IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JESUS MAR GARCIA,

Petitioner,

v.

HARLEY G. LAPPIN, Director;
MICHAEL K. NALLEY, Regional Director;
STEPHEN R. HOBART, Warden;
G. JONES, Health Service Administrator; and
DOCTOR REED, Medical Doctor,

Respondents.

OPINION AND ORDER

06-C-94-C

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This is a proposed civil action for injunctive and monetary relief brought pursuant to 42 U.S.C. § 1983. Petitioner Jesus Mar Garcia, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, contends that respondents were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Petitioner further contends that the Bureau of Prisons' medication policy is in conflict with the Eighth Amendment because the policy requires him to purchase his own over-the-counter medications.

Petitioner 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. In a previous order, I concluded that petitioner was unable to prepay the full fees and costs of instituting this lawsuit and ordered that he make an initial partial payment of the filing fee before this court decides whether he can proceed with his complaint in forma pauperis. Petitioner has timely 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, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed 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. 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).

From petitioner's complaint and attachments (previously filed administrative complaints), I find that petitioner has alleged the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Jesus Mar Garcia is a prisoner at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Harley G. Lappin is the director of the Federal Bureau of Prisons and respondent Michael K. Nalley is the regional director of the Federal Bureau of Prisons. The remaining respondents are employed at the Federal Correctional Institution in Oxford: respondent Stephen R. Hobart is the warden; respondent G. Jones is health services administrator; and respondent Doctor Reed is a medical doctor.

B. Petitioner's Medical Care

Petitioner has been suffering from ulcers and stomach acid reflux problems for more than 30 years. Petitioner believes he needs surgery to correct his acid reflux problem, but prison officials have not arranged for any. Instead, when petitioner attends sick call at Oxford, the medical staff tell him his condition should be treated with medications he may purchase at the facility's commissary. Also, the medical staff instructs petitioner to disregard the instructions on the medication and take "the amount needed for relief." The staff told petitioner to purchase Tagamet, but he could not, because it was not available in the commissary.

Petitioner has taken several medications that respondent Reed prescribed for his acid

reflux, including Ranitidine, Famotidine, Rolaids, Gaviscon, and Prilosec. None of these medications have worked. Petitioner believes his acid reflux is getting worse and is causing a burning feeling in his throat. Respondent Reed told petitioner to double his dosage of Prilosec and to take Gaviscon at the same time, but even after petitioner did this, his symptoms did not disappear. The acid reflux has caused petitioner to develop nodules on his vocal cords. Petitioner has seen a Dr. McDonald, a throat specialist at Divine Savior Health Care in Portage, Wisconsin. Dr. McDonald told petitioner that before he can address the problem with petitioner's vocal cords, petitioner needs to resolve his acid reflux problem. Petitioner's condition has reached a stage where he can no longer eat or sleep normally.

DISCUSSION

A. Deliberate Indifference

Deliberate indifference to a prisoner's serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). To state a deliberate indifference claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106. In other words, 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). Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

"Serious medical needs" encompass (1) conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and (3) conditions that have been "diagnosed by a physician as mandating treatment." Gutierrez, 111 F.3d at 1371-73. Petitioner alleges that he is "suffering greatly" as a result of his acid reflux disease. He suffers from a burning feeling in his throat, is unable to eat or sleep normally and has developed nodules on his vocal cords. These allegations of pain and suffering are sufficient to suggest a serious medical condition. Id. at 1372 n.7 (given liberal pleading standards for pro se complaints, "the 'seriousness' determination will often be ill-suited for resolution at the pleading stage").

To establish deliberate indifference, a petitioner must allege facts from which an inference may be drawn that a respondent was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001). 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) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)), this does not mean that prisoners are entitled to

whatever medical treatment they desire. Prison officials violate their affirmative Eighth Amendment duty to provide adequate medical care only when they are deliberately indifferent to a prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). An official is deliberately indifferent when he knows of and disregards an excessive risk to an inmate's health or safety. Farmer v. Brennan, 114 S. Ct. 1970, 1979 (1994). An official must have actual knowledge of a substantial risk before he can be found deliberately indifferent, but such knowledge may be inferred from the fact that the risk was obvious. Id. at 1981. Inadvertent error, negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment because they are not an "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-06; Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); see also Snipes, 95 F.3d at 590-91.

Petitioner's complaint is lacking in clarity and specificity and provides very few facts regarding the various respondents' involvement in the alleged constitutional violations. However, liberally construing petitioner's pro se complaint, as I must, I find that he is alleging that the medical staff who saw him at Oxford, including respondent Reed, knew about his 30-year history with acid reflux, knew he had already tried controlling his condition by taking multiple medications (including the higher doses suggested by respondent Reed) to no avail, yet failed to provide him with alternative treatment to cure his condition. I will allow petitioner leave to proceed on the claim that respondent Reed was

deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. Petitioner should notify the court immediately if I have misunderstood his complaint and he is not alleging that respondent Reed knew that petitioner had already exhausted all treatment options involving medication but kept prescribing him the same medications instead of doing something else to address his condition.

I will not allow petitioner to proceed on this claim against the other respondents. It is well established that liability under § 1983 must be based on a respondent's personal involvement in the constitutional violation. See 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). A respondent's direct participation in the deprivation is not required. Instead, an official satisfies the personal responsibility requirement "if she acts or fails to act with a deliberate or reckless disregard of petitioner's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985); Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir. 1982). In order for a supervisory official to be found liable under § 1983, there must be a "causal connection, or an affirmative link, between the misconduct complained of and the official sued." Smith v. Rowe, 761 F.2d at 369; Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). Petitioner has not alleged that respondents

Lappin, Nalley, Hobart or Jones participated either directly or indirectly in any constitutional violation. He has alleged no facts suggesting that any of these respondents were aware of petitioner's acid reflux condition or of the medical staff's allegedly inadequate course of treatment. Accordingly, petitioner will be denied leave to proceed against respondents Lappin, Nalley, Hobart and Jones with respect to his claim of deliberate indifference.

B. Medication

Petitioner contends that the Bureau of Prisons' medication policy of requiring inmates to pay for over-the-counter medication violates his rights under the Eighth Amendment. Petitioner's argument is meritless. The Eighth Amendment guarantees that the government will not ignore an inmate's serious medical needs; it does not guarantee free medical care. See, e.g., Martin v. Debruyn, 880 F. Supp. 610, 615 (N.D. Ind. 1995). Nothing in the Eighth Amendment requires the government to provide at no cost a commodity that would not be free outside the prison and that the inmate has the legal means to purchase. Id. at 614. If a prison official withholds necessary medical care from an inmate with a serious medical need who cannot afford to pay, the official's action would violate the inmate's constitutional rights, id. at 615, but insisting that an inmate with sufficient funds pay for his own medical care is neither deliberate indifference nor

punishment. Id. "A prison official violates the Eighth Amendment by refusing to provide prescribed [over-the-counter] medicine for a serious medical need only if the inmate lacks sufficient resources to pay for the medicine." Id.

Petitioner has not suggested that he lacked sufficient resources to pay for the medicine prescribed to him or alleged that prison officials refused to provide him with prescribed medicine for want of payment. Therefore, I will deny petitioner leave to proceed with respect to his claim that the over-the-counter medication policy violates his Eighth Amendment rights.

ORDER

IT IS ORDERED that

1. Petitioner Jesus Mar Garcia's request for leave to proceed in forma pauperis with respect to his claim of deliberate indifference is GRANTED as to respondent Reed and is DENIED as to respondents Nalley, Hobart, Lappin and Jones.

2. Petitioner's request for leave to proceed in forma pauperis with respect to his claim that the Bureau of Prisons' over-the-counter medication policy violates his rights under the Eighth Amendment is DENIED.

3. Respondents Nalley, Hobart, Lappin and Jones are dismissed from this case.

4. For the remainder of this lawsuit, petitioner Jesus Mar Garcia must send respondent Reed a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer will be representing respondent Reed, he should serve the lawyer directly rather than respondent Reed. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondent Reed or to respondent Reed's attorney.

5. Petitioner should keep a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. The unpaid balance of petitioner's filing fee is $210.05; petitioner is obligated to pay this amount when he has the means to do so, as described in 28 U.S.C. § 1915(b)(2).

7. The clerk of court will forward completed Marshals Service and summons forms to the United States Marshal, who will serve petitioner Jesus Mar Garcia's complaint on respondent Reed, the United States Attorney for the Western District of Wisconsin and the United States Attorney General as required by Fed. R. Civ. P. 4(i)(2)(A).

Entered this 4th day of April, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge