IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEXTER SALLIS #129759,

Petitioner,

v.

MARY BARTELS, DR. BURTON COX,
MANDY MATHSON and JOHN PAQUIN,

Respondents.

OPINION and ORDER

08-cv-514-slc[1]

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This is an action for injunctive and monetary relief brought under 42 U.S.C. § 1983 in which petitioner Dexter Sallis alleges that prison officials violated his Eighth Amendment rights by cutting off his migraine medicine and requiring him to come up with a $7.50 co-payment before he got more. Petitioner has requested leave to proceed in forma pauperis and has paid the initial partial filing fee.

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[1]Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the purpose of issuing this order only, I am assuming jurisdiction over the case.

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. See 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, 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 respondent who by law cannot be sued for money damages. 28 U.S.C. § 1915(e).

Because petitioner has alleged facts allowing an inference to be drawn that respondent Cox knew that petitioner needed migraine medicine but held the medicine hostage until petitioner made a co-payment, petitioner will be allowed to proceed on his claim against him. Likewise, petitioner will be allowed to proceed on his claim against respondent Paquin because petitioner alleges that respondent Paquin approved a technical rejection of petitioner's complaint about his need for migraine medication even though he knew that petitioner suffered severe daily migraines and could not repair the technical defect. However, petitioner will be denied leave to proceed against respondents Bartels and Mathson. Petitioner alleges no facts suggesting that respondent Bartels was involved in withholding petitioner's medication until he made a co-payment or that respondent Mathson knew the extent of petitioner's pain or inability to repair a technical defect when she rejected his complaint on technical grounds.

As an initial matter, petitioner filed two separate documents at the same time: his complaint, dkt. #1, and another document labeled "complaint" and making nearly identical allegations, dkt. #2. It is not clear whether petitioner attempted to rewrite his complaint and lost certain pages, but this second document is incomplete, stopping at the end of five pages in the middle of the story and without a signature. This second "complaint" will be disregarded as incomplete; at any rate, it does not appear to raise any separate claims.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Dexter Sallis is a prisoner at the Prairie Du Chien Correctional Institution. Respondents are prison officials with different roles at the Prairie Du Chien Correctional Institution: Mary Bartels is a nursing supervisor, respondent Burton Cox is a doctor, respondent Mandy Mathison is an inmate complaint examiner and respondent John Paquin is the warden.

Petitioner suffers from migraine headaches. The headaches are so severe that petitioner has gone through a series of tests in the past few years and has gone through different types of medication. The headaches get so bad that petitioner cannot read, write, sleep, eat or shower, and can hardly focus.

On May 7, 2008, petitioner went to the officer's station on Unit 5 to take medication for his migraine headaches. The officer on duty, an officer Fritz, told petitioner that he had been ordered to stop giving that medication after that day.

Petitioner wrote to the Health Services Unit, asking "Why have you stopped the medication I was taking for migraine headaches?" On May 8, 2008, a staff member of the Health Services Unit responded that "if you need an appointment a $7.50 co-pay applies." The staff member's signature on the response is illegible and no name is printed in the box entitled "PRINT NAME."

On May 8, 2008, petitioner wrote another request to the Health Services Unit asking why his migraine medication had been stopped. On May 9, 2008, petitioner received another response from a staff member of the Health Services Unit. It stated, "Doctor order expired—appointment for co-pay required. Let us know if you want an appointment." Again, the signature was illegible (although different) and there was no name printed on the response.

After petitioner received that response, he filed an inmate complaint, contending that medication that had been prescribed to him for headaches should not be stopped simply to make him pay a $7.50 co-payment and explaining that he could not currently make the co-payment and would not be able to make it every time the medicine ran out. On May 13, 2008, respondent Mathson rejected the complaint on the ground that because petitioner did not name the medication withheld, he failed to allege sufficient facts upon which redress may

be made under Wis. Admin. Code § DOC 310.11(5). Petitioner appealed the rejection, explaining that he could not remember the name of the medicine, but that it was a medicine that he had been prescribed to take severe migraines that he suffers daily. Respondent Paquin upheld respondent Mathson's decision to reject petitioner's complaint, concluding that petitioner did not allege sufficient facts upon which redress could be made.

On May 15, 2008, petitioner received a $25.00 money order. That day, he sent another health service request informing them that he now had the $7.50 to make the co-payment for the medication. Petitioner was given an appointment with the Health Services Unit for May 19, 2008. The nurse scheduled him to see the doctor. On May 20, 2008, the medication petitioner was taking was returned to him. There was no charge, and petitioner did not see a doctor. The signature on the slip authorizing the return of the medication is respondent Cox. Respondent Cox did not order the medication earlier because petitioner did not have the $7.50 co-payment.

OPINION

The Eighth Amendment affords prisoners a constitutional right to medical care. Snipes v. DeTella, 95 F. 3d 586, 590 (7th Cir. 1996) (citing Estelle v. Gamble, 429 U.S. 97, 103 (1976)). The standard for determining whether a prison official violates the Eighth Amendment in this setting is whether the official is "deliberately indifferent" to a prisoner's "serious medical need." Estelle, 429 U.S. at 104-05.

A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering when treatment is withheld, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subjects the prisoner 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 has three elements:

(1) Did petitioner need medical treatment?

(2) Did respondents know that plaintiff needed treatment?

(3) Despite their awareness of the need, did respondents fail to take reasonable measures to provide the necessary treatment?

Petitioner alleges that he suffered from migraine headaches so severe that they would immobilize him. From petitioner's allegations, an inference may be drawn that his migraine headaches were sufficiently serious to constitute a "serious medical need." This raises the question whether plaintiff's allegations suggest that respondents were deliberately indifferent to this need, a question that must be answered for each respondent.

First, as to respondent Bartels, petitioner does not allege any facts related to her involvement in depriving him of his medicine. Petitioner alleges that respondent Bartels failed to provide sufficient staff to provide him with medical care; however, petitioner does not allege that his failure to receive his medication was the result of understaffing; instead, he alleges that his medication was withheld intentionally, because he had not made a co-payment. Because petitioner alleges no facts suggesting that respondent Bartels was involved in denying him medical care, his claim against her will be dismissed. Sheik-Abdi v. McClellan, 37 F.3d 1240, 1248 (7th Cir. 1994) (Only those personally responsible for deprivation of constitutional right may be held liable under § 1983).

As for respondent Cox, the allegations allow an inference to be drawn that respondent Cox held petitioner's migraine medication hostage until petitioner made a co-payment. Petitioner's migraine medication was cut off; he was told that his "doctor order [had] expired" and he would be required to make a co-payment; and respondent Cox authorized the return of the medication only after petitioner finally made a co-payment. It is possible that respondent Cox did not know about the need for medicine until the co-payment was made; however, at this early stage, all inferences must be drawn in petitioner's favor, and it is possible to infer that respondent Cox knew of petitioner's need for migraine medication and simply refused to provide him his migraine medication until he paid.

The next question is whether it is deliberate indifference to require a prisoner to make a co-payment in this setting. Although the Court of Appeals for the Seventh Circuit has yet to consider whether charging prisoners for medical care may violate the Eighth Amendment, other courts have upheld such policies in limited circumstances. Reynolds v. Wagner, 128 F.3d 166 (3d Cir. 1997) (citing cases). Generally, it is not deliberate indifference for prison officials to refuse to treat a prisoner who is able to pay for medical treatment but refuses to do so. Id. at 174 ("If a prisoner is able to pay for medical care, requiring such payment is not "deliberate indifference."). However, although the government may charge prisoners for health care, courts have held that it may not withhold the care for a prisoner who is unable or unwilling to pay because of indigency. Id. at 174; Ancata v. Prison Health Services, Inc., 769 F.2d 700, 704 (11th Cir. 1985); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987). From petitioner's allegations, it is possible to infer that respondent Cox made co-payment a precondition of treatment, without regard to whether petitioner could pay. He could not pay, and, as a result, went without treatment until he received a $25.00 money order. These allegations suffice to allow petitioner to proceed on his claim that respondent Cox acted with deliberate indifference to his serious medical needs by refusing to provide his migraine medication until he made his co-payment. Petitioner should be aware that to prevail on his claim, he will be required later to provide evidence showing that respondent Cox knew of petitioner's need for migraine medicine

before petitioner made the co-payment and refused to prescribe him medication until it was paid.

Next, petitioner contends that respondents Mathson and Paquin should be held liable because they examined an inmate complaint that he filed complaining that he was not receiving medication and they rejected it for failing to identify the medication. In limited circumstances, it is possible to state a claim of deliberate indifference against a complaint examiner who is told of an ongoing medical need and fails to respond accordingly. Greeno v. Daley, 414 F.3d 645, 656 (7th Cir. 2005). Respondent Mathson received petitioner's inmate complaint about his denial of medication but declined to address it on its merits, instead telling petitioner that he needed to identify the name of the medicine. Such a bureaucratic response may have been frustrating to petitioner, but it does not allow an inference to be drawn that respondent Mathson acted with deliberate indifference to his medical needs. In light of the allegations that petitioner made in his inmate complaint, it is possible to infer that respondent Mathson knew that petitioner was not receiving certain medicine that he had been prescribed for headaches, but not that respondent was on notice of the severity or regularity of the headaches he suffered. Moreover, she had no reason to believe that her decision to reject the complaint would do any more than require petitioner to file a new complaint with more information. Thus, at most, respondent Mathson was aware that her decision would cause a short-term delay to petitioner's ability to obtain a

doctor-prescribed headache medicine. Such a response is not so inadequate as to evidence deliberate indifference by respondent Mathson. Therefore, petitioner's claim against her will be dismissed.

As for respondent Paquin, he had more information. Petitioner explained on appeal both that he did not know the name of the medication and that it was medication he was prescribed for severe migraines that he suffers daily. In light of this response, it is possible to infer that respondent Paquin was aware both that petitioner would suffer for every day he was delayed relief and that he might not be able to file a new complaint that would meet the strict standard set by respondent Mathson. Because it is possible to infer that respondent Paquin knew of petitioner's daily suffering and inability to name the medicine, his decision to approve respondent Mathson's decision may have been deliberately indifferent. Petitioner will be granted leave to proceed against respondent Paquin.

As a final matter, petitioner alleges that the members of the Health Services Unit staff who told him that a co-payment was required signed their names illegibly and failed to print their names when responding to his requests for treatment, but has not named any John or Jane Does as defendants. At this point, I assume that petitioner does not intend to sue these individuals.

ORDER

IT IS ORDERED that:

1. Petitioner Dexter Sallis's request for leave to proceed in forma pauperis is GRANTED with respect to his claims that respondents Dr. Burton Cox and John Paquin violated his Eighth Amendment rights by failing to address his need to receive his migraine medication before he could make a co-payment.

2. Petitioner Dexter Sallis's request for leave to proceed in forma pauperis is DENIED with respect to his claims that respondents Mary Bartels and Mandy Mathson violated his Eighth Amendment rights by failing to respond to his request for migraine medication before he could make a co-payment for failure to state a claim upon which relief may be granted and his claims against respondents Bartels and Mathson are DISMISSED.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that petitioner has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

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 the state respondents.

6. Because I have dismissed one or more claims asserted in petitioner's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against petitioner.

7. Petitioner is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Prairie Du Chien Correctional Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 3d day of October, 2008.

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