8-05. today

is 9-26-05. Def. Ferrey. Are (trying) to hinder my civil action, she is retaliating because I am -> trying to act of exercising my constitutional right. Babcock. vs. White 102 F.3d 267, 275 (7th Cir. 1996). Equal Protection City of Cleburne vs. Cleburn Living Center, 473 U.S. 432, 439 1985. I feel my First Amendment and 8th Amend. is being violated. Please Hon. Court. Defendants must understand they've made me loose lost (70 percent) of my hearing. How could any human being take -> advantage of an Elderly, disable patient? Please help me court. I am being very deprived!! help me sir/ms.? Def. Ferrey don't like inmates who challenge their rights that is unconstitutional. "Please" help me? Thank you for listening!!

Hon. Court Ms. A. Wright, stated she will tell the courts of all the documents that's "missing". She is the Program Assistance, here in the (NLCI) HSU department. She said. She "know" what she saw in my medical file. This is when I went to get exhibits attached to complaint, of my permanent injuries, of hearing lost attached, to show this Court. She said, All of my other documents have came up missing that was in my file. that shows I never received (2) hearing aid, and I "lost" my hearing because of not having any. Cause I only was allowed one, but the (one) I was allowed to have was broken yet, D.O.C. dept. in Madison, and the Def. Warner, HSU m.g.r. and Def. Heinzl would not give me any! this could have been (prevented) Now I only have (25 percent) hearing lefted. Why they do this to my life. Why? I don't "deserve" this! My life was put at "risk" when (inmates) would push me around, and I could not hear what I had did wrong. My asthma attack, I all most lost my life. NLCI Staff is very "wrong" of what they do to (inmates.)

C. Petitioner's Inmate Complaints

A document attached to petitioner's complaint dated July 12, 2005 and bearing the heading "Hess Memorial Hospital Audiology Department" contains the following writing:
"While in military had an incident of extreme unanticipated noise, resulting in his ears bleeding for 12 days afterward. Says he was fit with 1st set of HAs by the military."

On July 13, 2005, petitioner filed inmate complaint #NLCI-2005-21815 concerning his hearing loss and inability to obtain two hearing aids. On July 22, 2005, inmate complaint examiner Jill Sweeney recommended affirming the complaint with modification, stating:

Inmate Snodgrass complains that he has not been given hearing aids. Ms. Warner reviewed the inmate's chart and stated that an order has been made for the inmate to receive two hearing aids however some administrative procedures have delayed this process. Ms. Warner stated that she is currently working to get the inmate his hearing aids. Due to delays that have occurred, recommendation is made to affirm this complaint. As Ms. Warner is aware of the issue at hand, modification is made that no further action be taken by the ICE at this time. Inmate Snodgrass is encouraged to contact Ms. Warner with any questions or concerns relating to his hearing aids.

On July 29, 2005, petitioner filed another inmate complaint, #NLCI-2005-24271, in which he named respondents Frank, Casperson, Tegels, Ferrey, Zunker and Greer and alleged that they were responsible for his inability to obtain hearing aids. This inmate complaint was rejected on August 8, 2005 because it concerned the same issue that petitioner had raised in complaint #NLCI-2005-21815. Petitioner appealed the rejection of the complaint that same day. On September 19, 2005, petitioner filed inmate complaint #NLCI-2005-28675 complaining that respondent Ferrey had not responded to his appeal. On September 29, 2005, inmate complaint examiner Jill Sweeney recommended that the complaint be affirmed, writing:

Inmate complains about not receiving a response regarding an [sic] rejection

appeal that was filed in August. The complaint in question was reviewed and the appeal in question was found scanned into the record. Ms. Tegels was contacted and stated that she had never received a copy of this complaint. As it appears that the appeal was received by the ICE officer however misplaced between the ICE office and Ms. Tegels office, Recommendation is made to affirm this complaint. Ms. Tegels has been provided a copy of Inmate Snodgrass' appeal and will be addressing it accordingly at this time.

Respondent Tegels affirmed the decision to reject inmate complaint #NLCI-2005-24271 on October 7, 2005, stating:

Rejection of the appeal was appropriate at the time (August 8, 2005). The hardcopy appeal was not received in the Deputy's office until just recently thus a response has been delayed. It is important to note HSU has been working on Inmate Snodgrasse's hearing concerns during this time to include:
04/12/05 – First visit to HSU regarding Hearing Loss, Class III for Audiology Eval submitted by Dr. Heinzl
04/14/05 – Class III Approved for appointment at Hess Audiology
06/21/05 – Class III Approval printed
07/12/05 – Audiology appointment at Hess Memorial for Hearing Aide Eval
07/29/05 – HSUM C. Warner contacted Hess Audiology to inform them of Vestica billing and phone number. Hess to contact NLCI HSU to schedule appointment for Hearing Aides.
09/12/05 – Hearing Aide pick-up from Hess Audiology
10/03/05 – Follow-up Hearing Aide appointment at Hess Audiology

On August 15, 2005, petitioner filed an inmate complaint concerning the delay in receiving his asthma medication. On August 22, 2005, inmate complaint examiner Jill Sweeney recommended dismissal of the complaint, stating:

Inmate Snodgrass complains that he was denied medical treatment for his asthma which resulted in him having an asthma attack. RN Jilek was contacted and stated that she had seen the inmate on 08/15/05 after his housing unit staff reported breathing difficulties. RN Jilek stated that upon

seeing the inmate, she reviewed his medication profile and discovered that he had not requested refills of his inhalers for several months. RN Jilek stated that she spoke with the inmate and said “You have not been using your inhalers as directed, have you?” She stated that the inmate replied “No ma’am, but I will start.” In review of the inmate’s medication profile, it was discovered that the Qvar (preventative inhaler) was last refilled on 05/23/05. This inhaler, if used twice daily would last for one month. The inmate’s Albuterol (rescue inhaler) was last filled on 04/18/05. This is to be used on an as-needed basis. Both of these medications were refilled by RN Jilek on 08/15/05. There are no requests for refills in his chart during this time period. Based on the medication profile and the inmate’s own admission, he was not complying with the directives he had been given related to his inhaler usage. The inmate needs to request refills appropriately in accordance with policy and comply with treatment prescribed to him by the doctor. Based on the above, this examiner can find no evidence to support the inmate’s claims that staff negligence was the cause of his asthma attack. Recommendation is made to dismiss this complaint.

DISCUSSION

A. Eighth Amendment Claims

1. Eighth amendment standard

I understand petitioner to allege violations of his Eighth Amendment protection against cruel and unusual punishment in connection with his inability to obtain hearing aids and treatment for his asthma. To state a claim under the Eighth Amendment, a prisoner must allege that he has a serious medical need to which prison officials have been deliberately indifferent. Higgins v. Correctional Medical Services of Illinois, Inc., 178 F.3d 508, 511 (7th Cir. 1999). A serious medical need is one “that has been diagnosed by a

physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Foelker v. Outagamie County, 394 F.3d 510 (7th Cir. 2005). Also, conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated qualify as serious medical needs. Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997). Finally, a serious medical need can arise when the deliberately indifferent withholding of medical care results in needless pain and suffering. Id.

Deliberate indifference is a state of mind; to allege that prison officials have acted or failed to act with deliberate indifference, a prisoner's allegations must, at a minimum, suggest that the officials were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and that they drew the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). In other words, petitioner must allege that respondents knew of and disregarded a substantial risk to his health. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). Allegations that indicate mere negligence, malpractice or a difference of opinion concerning treatment are insufficient to state a claim of deliberate indifference. Id.

In screening petitioner's complaint, the court is to construe petitioner's allegations liberally in his favor. However, in this case, it is difficult to understand precisely what petitioner's claims are because his poorly written allegations are subject to different interpretations and appear to conflict with statements made by the inmate complaint

examiners who reviewed his inmate complaints.

2. Inability to obtain hearing aids

Petitioner's first Eighth Amendment claim concerns respondents' failure to provide him with hearing aids. However, his allegations are so muddled and scattershot that it is nearly impossible to understand what he is saying. He appears to be contending that each of the respondents denied him hearing aids for three years and that he has suffered permanent hearing loss as a result. If this is petitioner's claim, there are several problems with it.

First, petitioner's contention that respondents' failure to provide him with hearing aids *caused* his hearing loss to become permanent is preposterous. According to one website, <http://www.emedicinehealth.com/articles/14027-2.asp>, causes of hearing loss include aging, infection, loud noises or other trauma. To argue that failure to use hearing aids causes hearing loss is like arguing that a failure to use a wheelchair causes weakness in the legs. Both items are designed to *improve* the subject's quality of life in response to an existing debilitating condition, not to prevent the condition from occurring. Petitioner's complaint includes a document dated July 12, 2005, titled "Hess Memorial Hospital Audiology Department," which appears to explain the cause of petitioner's hearing loss, that is, an incident he experienced in the military. Nevertheless, even if petitioner's allegation of

causation misses the mark, I am unprepared at this early stage to say that a state official's failure to provide a prisoner with hearing aids after tests show he needs them to hear fails to state a claim of constitutional proportion. It is arguable that if the normal functions of moving about, seeing or hearing can be restored easily by such things as a prosthesis, eyeglasses or a hearing aid, a state's refusal to provide these things to prisoners would violate the Eighth Amendment. Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980) (denial of wheelchair for three days sufficient to state claim under Eighth Amendment); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974) (inmates' inability to obtain eyeglasses and other prosthetic devices actionable under Eighth Amendment). Even assuming petitioner has stated a constitutional claim, however, his allegations are too confusing to permit the respondents to respond to his complaint. Liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Although it is not necessary that each respondent participate directly in the violation, at the least the allegations must suggest that a respondent acted or failed to act with a deliberate or reckless disregard of plaintiff's constitutional rights or that he or she directed or approved of the violation. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); see also Kelly v. Municipal Courts of Marion County,

97 F.3d 902, 908 (7th Cir. 1996).

Starting with respondent Heinzl, petitioner alleges that Heinzl denied petitioner hearing aids, but he is not clear about when or how Heinzl became aware that petitioner did not have hearing aids and needed them in order to function normally. His allegations are:

(Also lost the aid. Marathon County) jail, and (WCI) only would provide one hearing aid. This policy must change. [Def.] [Heinzl] was the (same doctor) for me (at Dodge). He did it their, never gave me two hearing aids. I need hearing aids for both ears. “Why” did D.O.C. for (3 yrs) denied me all that time? Some one is liable for (70 percent) of my hearing lost permanent damage. The doctor in Waupun order (two) for me. And yet no one never gave it to me at my request.

In this single paragraph, petitioner seems to be saying that he had a hearing aid, lost it, got another one at Waupun Correctional Institution and had a second hearing aid ordered for him, moved at some point to Dodge Correctional Institution where he asked respondent Heinzl about getting hearing aids and was not given two hearing aids on demand. Missing from this jumbled sequence of events is any factual allegation from which an inference can be drawn that respondent Heinzl knew (1) petitioner was suffering significant hearing loss; (2) that the loss could be remedied only by providing petitioner with two hearing aids; and (3) that the two hearing aids ordered for petitioner while he was Waupun would not be forthcoming. For that matter, it is not even clear when and for what period of time petitioner was under respondent Heinzl’s care at the Dodge Correctional Institution.

With respect to respondent Booth, petitioner appears to be alleging that Booth

interfered with his ability to obtain hearing aids by telling the specialist who examined petitioner on July 12, 2005 that she could not treat petitioner “while being there” until “she made it clear that she are the one who is providing the (medical need) treatment ‘order’ for her patient.” This allegation makes no sense. As a correctional officer, Booth would not have a say in what kind of medical treatment petitioner received during his visit with the specialist on July 12. If petitioner is alleging that Booth advised the specialist that she would need to provide a written order for future treatment so that the Department of Corrections could assess petitioner’s treatment needs, that would seem a logical step with which petitioner would have no reason to take issue. Thus, it is impossible to interpret petitioner’s allegations against respondent Booth to state any kind of constitutional claim against him.

Petitioner alleges that respondents Greer and Zunker, both of whom work in Madison in the Department of Corrections’ Bureau of Health Services, were personally involved in denying him hearing aids because “they was (contacted) by co/defendants to question why pt. could not get (2 hearing) aids.” From this vague allegation, it is impossible to tell who contacted Greer and Zunker, when they were contacted, what they were told about petitioner’s needs and how they responded to what they were told.

Likewise, petitioner alleges that respondents Ferrey and Tegels would not allow petitioner to get hearing aids “when [he] arrived [at the New Lisbon Correctional Institution a year or so ago], despite having been contacted “about this problem” by respondents

Warner and Heinzl. This, too, is confusing. Petitioner signed his complaint in this court on October 12, 2005, which suggests that he was transferred to the New Lisbon Correctional Institution sometime around October 2004. However, according to the October 7, 2005 decision Tegels wrote in response to petitioner's appeal from the rejection of inmate complaint #NLCI-2005-24271, petitioner was not evaluated for hearing loss until April 12, 2005. He received approval for an appointment at "Hess Audiology" on April 14, 2005, was evaluated at Hess Memorial for hearing loss on July 12, 2005, was scheduled for hearing aid pick-up on September 12, 2005 and had a follow-up appointment at Hess on October 3, 2005. Moreover, Jill Sweeney's response to petitioner's inmate complaint #NLCI-2005-21815 suggests that as of July 22, 2005, hearing aids had been ordered for petitioner, although "some administrative procedures" had delayed their receipt. If respondents Ferrey and Tegels were preventing petitioner from being approved for hearing aids, it is impossible to determine when this alleged deliberate indifference occurred. Logically, Ferrey and Tegels could not have denied petitioner hearing aids while his hearing needs were being evaluated between April and July, and the record appears to show that he was approved for hearing aids in July and received them in September. If petitioner is alleging that respondents Ferrey and Tegels knew he needed hearing aids before he began the evaluation procedure in April, his allegations are void of information to support such an inference. In other words, there are no allegations suggesting how Ferrey and Tegels could have known as soon as petitioner

arrived at New Lisbon in October 2004 that he needed hearing aids and that they sanctioned a decision not to provide them to petitioner. Indeed, the attachments to petitioner's complaint suggest that petitioner did not file a formal inmate complaint about his inability to hear until July 12, 2005, the same day he was evaluated at Hess Memorial and was told he needed hearing aids.

Finally, petitioner alleges that respondents Matthew Frank and Steven Casperson "both had an (opportunity) to 'change' the 'rules' discretionarily, when they found out Pt. const. rights was being violated. they knew that the other (defs) was violating pt.'s rights and did nothing." Again, several questions are left unanswered by this vague assertion. When did Frank and Casperson become aware of petitioner's need for hearing aids, who told them, what were they told, and how did they respond? Without some indication that Frank and Casperson understood that doctors had assessed petitioner to be in need of hearing aids and that petitioner would suffer needlessly without them, petitioner's allegations do not support a claim of deliberate indifference against these two respondents.

A final problem concerns petitioner's apparent contention that the Wisconsin Department of Corrections has or had a policy that limits to one the number of hearing aids an inmate can receive. This assertion is undermined entirely by petitioner's own allegation that a doctor at Waupun Correctional Institution ordered two hearing aids for him and by the response he received to his inmate complaint #NLCI-2005-21815 to the effect that an

order had been placed for “two hearing aids” but that there had been administrative delays.

The discrepancies between certain facts alleged in petitioner’s complaint and information contained in the attachments to the complaint, and the lack of clarity in setting forth the allegations of fact regarding each named respondent may be explained by the fact that petitioner did not draft his complaint personally and possibly did not read it before he signed it. Petitioner’s complaint is written in the same hand and in the same style as complaints filed in the Western and Eastern Districts of Wisconsin by a frequent filer named Larry Ray Holman, who is housed at the New Lisbon Correctional Institution with petitioner. It may be that Holman did not have an accurate understanding of the facts before he wrote them in petitioner’s complaint or that he purposely described them loosely so as to avoid dismissal of the claims at the screening stage. Whatever the scenario, petitioner should be aware that by signing a complaint that is filed in federal court, he is representing to the court that, to the best of his knowledge, his factual contentions have evidentiary support, that is, they are true. Fed. R. Civ. P. 11(b)(3). If he is not truthful and his lack of candor is brought to light during the course of this lawsuit, he may be subject to sanctions under Rule 11.

Because the allegations in petitioner’s complaint regarding his need for hearing aids are so confusing as to violate Fed. R. Civ. P. 8, I will stay a decision whether to grant petitioner leave to proceed on this claim to allow him to submit a supplement to the

complaint in his own hand in which he explains clearly the following:

- 1) when he was first medically assessed as being in need of two hearing aids;
- 2) when and how each respondent learned of his need for hearing aids, precisely what they knew about his condition and how they responded; and
- 3) facts to support the contention that the Department of Corrections has a policy forbidding inmates from receiving more than one hearing aid.

3. Asthma medication

Petitioner alleges that he was having difficulty breathing on July 24, 2005 but that someone in the New Lisbon health services unit told him that he would have to see a doctor before he could receive an inhaler. His allegations suggest that he wrote to respondent Warner asking for something to help him breathe. However, his efforts were unsuccessful and he had an asthma attack twenty-three days later. Petitioner alleges further that he was rushed to the health services unit when he had his attack and that while he was there, a nurse told him that someone had “messed up” by placing his medical requests in the back of his medical file. He alleges that he might have been given treatment earlier had his requests not been misplaced.

Petitioner’s allegations suggest that he made several requests to see a doctor in the three weeks between July 24 and August 15 but that, despite his requests, he was not seen

or given a refill for his asthma inhaler until August 15. There are two problems with this claim, one of which is dispositive. First, petitioner's allegation that a nurse informed him that someone in the health services unit had "messed up" suggests that the placement of petitioner's requests for a refill in the back of his file was the result of a mistake or error. As noted earlier, liability for under the Eighth Amendment requires more than mere negligence; it requires a showing of actual intent or deliberate indifference. Harper v. Albert, 400 F.3d 1052, 1065 (7th Cir. 2005). Second, and more important, petitioner has alleged no facts from which an inference can be drawn that he was denied medical care when he needed it. Indeed, his allegations are that he was given an inhaler on August 15, when he suffered an asthma attack. Because he has made no allegations suggesting that any one of the respondents was deliberately indifferent to his serious medical need for an inhaler, his request for leave to proceed on this claim will be denied.

B. Retaliation and Access to Courts Claims

I understand petitioner to allege that respondent Ferrey retaliated against petitioner and interfered with his right of access to the courts by failing to respond to his medical requests and his appeal of the rejection of his inmate complaint #NLCI-2005-24271.

1. Applicable legal standards

A prison official who takes action in retaliation for a prisoner's exercise of a constitutional right may be liable to the prisoner for damages. Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The official's action need not independently violate the Constitution. Id. To state a claim for retaliation, a prisoner need not allege a chronology of events that supports drawing an inference that the official acted in retaliation. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). However, he must allege sufficient facts to put the defendants on notice of the claim so that they can file an answer. Id. A prisoner satisfies this minimal requirement when he specifies the constitutional right he exercised that motivated that act of retaliation and the retaliatory act. Id.

Petitioner has not alleged that respondent Ferrey's rejection of inmate complaint #NLCI-2005-24271 or her failure to respond to his requests for medical attention were motivated by petitioner's exercise of a constitutional right. He alleges that her refusal to respond was motivated by her desire to protect employees of the Department of Corrections responsible for failing to obtain hearing aids for him. If proven, such a claim might reveal that respondent Ferrey was attempting to minimize or cover up improper behavior on the part of other prison officials, but it does not allow the drawing of an inference that Ferrey was attempting to chill petitioner's exercise of a constitutional right. Therefore, petitioner has not stated a claim of retaliation against respondent Ferrey.

Petitioner's allegation that Ferrey's actions directly impeded his right of access to the

courts may be analyzed separately. Prisoners have a constitutional right of access to the courts for pursuing post-conviction remedies and for challenging the conditions of their confinement. Lehn v. Holmes, 364 F.3d 862, 865-66 (7th Cir. 2004). To state a claim of denial of access to the courts, a prisoner must allege facts suggesting that he “has suffered an injury over and above” the denial of access to a court. Walters v. Edgar, 163 F.3d 430, 434 (7th Cir. 1998). That is, he must allege facts showing that the “blockage prevented him from litigating a nonfrivolous case.” Id. Petitioner has failed to allege such facts. He has filed the present lawsuit despite Ferrey’s alleged refusal to respond to his requests for medical attention or respond to his rejected complaint. If petitioner is allowed to proceed on his claim that he was denied medical care for his hearing loss and respondents move to dismiss this claim for petitioner’s failure to exhaust his administrative remedies, Ferrey’s failure to respond to a rejected complaint will not save petitioner’s claim. A prisoner has the obligation to use the inmate complaint system at the right time and in the manner specified by the state. If a petitioner’s complaint is rejected, the understanding is that the complaint has failed at the outset to meet the state’s requirements and thus is insufficient to show exhaustion. Because petitioner has not alleged facts from which an inference can be drawn that he has been prevented from litigating this suit or will be prevented from litigating it because of respondent Ferrey’s failure to respond to his rejected complaint or respond to his requests for medical care, petitioner will be denied leave to proceed on his claim that he was

denied access to the courts.

ORDER

IT IS ORDERED that:

1. Petitioner Dean Snodgrass is DENIED leave to proceed in forma pauperis on his claims that his Eighth Amendment protection against cruel and unusual punishment was violated when his requests to obtain a refill of his asthma medication were placed in the back of his file in the health services unit at the New Lisbon Correctional Institution;

2. Petitioner is DENIED leave to proceed in forma pauperis on his claims that respondent Ferry retaliated against him and denied him access to courts when she failed to respond to his requests for medical attention and respond to his appeal of the rejection of an inmate complaint;

3. A decision is STAYED on petitioner's request for leave to proceed in forma pauperis on his Eighth Amendment claim concerning his inability to obtain hearing aids. On or before December 28, 2005, petitioner is to submit a supplemental complaint in his own hand explaining with in clear language the following:

- 1) when he was first medically assessed as needing two hearing aids;
- 2) when and how each respondent learned of his need for hearing aids, precisely what they knew about his condition and how they responded; and

3) facts to support the contention that the Department of Corrections has a policy forbidding inmates from receiving more than one hearing aid.

If, by December 26, 2005, petitioner fails to submit a supplement that clarifies his claim of deliberate indifference with respect to his hearing aids against the respondents, I will deny his request for leave to proceed in forma pauperis on this claim for his failure to set out the claim in clear and plain language as required by Fed. R. Civ. P. 8.

Entered this 16th day of December, 2005.

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