

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

MARK RAHOI,

Petitioner,

v.

MATTHEW FRANKS, JOHN HUZS,
DOCTOR SIRIN, WARDEN ENDACOTT,
DOCTOR HUIBREGTSE, WARDEN SCHNEITER,
and DOCTOR BURTON COX, JR., all sued
individually and in their official capacities,

Respondents.

ORDER

06-C-691-C

This is a proposed civil action for declaratory, injunctive and monetary relief, brought under 42 U.S.C. § 1983. Petitioner, who is presently confined at the Prairie du Chien Correctional Institution in Prairie du Chien, 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 fee for filing 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).

From his complaint and the attachments to it, I find that petitioner has alleged the following facts.

ALLEGATIONS OF FACT

In July 2005, petitioner was in a motor vehicle accident in which he suffered injuries rendering him a quadriplegic. At that time, he had surgery to fuse cervical vertebrae in his neck. Petitioner was released from the hospital in September of 2005. At that time, he still had weakness and was developing spasticity of his body. According to petitioner's doctor

at the time, spasticity is a common complication of spinal cord injuries that results in abnormal stiffness and movement of muscles and is a major risk factor for the development of contractures (abnormal shortening of muscles). Petitioner participated in all out-patient rehabilitation therapy for the spasticity in his back and had an MRI performed for pain in his right shoulder. The MRI revealed that he had an acute rotator cuff tear consistent with the trauma he suffered in the July accident. He was referred to the orthopedic department in connection with the tear, where he was scheduled for surgery on December 14, 2005, as well as pre-operative botox injections designed to decrease the spasticity and promote healing after surgery. However, on November 14, 2005, petitioner's probation was revoked. At that time, he was experiencing worsening spasticity on his right side, weakness in his right arm and slowness of movement and gait. His doctor had advised him that it was imperative to have the surgery and preoperative injections. He told petitioner that if he did not receive surgical repair, his rotator cuff muscles would shrink and surgical repair would become impossible. He advised petitioner also that not fixing his shoulder would increase petitioner's ongoing pain problems and that petitioner would suffer permanent problems as a result of his spinal cord injury, permanent weakness, spasticity and lack of coordination.

On December 15, 2005, petitioner arrived at the Milwaukee Secure Detention Facility. During intake, it was noted that he had missed the surgery that had been scheduled for December 14. Nevertheless, respondent Sirin, the doctor in charge, stated that no

follow-up was needed. Petitioner received no treatment during his stay at the Milwaukee Secure Detention Facility and was under-medicated. Respondent John Huzs is a prison official at the Milwaukee facility.

On March 24, 2006, petitioner was transferred to the Dodge Correctional Institution. There, his medical classification report indicated incorrectly that no on-site treatment at the health services unit was required, that petitioner had no chronic condition and that he did not require restricted-center system placement. Nevertheless, petitioner was given a 30-day medical restriction that included orders for a low bunk and first floor placement, an extra pillow and mattress and no recreation for one week.

On March 29, 2006, petitioner wrote a health service request seeking attention for extreme pain and muscle spasms in his back. On March 30, 2006, R. Last, a registered nurse, responded to the request,

You were seen 3/27/06 & given a muscle relaxer & Naproxen for pain. Continue to take the meds as prescribed & the doctor will be following up with you.

At some point shortly thereafter, petitioner was transferred to the Red Granite Correctional Institution. Respondent Endacott is the warden at Red Granite and Dr. Huibregtse is a medical doctor. On April 14, 2006, petitioner wrote a health service request noting that he had a medical restriction for first floor and an extra pillow and mattress and that he had been put on the second floor with no extra mattress or pillow. He also asked for

a refill of his Naproxen prescription. On April 15, 2006, a health services staff person responded,

Your special needs were approved for 30 days. You do have a MD appt prior to these expiring. You will need to discuss extension with MD @ your appt.

Two weeks later, petitioner saw a doctor. On May 14, 2006, petitioner wrote a health service request stating,

I would like to know what's going on with the x-rays of my back follow-up wise? Also when am I going to get my physical therapy. It's been a few weeks since I've been approved and months since I've had it last and I keep getting worse! Thank you.

S. Mouchin, a nurse, responded to this request on May 15, 2006, stating,

X-ray results aren't back yet. You are on the list for P.T. - when he has an opening and it is your turn you will be scheduled.

Petitioner did not receive physical therapy. On June 8, 2006, he wrote a health service request asking to be told when he might be given physical therapy. On June 9, he received the following response, "Have check with physical therapy." In addition, petitioner had difficulty receiving medications that had been prescribed. On July 27, 28 and 29, 2006, petitioner made health service requests asking about refills on various medications. In one response, he was told that he did not need a doctor's appointment to get refills if he would ask for refills 10-14 days prior to expiration. In another, he was told that his prescription for Naproxyn was stopped because he had complained of an upset stomach. In that

response, petitioner was told that he could talk to the doctor about the matter at his next appointment, which had already been scheduled. On July 30, 2006, petitioner wrote a health service request explaining a mixup in his medications,

First off the Gabpintin [sic] is for the nerves in my hands and in no way act as a muscle relaxant on me. Now I can barely move. The doctor said nothing to me about not renewing my Methocarhnol when he increased my Gabpintin [sic]. Had he I would have said no period! My core muscles are so tight they feel like they inside out. What the hell is this with you people. One step forward, ten back. I can't wait 3 to 4 weeks like this. What a joke! I need to see a doctor sooner than that! Also my Propoxy [sic] has been out for 3 days. I put a reorder form in 3 days ago. What is up with that!

Nurse Mouchin responded on July 31,

Mr. Rahoi – I cannot change what the MD wants. You need to stop making the blue slips sound so nasty or we will just send them back. You have an appt to see MD as told – you will get in as he has openings. Not sure about your Propoxyphene but will refill if we have them.

Petitioner continued to seek physical therapy and to complain about problems receiving his various prescriptions from August through early October 2006. On one occasion, he was told that the medication would take 7-10 days “to get in.” On two occasions, he was told that it was his responsibility to keep track of his prescription expiration dates and to insure that refills were ordered prior to expiration. On yet another occasion, he was told that a doctor had changed his prescription for Methocarhnol from two 500 mg tablets three times a day to one 500 mg tablet four times a day. At the end of September 2006, petitioner wrote to health services saying,

I [sic] back and neck are killing me and my spasticity is so bad. I feel like my insides are being squeezed. It's affecting everything from my breathing to my bowel movements. It's been that way for months. What are you people going to do? Also I have not had a bowel movement in 6 days. This is all ongoing!

In response, Nurse Mouchin responded,

You are being scheduled to go to pain clinic in Madison. The MD has done as much as he can. Take the Naproxen as well as other meds. You need to purchase Metamucil on canteen for chronic bowel issue, which you did not address at appt. 9/6/06.

At some point before October 26, 2006, petitioner was transferred to the Prairie du Chien Correctional Institution. Respondent Schneider is the warden of the Prairie du Chien facility and Dr. Cox was the doctor there. On October 26, petitioner wrote in a health service request form,

This is ongoing problem. I broke my neck in July '05 and injured my spinal cord. I need to see the doctor ASAP. I have trouble walking, doing stairs, my spasticity is so bad it's [sic] and the muscles are so tight I can hardly breathe. I'm suppose to have lower bunk restriction and double mattress. At Redgranite, I was approved to go to the pain clinic in Madison (have paperwork) still have not gone and its been 2 month. The pain and spasticity has not gone away, it's gotten worse! Also I need more physical therapy plus occupational therapy. My hands are so bad I can't even button a button and barely zip my coat!

In response, petitioner was told that his appointment with the pain clinic had been approved but not yet scheduled and that he had a doctor's appointment for November 1, 2006. To date, however, petitioner has not seen a pain doctor or received treatment and he is in line for yet another transfer to a new institution. Petitioner is experiencing extreme pain and the

failure to repair his rotator cuff problem has made surgery now impossible.

DISCUSSION

The Eighth Amendment protects prison inmates from cruel and unusual punishment and has been interpreted to require the government to provide for inmates' basic human needs such as food, clothing, shelter and medical care. Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996). With respect to medical care, the Supreme Court has held that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" to state an Eighth Amendment claim. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

This standard contains objective and subjective components. First, an inmate's medical need must be objectively serious. A condition meets this standard if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). In addition, the Court of Appeals for the Seventh Circuit has held that the phrase "serious medical needs" encompasses 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 v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997).

The subjective element of a denial of medical care claim requires that the prison official act with a sufficiently culpable state of mind. Id. at 1369. This state of mind, known as deliberate indifference, requires at a minimum that a prison official be aware of and disregard a substantial risk to the inmate's health. Greeno, 414 F.3d at 653. In other words, the official "must 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and 'must also draw the inference.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). However, "a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired." Haley v. Gross, 86 F.3d 630, 641 (7th Cir. 1996). On the other hand, inadvertent error, negligence, gross negligence and ordinary malpractice do not constitute 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).

In this case, petitioner has alleged sufficient facts to suggest that he has a serious medical condition brought about by a spinal cord injury he sustained in July 2005 and that he suffers extreme pain as a result of muscle spasms in his back and the spasticity of his muscles. The question is whether he has alleged facts from which an inference may be drawn that the respondents he has named in this lawsuit exhibited deliberate indifference to his serious medical needs.

I conclude that petitioner has stated a claim against respondent Sirin, the doctor at

the Milwaukee Secure Detention Facility at the time petitioner was incarcerated there. According to petitioner, respondent Sirin disregarded petitioner's medical condition and wrote in notes that would follow petitioner to the Dodge Correctional Institution that no follow-up to petitioner's missed surgery was necessary. Although it may be that respondent Sirin will be able to show that his action was the result of negligence or inadvertent mistake rather than deliberate indifference to petitioner's need for surgery, petitioner has alleged enough at this early stage to allow him to proceed against Sirin.

Likewise, I infer from petitioner's allegations that Drs. Huibregtse and Cox were aware of petitioner's need for surgery for his rotator cuff tear and physical therapy to prevent the development of spasticity and that their failure to arrange for the surgery and ongoing physical therapy would result in permanent, serious impairment to petitioner's health. In addition, although petitioner's allegations do not reveal whether respondents Huibregtse and Cox were aware of the difficulties he was having in receiving his medication, it may be possible for him to prove that these doctors knew that their orders for medication were not being carried out and that they turned a blind eye to the situation.

However, petitioner will not be granted leave to proceed against respondents Matthew Frank, John Huza, Warden Endacott or Warden Schneider. Liability under § 1983 arises only through a respondent's personal involvement in a 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). The doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his or her subordinates, is not applicable in § 1983 cases. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978). Because the actions or inactions of the medical staff at the various prisons in which petitioner has been incarcerated may not be attributed to respondents Frank, Huza, Endacott or Schneider, these respondents will be dismissed from this case.

ORDER

IT IS ORDERED that

1. Petitioner Mark Rahoi's request for leave to proceed in forma pauperis is GRANTED on his claim against respondents Doctor Sirin, Doctor Huibregtse and Doctor Burton Cox, Jr. that these individuals were deliberately indifferent to his serious medical needs when they failed to arrange for him to receive surgery for his rotator cuff tear and physical therapy for complications from his spinal cord injuries.

2. Petitioner is GRANTED leave to proceed on his claim against respondents Huibregtse and Cox that these respondents were deliberately indifferent to his need for prescribed medication when they failed to insure that the prescriptions were timely renewed.

3. Petitioner is DENIED leave to proceed on his claims against respondents Matthew Franks, John Huza, Warden Endacott and Warden Schneider, because petitioner has not

alleged these respondents' personal involvement in the denial of his Eighth Amendment rights.

4. Respondents Matthew Franks, John Huzs, Warden Endacott and Warden Schneider are DISMISSED from this action,

5. For the remainder of this lawsuit, petitioner must send respondents Sirin, Huibregtse and Cox 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 respondent or to respondent's attorney.

6. 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.

7. The unpaid balance of petitioner's filing fee is \$346.62; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney

General for service on the state defendants.

Entered this 31st day of January, 2007.

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