

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

CHRISTOPHER GLENN NEAL,

Petitioner,

v.

DOE/DOCTOR SULIENE,
DOE/DOCTOR CALLISTER,
DOE/NURSE KIM and
DOE/ALSUM, in their individual
and official capacities,

Respondents.

ORDER

08-cv-177-slc¹

This is a proposed civil action for declaratory, injunctive and monetary relief brought under 42 U.S.C. § 1983. Petitioner Christopher Glenn Neal, a prisoner, contends that respondents have violated his rights under the Eighth Amendment by failing to provide him

¹On March 11, 2008, I entered an order stating that 50% of all civil cases, with several exceptions unrelated to this case, would be assigned randomly to Magistrate Judge Stephen L. Crocker during the period of Judge Shabaz's convalescence and rehabilitation following shoulder surgery. This is one of those cases. However, because the case was under advisement for screening before the parties could be offered an opportunity to decline to have the magistrate judge hear the case, I assumed jurisdiction over the case to enter this dispositive order.

with adequate medical care. Petitioner requests 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 of \$47.15 as required under § 1915(b)(1).

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 defendant who by law cannot be sued for money damages.

Because petitioner has failed to allege facts from which it may be inferred that respondents Suliene, Callister, Kim and Alsum were deliberately indifferent to serious medical needs, he will be denied leave to proceed on his Eighth Amendment claim.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

Petitioner Christopher Glenn Neal is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. Respondents Doctor Suliene, Doctor Callister, Alsum and

Kim are all employed at the Columbia Correctional Institution in Portage, Wisconsin. Suliene is a medical doctor. Callister is a psychiatrist. Alsum is a Health Service Manager. Kim is a nurse.

On September 24, 2007, petitioner filed a Health Services request stating, "I can't ejaculate semen nor can I maintain an erection since I've been taking my meds." At the time petitioner was receiving the following psychiatric medications: (1) Fluoxetine; (2) Risperidone; (3) Trazodone; (4) Haldol; and (5) Hydroxyine. That same day, Health Services responded to petitioner's request with a hand written note stating, "We don't provide Viagra for this problem." Despite the initial response from Health Services, petitioner was seen by respondent Callister on September 25, 2007. Petitioner and respondent Callister discussed possible causes of petitioner's sexual dysfunction, including the psychiatric medications petitioner was taking and petitioner's diabetes. In an effort to address petitioner's sexual dysfunction, respondent Callister modified petitioner's medication doses so long as petitioner would contact Health Services or respondent Callister if he had an appearance of psychotic symptoms. Petitioner was scheduled for a follow-up appointment on November 6, 2007.

On October 6, 2007, petitioner filed an offender complaint seeking medical care because of his sexual dysfunction. The inmate complaint examiner recommended affirming petitioner's complaint with the modification that Health Services make sure petitioner

received his follow-up appointment. On November 20, 2007, petitioner was seen by respondent Callister for his follow-up appointment to address his concerns regarding the side effects of his psychiatric medications. At the appointment, petitioner noted that he had not experienced sexual dysfunction when he was taking his psychiatric medications outside prison. Respondent Callister again reduced some of petitioner's medication doses and scheduled another follow-up appointment in a month or sooner if needed.

On December 4, 2007, petitioner submitted a Health Service Request seeking medical care for sexual dysfunction. In the request petitioner noted that his sexual dysfunction had not changed despite the change in his psychiatric medication doses and that he had begun experiencing a stinging feeling when he urinated. On December 5, 2007, petitioner was seen by respondent Kim on a sick call. During the sick call, petitioner explained his sexual dysfunction and the possible connection to his psychiatric medications to respondent Kim, who told petitioner that she could not treat him but that he should discuss his concerns with respondent Callister. Petitioner felt humiliated after the sick call with respondent Kim. Petitioner was scheduled for another sick call on December 12, 2007, but he refused to be assessed because of the humiliation he suffered during the previous sick call.

On December 18, 2007, petitioner was seen by respondent Callister for another follow-up appointment to address petitioner's concerns regarding the side effects of his psychiatric medications. During this appointment, petitioner reported experiencing the

same sexual dysfunctions as before as well as new symptoms, including testicular pain, dysuria and lower abdominal pain. Respondent Callister reduced some of petitioner's medication doses, ordered petitioner to undergo an urinalysis test, referred petitioner to primary care to undergo an evaluation of his genitourinary complaint and scheduled petitioner for another follow-up appointment within one month or sooner if needed.

On December 24, 2007, petitioner submitted another Health Service Request seeking medical services for a sharp stabbing pain in his lower abdomen and in between his legs where his testicles and penis connect as well as a stinging feeling when he urinated. Health Services received the request on December 27, 2007, and noted that petitioner had just undergone his urinalysis on December 26, 2007, and the results were negative for an infection.

On January 3, 2008, petitioner filed an offender complaint, seeking medical care regarding his sexual dysfunction as well as the stinging feeling he experienced when urinating. On January 7, 2008, petitioner was seen by respondent Suliene to evaluate petitioner's genitourinary complaints. At the appointment, petitioner's vital signs were found to be within normal limits. Respondent Suliene noted that petitioner's recent urinalysis results had come back negative for an infection. Despite the negative urinalysis results, petitioner was prescribed medication to treat an urinary tract infection. Petitioner was ordered to undergo another urinalysis in two weeks followed by another doctor

evaluation in two to three weeks. On January 15, 2008, the inmate complaint examiner dismissed petitioner's January 3 complaint in light of petitioner's appointment with respondent Suliene.

OPINION

The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. 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 may 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" include (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 contends that he is suffering from sexual dysfunction, dysuria and lower abdomen pain. Petitioner's sexual dysfunction, or to be more specific his alleged erectile dysfunction, by itself cannot be considered a serious medical need worthy of Eighth

Amendment protection because there is nothing to suggest that such dysfunction is life-threatening, results in needless pain and suffering or when diagnosed by a doctor would mandate treatment. However, when petitioner's sexual dysfunction is combined with dysuria and lower abdomen pain along with the prescription of medication for a urinary tract infection, it is reasonable to conclude that petitioner has alleged a serious medical need.

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). Deliberate indifference may be 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).

Petitioner does not contend that respondents took no action regarding his medical need. Instead, from the allegations in his complaint I understand him to be contending that respondents were deliberately indifferent to his serious medical need because the treatment he received did not solve his medical problems. (I note that petitioner does not contend what treatment would have provided a solution.) This leaves the essential question whether the medical treatment petitioner received was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate [his] condition," Snipes v. Detella, 95

F.3d 586, 592 (7th Cir. 1996), giving rise to a claim of deliberate indifference. See also, Estelle, 429 U.S. at 104 (holding that deliberate indifference “is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”).

Petitioner was seen three times within three months by respondent Callister and each time respondent Callister attempted to address the medical needs petitioner reported. Twice respondent Callister adjusted petitioner’s psychiatric medications in attempts to resolve petitioner’s medical needs. When the symptoms accompanying petitioner’s medical needs changed, respondent Callister ordered an urinalysis and referred petitioner to another doctor, respondent Suliene, to evaluate petitioner’s new symptoms. Petitioner underwent the ordered urinalysis and within two weeks of obtaining the results, was seen by respondent Suliene for an evaluation. Despite the negative urinalysis results, respondent Suliene prescribed urinary tract infection medicine for petitioner in reliance on petitioner’s complaints of dysuria. Moreover, petitioner was scheduled for another urinalysis and follow-up appointment with respondent Suliene for a re-evaluation. Additionally, when petitioner told respondent Kim about his medical need and the connection with his psychiatric medications, she told him that she could not do anything at that time but that he could and should discuss his needs with a doctor, that is, respondent Callister. Such medical care by

respondents does not suggest they were deliberately indifferent or that their actions were blatantly inappropriate. On the contrary, petitioner received persistent medical care from respondents.

Inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Alleging facts that, if true, would constitute poor or negligent medical care is not enough to support a claim that petitioner's rights under the Eighth Amendment have been violated. See Estelle, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). At most, petitioner's allegations may rise to the level of negligent medical care. Therefore, petitioner's desire for other medical treatment is not enough to sustain an Eighth Amendment claim for inadequate medical care.

Because petitioner fails to state a claim upon which relief can be granted, I will deny his request for leave to proceed in forma pauperis on his Eighth Amendment claim of inadequate medical care.

ORDER

IT IS ORDERED that

1. Petitioner Christopher Glenn Neal's request for leave to proceed in forma pauperis

is DENIED with respect to his claim that respondents Doctor Suliene, Doctor Callister, Nurse Kim and Alsum exhibited deliberate indifference to his serious medical needs and this case is DISMISSED with prejudice for petitioner's failure to state a claim upon which relief may be granted;

2. The unpaid balance of petitioner's filing fee is \$302.85; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2).

3. A strike will be recorded against petitioner pursuant to § 1915(g);

4. The clerk of court is directed to close the file.

Entered this 22nd day of April, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge