

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

DERWIN JONES #383247,

Petitioner,

v.

RICK RAEMISCH, Secretary, Dept. of
Corrections, SCOTT HOFTIEZER, and
Wisconsin Department of Corrections
Medical Director DAVID BURNETT,¹

Respondents.

ORDER

08-cv-294-bbc

This is a proposed civil action for monetary and declaratory relief, brought under 42 U.S.C. § 1983. Petitioner Derwin Jones 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 \$16.47 initial partial payment required under § 1915(b)(1).

¹In the caption of his complaint, petitioner listed as a respondent “Department of Corrections Medical Director (Name Unknown).” However, I am aware of from other lawsuits filed in this court that Dr. David Burnett is the Medical Director for the Wisconsin Department of Corrections. Therefore, I have included his name in the caption of this case.

Because petitioner is a prisoner, his complaint must be screened pursuant to 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. 42 U.S.C. § 1915(e).

I conclude that petitioner may proceed on his Eighth Amendment claim against respondents Hoftiezer and Burnett because petitioner's allegations that these respondents denied him a necessary surgery on his hammertoe deformities and instead prescribed him medicated pain cream is enough to suggest that they may have been deliberately indifferent to petitioner's serious medical need. I conclude further that petitioner has failed to state a claim against respondent Raemisch, because there are no allegations from which an inference may be drawn that Raemisch was involved in denying petitioner his request for surgery.

In his complaint, petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Derwin Jones is a prisoner confined at the Oshkosh Correctional Institution in Oshkosh, Wisconsin.

Respondent Rick Raemisch is Secretary of the Department of Corrections. Respondent Scott Hoftiezer is the committee chairperson for the Medical Department of the Wisconsin Department of Corrections. Respondent Dr. David Burnett is the Wisconsin Department of Corrections' Medical Director.

B. Petitioner's Foot Issues

On January 25, 2008, Dr. Murphy, a doctor at the Oshkosh Correctional Institution, saw petitioner regarding petitioner's "intense" pain and deformities in his toes. Dr. Murphy assessed petitioner's condition and referred him to a podiatrist at UW-Madison Hospital, who petitioner saw on February 11, 2008. The podiatrist, Dr. Kalker, diagnosed petitioner with hammertoe deformities in several of his toe bones that were causing him pain and making it difficult to wear shoes.

On March 3, 2008, petitioner returned to UW-Madison Hospital to see Dr. Kalker. Kalker recommended that petitioner receive surgery to correct the bone deformities in his toes, followed by immobilization in a surgical shoe for six to eight weeks. However, Dr. Kalker noted that such surgery had "potential complications" including "infection, scarring, numbness, prolonged swelling, recurrence, and need for further treatment." On April 15, 2008, petitioner went to see Dr. Murphy about receiving surgery on his toes. Dr. Murphy told petitioner that although he would recommend the surgery for petitioner, petitioner

would “most likely” not receive approval. Murphy told petitioner that he needed to learn to live with the pain in his feet like other people learn to live with pain in their backs. Respondent Hoftiezer reviewed petitioner’s medial assessment and made a recommendation to respondent Burnett. Respondent Hoftiezer noted that podiatry recommended surgery, that petitioner did “not [have] a lot of disability (able to walk the track, work in [sic] serverry, function on unit)” and that surgery was “costly” and had “benefit[s] uncertain.” Respondent Hoftiezer recommended “conservative therapy,” including “capsaicin.”

On April 16, 2008, petitioner received a memorandum stating that his request for surgery was denied. The memorandum also stated that respondent Burnett had accepted respondent Hoftiezer’s recommendation and prescribed petitioner a medicated cream, capsaicin, that he could apply to his toes to lessen the pain. Petitioner wrote to respondent Burnett to ask how the capsaicin cream was going to straighten the bones and stop the intense pain in his toes, but petitioner received no response. As of May 13, 2008, petitioner had not received any capsaicin.

DISCUSSION

I understand petitioner to be alleging that respondents’ decision to deny him surgery violated his Eighth Amendment rights. 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 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’s hammertoe deformities rise to the level of “serious medical needs” because petitioner’s allegations are that he is suffering “intense” pain without the surgery and that his hammertoe deformities have been diagnosed by two doctors as mandating some form of treatment.

Besides allegations of a serious medical need, petitioner’s allegations must support the inference that prison officials are being deliberately indifferent to that need. Deliberate indifference in the denial or delay of medical care is evidenced by actual intent or reckless disregard. A prison official has a sufficiently culpable state of mind when the official “knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk.”

Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (citing Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002)).

Deliberate indifference is a high standard; 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). “[T]he Eighth Amendment is not a vehicle for bringing claims for medical malpractice.” Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996)(citations omitted). When a prisoner disagrees with a doctor’s treatment there is no constitutional claim “unless the medical treatment is ‘so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner’s condition.’” Id. at 592 (quoting Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), vacated and remanded on other grounds sub nom. Cannon v. Thomas, 419 U.S. 813 (1974)). To allow a jury to infer deliberate indifference on the basis of a physician’s treatment decision, the decision must be so far afield of accepted professional standards as to imply that it was not actually based on a medical judgment. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 262 (7th Cir. 1996).

Petitioner alleges that respondents Hoftiezer and Burnett were aware of Dr. Kalker’s diagnosis of petitioner’s hammertoe deformities as well as Kalker’s recommendation that the hammertoe deformities be surgically corrected. Petitioner’s allegations also suggest that respondents Hoftiezer and Burnett considered the recommendation that petitioner have

surgery but that they decided to treat petitioner's condition "conservatively" with capsaicin cream. Because it is impossible to know at this early stage in the proceedings whether providing a medicated pain cream in place of surgery to treat petitioner's painful toe deformities is not so far afield of accepted professional standards as to imply that the decision was not actually based on medical judgment, I will allow petitioner to proceed on his claim against respondents Hoftiezer and Burnett.

Petitioner should be aware that he has a difficult road ahead of him in pursuing this deliberate indifference claim against respondents Hoftiezer and Burnett. In order to succeed on his claim, petitioner will need to prove that surgery was the only appropriate response to treat his physical condition and that respondents Hoftiezer and Burnett were aware that this was the case but nevertheless refused him surgery and gave him medicated cream instead. The law is clear that "[m]ere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole, 94 F.3d at 261; Snipes, 95 F.3d at 591 (decision "whether one course of treatment is preferable to another" is "beyond the [Eighth] Amendment's purview"). Therefore, if petitioner merely proves that he would prefer the surgery over the medicated cream as opposed to proving that treatment with medicated cream is so blatantly inappropriate as to evidence deliberate indifference, he will not succeed on his claim. Snipes, 95 F.3d at 592 (Eighth Amendment does not require prison officials keep an inmate pain-free or administer

least painful treatment).

Petitioner's allegations contain a potential second Eighth Amendment claim regarding respondent Burnett's failure to insure that petitioner receive the capsaicin cream prescribed for his toe pain. Petitioner alleges that respondent Burnett prescribed him the medicated cream on April 16, 2008, but that as of the day before he signed his complaint for filing in this court on May 14, 2008, he still had not received the medication. Allegations that petitioner was prescribed pain medication for his "intense" toe pain but was not provided with the medication for almost a month is sufficient to state a claim for deliberate indifference. Although petitioner does not say who is preventing him from receiving his prescription, I will infer for the moment that respondent Burnett is responsible for making sure that his orders are carried out. Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981) (permitting plaintiff's claim against prison medical administrator because one could infer his personal involvement in the alleged gross denial of care). Therefore, petitioner will be granted leave to proceed against respondent Burnett regarding his additional Eighth Amendment claim.

However, there are no allegations in petitioner's complaint to explain how respondent Raemisch may have been involved in violating petitioner's Eighth Amendment rights. It is well established that liability under § 1983 must be based on a respondent's personal involvement in the 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); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987). Petitioner does not allege any facts from which an inference may be drawn that respondent Raemisch joined in the decision to deny petitioner surgery or even that he was aware of the decision. Accordingly, petitioner fails to state a claim against respondent Raemisch and he will be dismissed from the case.

ORDER

IT IS ORDERED that:

1. Petitioner Derwin Jones's request for leave to proceed in forma pauperis is DENIED on his claim against respondent Rick Raemisch because petitioner fails to state a claim that respondent Raemisch violated his rights under the Eighth Amendment.
2. Respondent Rick Raemisch is DISMISSED from this action.
3. A strike is recorded against petitioner for including in his lawsuit a claim that failed for one of the reasons listed in 28 U.S.C. § 1915(g).
4. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Scott Hoftiezer and Dr. David Burnett violated his rights under the Eighth Amendment by denying him surgery and his claim that respondent Burnett violated his rights under the Eighth Amendment by failing to insure that petitioner was provided his prescribed medicated cream.

5. 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 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 \$333.53; 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 petitioner's complaint and this order are being sent today to the Attorney General for service on respondents Hoftiezer and Burnett.

Entered this 5th day of August, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge