IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK J. WALKOWIAK,

Petitioner,

v.

DR. HEINZL, DR. REYNOLDS, DR. BRAINARD, DR. FRODIN, BEENZO, nurse at New Lisbon Correctional Institute, BOB GILMATO, GANDOLIN, nurse at New Lisbon Correctional Institute, PRELL, nurse at New Lisbon Correctional Institute, KATHY PRELL, CANDACE WARNER, JO ANN COOK, JOE THYNE, ANA BOATWRIGHT, MR. PLEUSS, MR. BELLILE, and NURSES DOES,[2]

Respondents.

OPINION and ORDER

08-cv-368-slc[1]

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[1]Although this case was assigned automatically to Magistrate Judge Stephen Crocker, I have assumed jurisdiction because consents to the magistrate judge's jurisdiction have not yet been filed by all the parties.

[2]In his original complaint, petitioner named a different set of respondents, including New Lisbon Correctional Institution, Mr. Fuchs, Ms. Rachel, Captain Jaeger, Mildred Parise, Officer Rebee, Officer Finnell, Officer Wiegel, Officer Swenson, Officer Tydrich, Sandy Clemmerson. I have amended the caption to reflect the respondents that petitioner identifies in his amended complaint, dkt. #7.

After petitioner requested leave to proceed in forma pauperis and paid an initial partial filing fee, I reviewed his complaint. Petitioner's first complaint failed to meet the pleading requirements of Fed. R. Civ. P. 8, so I dismissed it without prejudice and told him to try again. His amended complaint could not be treated as a single lawsuit under Fed. R. Civ. P. 20, so I gave him until October 7, 2008 to choose which of the separated lawsuits he would like to pursue under this case and which, if any, he would like to pursue as separate lawsuits subject to separate filing fees and potential strikes.

Petitioner has decided to pursue only one of his lawsuits, that respondents nurse Doe, Heinzl, Beenzo and Warner refused to give him an extra mattress that he requested on numerous occasions. The claims identified in the remaining lawsuits will be dismissed without prejudice.

Unfortunately, petitioner did not stop there. Instead, he has complicated matters yet again by asking to supplement his complaint with a "statement of fact," in which he alleges that a number of prison officials not named in the complaint failed to adequately respond to his cries for help when he suffered from a sudden onset of excruciating back pain that lasted from October 1 to October 3, 2008. Petitioner contends that the new incident is sufficiently related to his present lawsuit to allow the supplement.

I conclude that it would violate Rule 20 to allow these claims to proceed together. Petitioner's present lawsuit involves his allegations that respondents refused to provide him with an extra mattress for his chronic back pain. Petitioner's new allegations relate to a

separate incident and different respondents. There would be few facts in common to both lawsuits.

Even if I concluded that petitioner's proposed new claim could be joined with this lawsuit under Rule 20, it would do him no good because the claim would have to be dismissed for failure to exhaust his administrative remedies. Under 42 U.S.C. § 1997e(a), a prisoner must exhaust his administrative remedies by completing "each step within the administrative process." Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Such steps include filing a grievance and completing all necessary appeals in accordance with the procedures set by the prison system. Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005). Petitioner filed his new "statement of facts" six days after the incident occurred, meaning that he could not have completed the multiple steps required by the prison's grievance process. If petitioner wants to proceed on the new claims, he must exhaust his administrative remedies before he files a new lawsuit. Accordingly, I will deny as moot petitioner's motion for a "subpoena" to "sequester" various pieces of evidence related to these claims.

Petitioner says that he was willing to "voluntarily dismiss" his current complaint if he can replace it with his new claims. Because petitioner will not be allowed to substitute his new claims, this request is moot. If petitioner still wishes to dismiss his case voluntarily, he may provide written notice of his voluntary dismissal to this court and the parties, in accordance with Fed. R. Civ. P. 41.

Having addressed these concerns, I turn to petitioner's complaint. Because petitioner is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny him leave to proceed if his 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). In screening petitioner's complaint, I must read the allegations generously because petitioner is a pro se litigant. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Petitioner will be granted leave to proceed in forma pauperis on his claim that respondents nurses Does, Heinzl, Beenzo and Warner acted with deliberate indifference to his serious medical needs when they denied him an extra mattress. At this early stage it is possible to infer that respondents' alleged actions caused him needless pain and suffering.

In his complaint petitioner alleges the following facts.

ALLEGATIONS OF FACT

A. Parties

Petitioner Mark J. Walkowiak is a prisoner at the New Lisbon Correctional Institution. Respondents are employees at the prison: respondent Dr. Heinzl is a medical doctor; respondent Beenzo is a registered nurse; respondents Nurses Does are nurses; and respondent Candace Warner is a Health Services Unit Administrator.

B. Back Pain

Shortly after petitioner's arrival at the New Lisbon Correctional Institution in November 7, 2006, he began to experience pain in various parts of his body. Petitioner met with respondents nurse Doe and Heinzl and told them of his history of major back, knee and elbow injuries. He asked for an extra mattress because his pain prevented him from sleeping and his body would go numb after lying down for a short time.

On February 28, 2007, petitioner wrote to the Health Services Unit, explaining that he was suffering pain, headaches, memory loss, anxiety, depression and painful sleepless nights. After this, he saw a respondent nurse Doe and explained his problems and asked again for an extra mattress. He was not given one.

During the last week of March and the first week of April 2007, petitioner began experiencing severe back pain, progressing to the point that he had extreme difficulty walking. Once again, petitioner saw a respondent nurse Doe and respondent Heinzl to tell them of his back pain and ask for an extra mattress. His request was denied again.

Petitioner continued to suffer back pain. On July 28, 2007, a respondent nurse Doe denied a request for an extra mattress. On August 26, 2007, when petitioner complained of his condition to respondent Beenzo, Beenzo told him that his complaint had been forwarded to the "comfort committee" for approval.

On November 3, 2007, petitioner again wrote to the Health Services unit complaining of pain, lack of sleep, shortness of breath, heart palpitations, dizziness, fainting,

severe headaches, several rashes, cold or flu-like symptoms and unexplained bruises. He asked about the status of the "comfort committee's" decision regarding the extra mattress. On November 4, 2007, a resident nurse Gunningham responded that the committee had not yet reviewed petitioner's complaint.

On November 25, 2007, petitioner experienced severe back pain, making it difficult for him to walk. He saw a respondent nurse Doe on November 27, 2007 and explained to her that he was in continuous pain and needed an extra mattress. On January 16, 2008, petitioner saw a respondent nurse Doe. She did not address petitioner's pain or the comfort committee's decision. On January 18, 2008, respondent Beenzo wrote to petitioner, telling him that he did not meet the criteria for a second mattress, which include suffering from an orthopedic injury or skeletal trauma.

On April 8, 2008, petitioner complained once again that he was in pain and could not sleep. Respondent Heinzl wrote that petitioner did not meet the criteria for a second mattress. Respondent Warner wrote petitioner to tell him that, although respondent Heinzl had determined that he did not meet the criteria for a second mattress, his mattress would be checked to see whether it was worn, and if so, it would be replaced. An officer checked the mattress and he and sergeant Jantzen deemed it adequate.

Petitioner filed an inmate complaint related to his back pain, but it was denied at every level. On May 6, 2008, petitioner complained again to the Health Services Unit about pain in his back, knee, ankle, neck and shoulder and asked again for a mattress. Respondent

Beenzo denied his requests in a reply dated May 7, 2008. On May 16, 2008, petitioner wrote the Health Services Unit, describing his history of back pain, including an injury from a serious car accident in 1985 and a ruptured disk in 1995. None of these concerns were addressed in a written response from a respondent nurse Doe. On May 19, 2008, petitioner saw respondent Heinzl, but his concerns were not addressed.

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), 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 petitioner 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 chronic back pain, making it difficult at times for him to engage in basic activities such as sleeping and walking. If petitioner's allegations are true, his condition may be a "serious medical need." As to the next element, petitioner alleges that he told all respondents of his back pain, most of them on several occasions. Thus, an inference may be drawn that each respondent was aware that petitioner had a serious medical need.

As to the last element of the claim, the question is whether each respondent took reasonable measures to treat petitioner's back pain in light of what he or she knew. Each respondent reviewed complaints from petitioner regarding his back pain and refused to provide him with an extra mattress. At this early stage, it is possible to infer that respondents' refusal to allow petitioner an extra mattress to ease his back pain resulted in "needless pain and suffering" and was not a reasonable response to his serious medical need. Therefore, I will grant petitioner leave to proceed in forma pauperis against respondents on his Eighth Amendment claim.

Petitioner should be aware that he has an uphill battle before him. Petitioner alleges that his request for an extra mattress was reviewed by a doctor and a "comfort committee"; both decided that he did not meet certain criteria. If petitioner's claim boils down to a simple disagreement about the proper criteria for affording patients mattresses or the proper way to treat his back pain, he is bound to lose. 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." Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). In other words, the treatment 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).

ORDER

IT IS ORDERED that:

1. Petitioner Mark J. Walkowiak's claims identified in this court's order of September 26, 2008, dkt. #9, as making up Lawsuits ##1, 2 and 4-7 are DISMISSED without prejudice to petitioner's refiling these claims at some later date. Petitioner does not owe a filing fee for any of these actions.

2. Respondents Dr. Reynolds, Dr. Brainard, Dr. Frodin, Bob Gilmato, Gandilin, Prell, Kathy Prell, Jo Ann Cook, Joe Thyme, Ana Boatwright, Mr. Pleuss and Mr. Bellile are DISMISSED from this case.

3. Petitioner's motion to supplement his complaint or substitute a new cause of action for the remaining claims, dkt. #10, is DENIED.

4. Petitioner's motion for issuance of a subpoena, dkt. #11, is DENIED as moot.

5. Petitioner's request for leave to proceed in forma pauperis is GRANTED on his claim that respondents Nurses Does, Doctor Heinzl, nurse Beenzo and Candace Warden violated his Eighth Amendment rights by failing to provide him with a second mattress to ease his severe back pain.

6. For the remainder of this lawsuit, petitioner must send respondents a copy of every paper or document 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 respondents or to respondents' attorney.

7. 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.

8. Pursuant to an informal service agreement between the Attorney General and this court, copies of petitioner's amended complaint, dkt. #7; the order of September 29, 2008,

dkt. #9; and this order are being sent today to the Attorney General for service on the state respondents.

Entered this 22nd day of October, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge