IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RALPHFIELD HUDSON,

OPINION and ORDER

Petitioner,

07-C-355-C

v.

WARDEN HOBART (retired),
Federal Correctional Institution,
Oxford, Wisconsin; DR. REED,
Heath Service Clinical Director;
G. JONES, Health Service Administrator;
T. SPENCE, Chief Pharmacist;
McKINNON, Physician Assistant; and
J. PENAFLOR, Physician Assistant,

Respondents.

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This is a proposed civil action for declaratory and monetary relief, brought pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Administrative Procedures Act, 5 U.S.C. § 701 – 706. Petitioner, Ralphfield Hudson, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, has made the initial partial payment of the filing fee required to be paid under the Prison Litigation Reform Act. Pursuant to the act, petitioner's complaint requires

screening. 28 U.S.C. § 1915(e)(2).

In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under a liberal construction, it is legally frivolous or 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. After reviewing petitioner's complaint, I conclude that petitioner has stated a claim under the Eighth Amendment against respondent T. Spence regarding her reduction in the dosages of petitioner's epilepsy medications. Petitioner has stated an Eighth Amendment claim against respondent J. Penaflor regarding his refusal to treat a rash on petitioner's arms and legs. Petitioner has not stated any claim with respect to respondents Warden Hobart, Dr. Reed, G. Jones or McKinnon and they will be dismissed from the case.

In his complaint and materials referenced in the complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Ralphfield Hudson is a prisoner who is presently incarcerated at the Federal Correctional Institution in Oxford, Wisconsin.

At times relevant to this complaint, respondents Hobart, Reed, Jones and Spence

worked at the Federal Correctional Institution in Oxford, Wisconsin. It is not clear from petitioner's complaint whether respondents Penaflor and McKinnon are or were employed by the Federal Correctional Institution.

Respondent Hobart was the warden. As warden, he was responsible for all employees of the institution and the day-to-day operation of the institution. He has now retired. Respondent Reed is a doctor and the clinical director. He is required to review the medical records of all prisoners and has final authority with respect to each prisoner's treatment and care. Respondent Jones is the health services administrator. She plans, implements and controls all aspects of the department's administration, including procurement and supply. In addition, she is responsible for all "ancillary departments," including the pharmacy, nursing, laboratory and health records departments.

Respondent Spence is the chief pharmacist. She is responsible for the administration and distribution of all medication within the institution. In addition, she is responsible for pharmaceutical care for all prisoners and for providing them with medical information.

Respondent McKinnon was a physician's assistant who was petitioner's primary care-giver and was responsible for petitioner's day-to-day care in March 2006. Respondent Penaflor is a physician's assistant assigned to the health services unit. He is petitioner's current primary care-giver.

B. Petitioner's Medical Care

On January 23, 2006, petitioner was transferred to the Federal Correctional Institution in Oxford from another Bureau of Prisons institution in Terre Haute, Indiana. At the previous institution, petitioner and health services staff had "worked out the perfect dosage of medication" for his health problems. During his intake interview at the Oxford Correctional Institution, petitioner told health services staff the types and dosages of medication he was taking. This information was logged on the intake form by a nurse named D. Hinski, who also noted that petitioner suffered from "HEPC+," "HTN," "hyperlipidemia" and a "seizure disorder."

In spite of this information, respondent Spence told petitioner that she didn't have "that kind" of medication on hand and "refused to order the right dosage of medications." The Health Services Manual and Program Statement § 6000.05 does not give pharmacists authority to "prescribe medication, refuse medications or change dosage of medications" made by members of the medical staff.

On March 22, 2006, petitioner had a seizure, which caused him to fall down and hit his head against the wall. As a result of his fall and the associated head trauma, petitioner has experienced memory loss and numbness to his right side and arm. Respondent McKinnon was on call when petitioner had the seizure. However, prison staff members were unable to reach respondent McKinnon. It took three or four calls "to different defendant's"

(sic) before staff reached "P.A. Clamens," who refused to "come in" and "check [petitioner] out."

Respondent Penaflor refused to treat a rash on petitioner arms and legs. On numerous other occasions, respondent Penaflor has refused to treat petitioner's other medical needs. Respondent Penaflor "talks crazy" to petitioner and petitioner has a hard time understanding him; therefore, it is difficult for petitioner to determine whether he has been treated appropriately in response to his complaints about his health care needs.

DISCUSSION

A. Eighth Amendment Claims

The Eighth Amendment requires the government "'to provide medical care for those whom it is punishing by incarceration.'" Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To prevail ultimately on a claim under the Eighth Amendment, a prisoner must prove that prison officials engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle, 429 U.S. at 106.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584 -85 (7th Cir. 2006). The condition does not have

to be life threatening. Id. A medical need may be serious if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if otherwise subjects the detainee to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, petitioner's claim raises three issues:

(1) Whether petitioner had a serious medical need;

(2) whether respondents knew that petitioner needed treatment; and

(3) despite their awareness of the need, whether respondents failed to take reasonable measures to provide the necessary treatment.

Petitioner does not have to allege the facts necessary to establish each of these elements at the pleading stage, but they provide the framework for determining whether petitioner has alleged enough to give respondents notice of his claims and whether there is a set of facts consistent with petitioner's allegations that would entitle him to relief. Kolupa v. Roselle Park District, 438 F.3d 713, 715 (7th Cir. 2006); Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005).

Petitioner has alleged that he suffers from a condition that causes him to have seizures and that he was being treated with prescription medication for his condition while he was

housed at another facility in Terre Haute, Indiana. This strongly suggests that he had a serious medical need. Moreover, this is not petitioner's first case related to inadequate medical care. In an earlier case brought by petitioner, the Court of Appeals for the Seventh Circuit was persuaded that petitioner's epileptic condition, as it existed then, constituted a serious medical need. Hudson v. McHugh, 148 F.3d 859, 863 (7th Cir. 1998). There is no reason to think that petitioner's epileptic condition has changed so that it no longer constitutes a serious medical need.

More questionable is whether petitioner's rash on his arms and legs is a serious medical need as well. Although petitioner does not say so, it is possible that his rash was painful or caused him to experience unnecessary suffering. At this early stage, this is sufficient to suggest that it, too, constitutes a serious medical need. However, the analysis does not stop here. I must consider also whether respondents exhibited deliberate indifference to petitioner's need for proper medication and care. As noted above, whether a particular respondent was deliberately indifferent to petitioner's serious medical needs depends on the respondent's awareness of the problem and whether he or she took reasonable steps to provide necessary treatment.

1. Respondents Hobart, Reed and Jones

Petitioner's complaint contains no allegations whatsoever about any "acts or

omissions" by respondents Hobart, Reed and Jones. Therefore, it is impossible to conclude that petitioner states a claim against any of them because he has given them no notice about the nature of his claims. See, e.g., Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

To the extent petitioner believes that respondents Hobart, Reed and Jones were responsible for his inadequate medical care because they supervised the operations of the prison, the medical staff and the health services program, this kind of indirect responsibility is not a basis for liability under § 1983. 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). In an action under § 1983 there is no place for the doctrine of respondeat superior, under which a supervisor may be held responsible for the acts of his subordinates. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-695 (1978); Gentry, 65 F.3d at 561. Petitioner has not alleged that respondents Hobart, Reed or Jones were directly involved in his medical care or were even aware of his condition. Therefore, petitioner will be denied leave to proceed against respondents Hobart, Reed and Jones and they will be dismissed from this lawsuit.

2. Respondent Spence

Petitioner's claim against respondent Spence fares better. Because respondent Spence dispensed medication to petitioner, it is possible to infer that she knew about his epileptic condition. Armed with this information, respondent Spence claimed not to have the type of medication petitioner had been taking, and instead gave him something else at the wrong dose to control his seizures. Petitioner asserts that respondent Spence refused as well to order the proper dosage of his medication, despite his requests.

It is doubtful that respondent Spence's giving petitioner a different medication to control his seizures would provide the basis for an Eighth Amendment claim. It seems more like negligence, at most. Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002) (holding that negligence does not constitute deliberate indifference and that even admitted medical malpractice does not give rise to constitutional violation). However, at this early stage of the proceedings, I will allow the claim to go forward, together with the claim resting on respondent Spence's alleged subsequent refusal to order the medication prescribed to control petitioner's seizures.

3. Respondent McKinnon

It appears that petitioner's complaint against respondent McKinnon is that McKinnon, who was petitioner's primary care-giver, was not available when petitioner suffered a seizure on March 22, 2006, even though McKinnon was supposed to be on call.

Instead, staff members reached another physician's assistant, who refused to go to the prison to check on petitioner. It is possible that petitioner might state a claim against the physician's assistant who refused to attend to his medical needs, if that person were aware of petitioner's condition and knew that his refusal to check on petitioner could worsen petitioner's condition. However, petitioner has not named this other physician's assistant as a party to this lawsuit.

Moreover, petitioner's own allegations indicate that staff was unable to reach respondent McKinnon *at all*. Perhaps respondent McKinnon was irresponsibly ignoring his calls. But, even so, petitioner does not state a claim against him because respondent McKinnon was not told that petitioner had suffered a seizure and needed care. Because petitioner has alleged that respondent McKinnon was not aware of his medical condition, he cannot claim that McKinnon acted with deliberate indifference to it. Therefore, respondent McKinnon will be dismissed from this lawsuit.

4. Respondent Penaflor

Finally, petitioner asserts that respondent Penaflor failed to treat him for a rash on his arms and legs, has refused to treat other medical conditions on a regular basis and, on other occasions, was so difficult to understand that petitioner is not sure whether he received proper treatment. Petitioner's second and third assertions are so sketchy in nature that they

are insufficient to put respondent Penaflor on notice about the specific nature of petitioner's claim against him and will be dismissed as a result. Petitioner's first assertion is more clear and direct. If respondent Penaflor knew that petitioner's rash was causing him significant discomfort and refused to take reasonable steps to treat the rash, these actions might constitute deliberate indifference. Therefore, petitioner will be granted leave to proceed against respondent Penaflor solely on his claim that respondent Plenaflor refused to treat a rash on petitioner's arms and legs.

B. Violation of Bureau of Prisons' Program Statement

Petitioner appears to contend that respondent Spence violated Bureau of Prisons Program Statement 6000.05, which allows pharmacists to substitute generic medications for brand name medications, but does not allow a pharmacist to change a prescription entirely. Petitioner asserts that he has a cause of action for this violation under the Administrative Procedures Act. There are several problems with this claim. First, it appears that the program statement to which petitioner refers is now out of date. The court's brief independent review of current program statements did not reveal an exact match for the restriction petitioner contends applies.

Next, even if a current program statement allows prison pharmacists to change prescriptions only in limited ways, respondent Spence's violation would not give rise to a

cause of action. Generally speaking, the Court of Appeals for the Seventh Circuit has held that "[t]he BOP's program statements are internal agency interpretations of its statutory regulations." Parsons v. Pitzer, 149 F.3d 734, 738 (7th Cir. 1998); see also Reno v. Koray, 515 U.S. 50 (1995) ("The Bureau's interpretation is recorded in its 'Program Statements,' which are merely internal agency guidelines and may be altered by the Bureau at will."). They do not create a federal cause of action for a prisoner but instead serve as internal guidelines. Miller v. Henman, 804 F.2d 421, 426 (7th Cir. 1986) ("The manual was not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations, and therefore it does not create legally enforceable entitlements.").

ORDER

IT IS ORDERED that

1. Petitioner Ralphfield Hudson's request for leave to proceed in forma pauperis is GRANTED with respect to his claims under the Eighth Amendment that respondent T. Spence violated his constitutional rights by giving him an ineffective medication for his epilepsy and by improperly reducing the dosage of his seizure medications.

2. Petitioner's request for leave to proceed in forma pauperis is GRANTED with respect to his claim that respondent Penaflor violated his Eighth Amendment rights when he refused to treat a rash on petitioner's arms and legs.

3. Petitioner is DENIED leave to proceed in forma pauperis on his claims under the Administrative Procedures Act.

4. Petitioner's request for leave to proceed in forma pauperis is DENIED on his claims against Warden Hobart, Dr. Reed, G. Jones and McKinnon. Respondents Hobart, Reed, Jones and McKinnon are DISMISSED from this action.

5. For the remainder of this lawsuit, petitioner must send the United States Attorney for the Western District of Wisconsin a copy of every paper or document that he files with the court. Once petitioner has learned what lawyer in the United States Attorney's office will be representing respondent, he should serve the lawyer directly rather than the United States Attorney. The court will disregard any documents submitted by petitioner unless petitioner shows on the court's copy that he has sent a copy to the United States Attorney or to the lawyer assigned to represent respondent United States.

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 $59.30; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

8. Copies of petitioner's complaint and this order are being sent today to the United

States Marshal for service on the respondent.

Entered this 27th day of August, 2007.

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