IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CLAYTON MELLENDER,

Petitioner, OPINION and ORDER

v. 06-C-547-C

DR. CHARLES LARSON;
RICHARD RAEMISCH,

Respondents.

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In this proposed civil action for injunctive and monetary relief, petitioner Clayton Mellender, a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin, contends that respondents have violated his rights under the Eighth Amendment and under the Americans with Disabilities Act (ADA), by failing to provide him with medical treatment and reasonable accommodations for his many alleged medical needs. Petitioner requests leave to proceed in forma pauperis, as authorized by 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. He has made 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). Nevertheless, when the litigant is a prisoner, the court must dismiss the complaint if the claims contained in it are legally frivolous, malicious, fail to state a claim upon which relief may be granted or seek money damages from a respondent who is immune from such relief. 28 U.S.C. § 1915A.

Because petitioner has alleged facts from which it may be inferred that respondents Larson and Raemisch were deliberately indifferent to his need for methadone, medical equipment and simple accommodations, he will be granted leave to proceed on his claim that respondents. Moreover, because petitioner has alleged facts from which it may be inferred that respondents Larson failed to provide petitioner with reasonable accommodations for his alleged disability (in the form of a cane and wheelchair), he will be granted leave to proceed against respondents on his ADA claim as well.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Clayton Mellender is a prisoner at the Waupun Correctional Institution in Waupun, Wisconsin.

Respondent Dr. Charles Larson is a physician at the Waupun Correctional

Institution.

Respondent Richard Raemisch is Deputy Secretary of the Wisconsin Department of Corrections.

B. Medical Needs

When petitioner arrived at the Waupun Correctional Institution he had numerous "medical restrictions" and special needs that had been accommodated by the state prisons where he had resided previously, including the Dodge, Columbia, Oshkosh and New Lisbon Correctional Institutions. During petitioner's intake examination at the Waupun Correctional Institution, respondent Larson eliminated all previous accommodation orders without first evaluating petitioner to determine whether he needed accommodation. Respondent Larson refused to issue petitioner a cane, although petitioner cannot bear his full weight on his left leg. As a result, petitioner "suffered many falls and excruciating pain in [his] heel." After petitioner was injured from a fall, he was permitted for a short time to use two crutches, then one crutch; however, respondent Larson "discontinued" petitioner's crutch authorization effective October 10, 2006.

When petitioner arrived at the Waupun Correctional Institution, respondent Larson asked him how much methadone he took daily. When petitioner answered, "120 milligrams," respondent Larson said, "Get ready for me to reduce it. If the guys that take

low doses of methadone find out, they will all come clamoring for more." Several days later, respondent Larson reduced petitioner's methadone dose to 90 mg. daily. Respondent Larson did not taper petitioner's dose, but made the reduction all at once. As a result of the reduction, petitioner experiences more pain, requiring him to use lidocaine, which causes him heart problems.

Before coming to the Waupun Correctional Institution, petitioner had a standing order for a second mattress or an "egg crate" mattress because he has "compression neuropathies" in the nerves of his outer thighs that cause him severe pain and burning. Petitioner had a lower bunk restriction and lower tier restriction because he has knee problems that make it difficult for him to climb stairs or ladders. From 2003 until the time he arrived at the Waupun Correctional Institution, petitioner was given ice four times a day to relieve testicular pain, as ordered by doctors with the University of Wisconsin urology department. In addition, petitioner was given an extra blanket to elevate his legs and relieve edema. At other prisons, petitioner had a standing order permitting him to use a wheelchair when he travels long distances. Respondent Larson discontinued each of these special authorizations and accommodations for no apparent reason.

Recently, petitioner has begun experiencing seizures. One was so severe, he had to be transported to the local emergency room, where the treating physician told him he had experienced a seizure. Respondent Larson has told petitioner that he does not believe

petitioner is having seizures and he does not intend to evaluate the problem further.

Petitioner has sent complaints to respondent Raemisch, who refuses to investigate the matter.

OPINION

A. Deliberate Indifference

Deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103 (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 and that prison officials were deliberately indifferent to that need. Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). "Serious medical needs" encompass (1) conditions that are life-threatening or that carry risk 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 suffers from a variety of medical problems, including knee

spurs caused by arthritis, testicular pain, severe nerve pain in his outer thighs, weakness in his left leg and swelling in both legs. (It is not clear from the complaint whether petitioner suffers from an underlying medical problem that manifests itself through these symptoms.) Before arriving at the Waupun Correctional Institution, petitioner was prescribed 120 mg. methadone daily to treat his pain, was authorized to use a wheelchair for traveling long distances and a cane for traveling shorter distances, had a lower bunk and lower tier restriction; was permitted to ice his testicles four times daily, was given an extra blanket to prop under his swollen legs at night and used an egg crate mattress to reduce the nerve pain in his thighs. Petitioner alleges that shortly after he arrived at the Waupun Correctional Institution, respondent Larson discontinued each of these treatments and accommodations without medical justification. Moreover, petitioner alleges when he began experiencing seizures recently, respondent Larson refused to provide him with any treatment or testing to determine the cause of the seizures. When petitioner complained to respondent Raemisch that respondent Larson was not providing him with medical treatment, Raemisch refused to investigate.

Deliberate indifference requires that a prison official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and actually "draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Medical malpractice alone is not equivalent to deliberate indifference. Vance v. Peters, 97 F.3d 987, 992 (7th

Cir. 1996); see also Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Deliberate indifference is evidenced by a respondent's actual intent or reckless disregard for a prisoner's health or safety, and must amount to 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). With that high standard in mind, I turn to each of petitioner's allegations against each respondent.

1. Respondent Larson

Petitioner contends that Larson exhibited deliberate indifference to his need for medical treatment by (1) arbitrarily reducing his methadone prescription; (2) discontinuing his authorization for medical equipment and other accommodations he needed for his many physical ailments; and (3) failing to investigate the cause of his recent seizures. First, petitioner alleges that respondent Larson decreased his methadone dose not because it was medically indicated, but because Larson feared other prisoners would want higher doses if they learned that petitioner was receiving 120 mg. daily. Petitioner alleges also that respondent Larson reduced his dose all at once, without tapering the medication, a decision that could have caused him serious harm. If the facts petitioner has alleged are true, it may be possible to infer that respondent Larson failed to exercise medical judgment entirely, and instead based his decision to reduce petitioner's methadone on factors unrelated to

petitioner's need for medical care. Youngberg v. Romeo, 457 U.S. 307, 323(1982) (liability may be imposed on professional only when his decision "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person . . . did not base the decision on such a judgment"). However, although petitioner has stated a claim against respondent Larson, I note that petitioner faces an uphill battle in proving his claim. By petitioner's own admission, respondent Larson did not discontinue the medication, but merely reduced petitioner's daily dose by 30 mg. Moreover, petitioner alleges that respondent Larson prescribed lidocaine (another pain reliever), presumably in order to counteract the decrease in petitioner's methadone prescription. Ultimately, petitioner will be able to succeed on his claim only if he is able to show that respondent Larson knew that the decision to decrease petitioner's methadone and replace it with lidocaine was dangerous to petitioner's health and unlikely to provide him with adequate pain relief. Although petitioner's burden is a heavy one, it is not impossible that he will be able to come forward with facts that support his allegations. Consequently, I will grant him leave to proceed on his claim that respondent Larson exhibited deliberate indifference to his medical needs by precipitously decreasing his dose of methadone.

Petitioner alleges that respondent Larson exhibited deliberate indifference in other ways as well. According to petitioner, while he was housed at the Dodge, Columbia, Oshkosh and New Lisbon Correctional Institutions, he was authorized to have a cane, a

wheelchair, an egg crate mattress, an extra blanket and ice packs four times daily. It is not clear whether these accommodations were related simply to the symptoms petitioner describes (edema, weak knees, testicular pain and nerve pain), or whether he suffers from an underlying disease or overarching disability that manifests itself in the symptoms he describes. Although swelling or nerve discomfort in itself might not amount to a serious medical need, the combination of symptoms petitioner describes, along with his allegation that four prisons found it necessary to accommodate him in the ways he describes, permit an inference that he has one or more serious medical needs that necessitate the accommodations he received at other prisons. The Court of Appeals for the Seventh Circuit has held that denying a prisoner adaptive equipment may amount to deliberate indifference. Hughes v. Joliet Correctional Center, 931 F.2d 425, 428 (7th Cir. 1991) (prisoner stated claim by alleging "prison officials had denied him access to his crutches and leg brace"). The court has also held that, in some circumstances, nerve pain may constitute a serious medical need. See, e.g., Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999). To the degree that petitioner disagrees with the manner in which respondent Larson treated his medical problems, he fails to state a claim under the Eighth Amendment. However, to the degree that petitioner alleges that respondent Larson failed to treat him entirely while discontinuing petitioner's previously authorized medical accommodations, I find that he has alleged facts from which it may be inferred that respondent Larson exhibited deliberate indifference by

discontinuing his authorization for a cane, wheelchair, egg crate mattress, extra blanket and ice packs. He will be granted leave to proceed on this claim as well.

Petitioner contends that respondent Larson exhibited deliberate indifference recently by refusing to investigate the cause of petitioner's recent seizures, one of which was so severe that it required a trip to the local emergency room. According to petitioner, respondent Larson denies that petitioner has a seizure disorder and will not provide him with any treatment or medical testing. Seizures are serious medical conditions, whether they occur as a result of a diagnosed condition, such as epilepsy, Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998), or from an unknown or undiagnosed condition. Given the fact that petitioner alleges he suffered repeated seizures, one of which required emergency medical attention, respondent Larson's alleged failure to provide any follow-up treatment or investigation failing to provide treatment would constitute a "prototypical case of deliberate indifference, [with] an inmate with a potentially serious problem repeatedly requesting medical aid [and] receiving none." Id. Consequently, petitioner will be granted leave to proceed on his claim that respondent Larson exhibited deliberate indifference to his serious medical needs when he refused to treat petitioner for his recent seizures.

2. Respondent Raemisch

Petitioner contends that respondent Raemisch exhibited deliberate indifference by

failing to investigate petitioner's complaints about the inadequate medical care respondent Larson was providing. Although petitioner's claim against respondent Raemisch is more tenuous than his claims against respondent Larson, he will be granted leave to proceed against Raemisch. Petitioner alleges that he informed respondent Raemisch of his health problems and of respondent Larson's refusal to treat him and that Raemisch did nothing to investigate or intervene. Petitioner has done enough to put defendant Raemisch on notice of the claim against him; at this stage of the proceedings, he is required to do no more.

B. ADA

To the extent that petitioner contends that respondent Larson's decision to remove his cane and wheelchair have impeded his ability to safely move around the prison, his claim implicates the Americans with Disabilities Act, 42 U.S.C. § 12132, which states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Under the ADA, a "qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of

services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131. To the extent that petitioner alleges he is prevented from safely navigating the prison because of his weak left leg and arthritic knees, he may qualify as a disabled individual under the statute.

State prisons fall squarely within the statutory definition of "public entity," and prison recreational "activities," medical "services," and educational and vocational "programs," fall within the statute's ambit. Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 210 (1998). Therefore, if petitioner shows that respondent Larson's failure to provide him with a cane and wheelchair prevented him from accessing prison programs or services, he may be able to prevail on his ADA claim. Petitioner should be aware, however, that it is not clear whether he may obtain monetary relief against state officials under the ADA or whether he may obtain only injunctive relief. United States v. Georgia, 126 S. Ct. 877, 878 (2006). The question is one that will need to be answered at a later stage of the proceedings.

C. Motion for a Preliminary Injunction

With his complaint, petitioner has filed a "Motion for Emergency Restraining Order and Preliminary Injunction" in which he asks the court to order respondents to provide him immediately with an egg crate mattress, a wheelchair, an ice pack four times daily, 120 mg.

methadone, a cane, an extra blanket, a "lower bunk" restriction, a "lower tier" restriction and a medical evaluation to determine the cause of seizures petitioner has allegedly been experiencing in recent weeks. From the content of his motion, it appears that petitioner is aware of the standard that must be applied in deciding the motion:

> A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the petitioner has a reasonable likelihood of success on the merits; 2) whether the petitioner will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the petitioner outweighs the threatened harm an injunction may inflict on respondent; and 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Village of Williams Bay, 865 F.2d 877, 883 (7th Cir. 1989). At the threshold, a petitioner must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If petitioner makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. In re Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997).

Although petitioner has submitted affidavits in support of his motion, the affidavits merely refer to attached medical records that do not bear directly on his claim that respondents Larson and Raemisch are deliberately refusing to provide him with an ample dose of pain medication or with medical equipment simply to cause him needless suffering.

In an effort to insure that this court has a complete factual record before it decides

petitioner's motion for emergency injunctive relief, petitioner will be required to follow this court's procedures for obtaining such relief. Those procedures are described in a document titled Procedure To Be Followed On Motions For Injunctive Relief, a copy of which is included with this order. Petitioner should pay particular attention to those parts of the procedure that require him to submit proposed findings of fact in support of his motion and point to admissible evidence in the record to support each factual proposition. Because petitioner has not submitted proposed findings of fact in support of his motion, together with evidence sufficient to make the showing required for preliminary injunctive relief, I will allow him time to do so before deciding what further action might be appropriate.

ORDER

IT IS ORDERED that

1. Petitioner Clayton Mellender's request to proceed in forma pauperis is GRANTED with respect to his claims that

a. respondent Dr. Charles Larson exhibited deliberate indifference to his serious medical needs by (1) reducing his methadone without medical justification; (2) discontinuing his authorization for a wheelchair, cane, lower bunk restriction, lower tier restriction, an extra blanket, an egg crate mattress and ice packs; and (3) failing to treat petitioner for his recent seizures;

b. respondent Richard Raemisch exhibited deliberate indifference to his serious medical needs by failing to investigate his complaint that respondent Larson was denying him appropriate medical care; and

c. respondents Larson violated his rights under the Americans with Disabilities Act by refusing to provide him with a cane and a wheelchair.

2. 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 has learned what lawyer will be representing respondents, he should serve the lawyer directly rather than respondents. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to respondents or to respondents' attorney.

3. 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.

4. The unpaid balance of petitioner's filing fee is $334.67; 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).

5. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's complaint and this order are being sent today to the Attorney General for service on respondents.

FURTHER, IT IS ORDERED that petitioner's "Motion for Emergency Restraining

Order and Preliminary Injunction" is STAYED until petitioner submits proposed findings of fact in support of his motion for a preliminary injunction, together with additional evidentiary materials as he deems appropriate. If, by October 31, 2006, petitioner fails to support his motion with proposed findings of fact and evidentiary materials as required by this court's procedures, his motion will be denied.

Entered this 26th day of October, 2006.

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