IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DWAYNE ALMOND, #238829-A,

Plaintiff,

v.

WILLIAM POLLARD, RICHARD HEIDORN
and JEANANNA ZWIERS,

Defendants.

ORDER

09-cv-335-bbc

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Plaintiff Dwayne Almond, a prisoner at the Green Bay Correctional Institution, is proceeding in forma pauperis on an Eighth Amendment claim that defendants Richard Heidorn, Jeananna Zwiers and William Pollard are denying him adequate treatment for his back ailments. Defendants have filed a motion for summary judgment. After two rounds of supplemental briefing, the motion is ripe for consideration. In addition, plaintiff has filed a motion to stop interference with his outgoing mail to this court, which I will deny. From the proposed findings of fact and supporting materials provided by the parties, I conclude that plaintiff has failed to show that defendants violated his Eighth Amendment rights. Accordingly, I will grant defendants' motion for summary judgment.

MOTION TO STOP MAIL INTERFERENCE

Plaintiff has filed a motion to stop interference with his outgoing mail to this court, stating that his proposed findings of fact were intercepted. Because the court has received this document as well as many other documents submitted by plaintiff over the last several months, there seems to be no reason to take any action on this matter. Therefore I will deny this motion.

MOTION FOR SUMMARY JUDGMENT

For the sole purpose of deciding plaintiff's motion for summary judgment, I find from the parties' submissions that the following facts are undisputed, unless otherwise noted.

A. Undisputed Facts

1. Parties

Plaintiff Dwayne Almond is an inmate at the Green Bay Correctional Institution. Defendant Jeananne Zwiers is employed by the Wisconsin Department of Corrections as nursing supervisor in the Health Services Unit at the Green Bay Correctional Institution. Her duties include management and supervision of health care services provided to inmates, developing procedures, monitoring care plans and preparing required reports.

Defendant Richard Heidorn, M.D., is employed by the Department of Corrections as a physician at the Green Bay Institution. Heidorn has the duties and responsibilities of attending to the medical needs of inmates, diagnosing and treating illness and injuries and

arranging for professional consultation when warranted.

Defendant William Pollard is employed by the Department of Corrections as warden of the Green Bay Correctional Institution. Pollard is responsible for the overall administration and operation of the prison.

2. Prison procedures

Defendants assert that if an inmate is in segregation, over-the-counter pain relievers, including Ibuprofen and Acetaminophen, are available at the inmate's request 5 times each day without charge. Plaintiff disputes this assertion, stating that prison staff does not provide medications to inmates in segregation.

If an inmate is in general population, he is able to purchase over-the-counter pain relievers through the commissary. However, plaintiff notes that he is indigent.

I understand defendants to be averring that to the extent that an inmate is prescribed medication, he will never be refused that medication because of an inability to pay the co-payment.

3. Treatment history

Plaintiff has had a history of self-reported chronic back pain. On March 31, 2006, plaintiff was transferred from the Columbia Correctional Institution to the Green Bay Correctional Institution. Upon review of plaintiff's medical records, the Health Services Unit became aware that plaintiff had reported having chronic back pain since the early

1990s.

On April 6, 2006, x-rays were taken after plaintiff complained of back pain. They disclosed no abnormal findings. On May 5, 2006, plaintiff was seen by defendant Heidorn to be evaluated. Plaintiff displayed no apparent problem with movement or gait at that time.

On July 6, 2006, plaintiff was transferred to the Wisconsin Resource Center, and on September 11, 2006, transferred back to the Green Bay Correctional Institution, where he was evaluated by Nurse Lutsey on the same day. Plaintiff did not report any back problems at that time and was encouraged to submit a health services request for any of his medical needs. On September 19, 2006, plaintiff was seen at the Health Services Unit in accordance with his request to be seen for complaints of back pain. Nurse Lutsey reviewed the x-rays taken in April of 2006, which were within normal limits. Plaintiff did not appear in any acute distress. Plaintiff was given exercises to stretch and strengthen his back; he had a current order for 600 mg. of Ibuprofen.

Plaintiff was seen by Health Services Unit staff at least eight times between September 20, 2006 and October 15, 2007 for other medical ailments. He did not report any back problems at any of these appointments.

On October 16, 2007, at approximately 7:20 p.m., plaintiff asked to see the physician because he was experiencing back pain. During his evaluation, plaintiff was able to walk to the door and bend over and was in no obvious distress. He was offered Ibuprofen and pain rub, but refused. Later that night, at approximately 8:30 p.m., plaintiff asked to be seen in the Health Services Unit for back pain. Plaintiff's gait was within normal limits. He was

again provided with exercises to stretch his back muscles and was informed about the importance of stretching those muscles. Plaintiff was also provided analgesic balm and instructed to rub it on his back several times a day if needed.

On October 19, 2007, plaintiff was seen in the Health Services Unit at his request for evaluation of his back pain. He reported that his back was swollen, but the nurse evaluating him did not find any swelling. The nurse noted that plaintiff had been seen recently for this complaint and had been given exercises for stretching, analgesic balm and Ibuprofen. Plaintiff reported that this was not helping. The nurse scheduled an appointment with defendant Heidorn for further evaluation.

On November 9, 2007, plaintiff was seen by defendant Heidorn for his previous complaints of back pain. Plaintiff was demanding a lower bunk, extra mattress and pain medication. Heidorn's initial exam was negative for neuromuscular findings. However, he order an x-ray of the lumbosacral and thoracic spine.

On November 15, 2007, plaintiff had x-rays taken of his lumbosacral and thoracic spine. The results of both of these areas were within normal limits. The lumbar spine was in good position and alignment showing no fractures or subluxation. The thoracic spine showed well maintained vertebral body heights and disc spaces with no fractures or subluxation seen.

On January 28, 2008, defendant Heidorn prescribed plaintiff Ibuprofen 600 mg as a pain reliever for his self-reported lower back pain, even though previous evaluations showed no medical indication that plaintiff needed to be prescribed pain relievers. The prescription

allowed refills for a one-year period.

On March 17, 2008, plaintiff was seen for his complaint of back pain. Plaintiff reported no new problems with his back and seemed to accept the current regimen in place. On May 13, 2008, plaintiff was seen in the Health Services Unit by nurse Shari Heinz for complaints of low back and neck pain. Plaintiff stated that he had slipped in his cell, pulling his back or neck five days before the appointment. It was noted that plaintiff was walking without difficulty. An examination uncovered no abnormalities. Plaintiff was taking Ibuprofen 600mg, and vital signs were normal. Nurse Heinz instructed plaintiff to continue with Ibuprofen as ordered, provided him ice for a week and an analgesic rub as needed. Ice is typically used for acute injuries on a short term basis. Plaintiff was instructed to follow up with the Health Services Unit as needed.

Plaintiff did not report any back complaints between May 14, 2008 and early September 2008. Defendants state that plaintiff was provided refills of Ibuprofen fourteen times between May and October 2008, but plaintiff disputes this, saying he never received any pain medication after May 2008.

On September 11, 2008, plaintiff was seen at his request for back pain. The evaluating nurse scheduled plaintiff to be seen by defendant Heidorn. On September 19, 2008, plaintiff was evaluated by Heidorn, who found no physical evidence of back problems, no swelling or redness and normal gait.

On December 21, 2008, security staff contacted the Health Services Unit staff to inform them that plaintiff was complaining of continued body swelling. On December 23,

2008, plaintiff was seen at sick call for his complaints of swelling, including in his back. Plaintiff wanted to go to the hospital. However, the evaluation showed no swelling on any part of plaintiff's body.

On January 11, 2009, plaintiff was seen for multiple complaints, including his back. The nurse's assessment was that his back was within normal limits, with no swelling or abnormalities.

The Ibuprofen prescribed to plaintiff on January 28, 2008 expired on January 29, 2009. Because plaintiff never requested a refill of his medication after October 7, 2008 or a renewal of the prescription after it expired in January 2009, defendant Heidorn thought it "was logical to conclude that plaintiff's pain had subsided."

On September 10, 2009, plaintiff was seen for multiple complaints, including his back. The findings were within normal limits, with no swelling or redness. On December 21, 2009, plaintiff was seen for complaints of swelling, including in his back. The nurse found no abnormalities but consulted defendant Heidorn, who ordered lab work to be done that was unrelated to plaintiff's back.

On February 19, 2010, plaintiff was seen for multiple complaints, including pain in his low and mid back and neck pain. He stated that he had "knots and swelling of entire spine." Defendant Heidorn's examination showed negative findings, but he ordered another set of x-rays to be taken. Plaintiff had these tests on February 25, 2010. The results indicated that "there is a minimal amount of air in the small bowel" (called a "small bowel ileus") but there were no problems noted with his spine; the report stated "NORMAL

LUMBAR SPINE."

The various examinations of plaintiff have revealed no significant bone or joint disease other than mild arthritis in one of plaintiff's fingers. Plaintiff has never complained about not receiving pain medication when requesting a refill of his Ibuprofen or asking to be seen by defendant Heidorn or another HSU staff member. Plaintiff has never complained about an inability to pay for a pain medication.

4. Defendants Zwiers and Pollard

Defendants state that defendant Zwiers never personally provided any medical treatment to plaintiff. Plaintiff tries to dispute this by showing that Zwiers has reviewed some of his previous health service requests.

Defendants state that defendant Pollard exercises no day-to-day supervisory control over Health Services Unit employees and has no control over their diagnostic and treatment decisions. Further, Pollard does not have any record of any correspondence from plaintiff. Plaintiff disputes this by stating that he has sent Pollard "many Correspondence/Letters, Interview Information Request[s]." Also, he states that Pollard acts as a corrections complaint examiner for inmate complaints arising in the Green Bay prison. Finally, he states that Pollard told him that if plaintiff kept challenging prison staff, he "didn't care what happens" to plaintiff.

B. Opinion

Plaintiff is proceeding on an Eighth Amendment claim that defendants are denying him adequate treatment for his back ailments. As an initial matter I note that plaintiff includes proposed findings to the effect that from December 2008 to December 2009, he was forced to kneel with handcuffs on his hands or feet every time he was taken out of segregation. Plaintiff was not allowed to proceed on an excessive force claim, so I will not consider these proposed findings.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Under the Eighth Amendment, a prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). 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). A medical need may be serious if it "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994).

"Deliberate indifference" means that prison officials know of and disregard an excessive risk to inmate health and safety. Farmer, 511 U.S. at 837. Inadvertent error, negligence, gross negligence and ordinary malpractice are not cruel and unusual punishment

within the meaning of the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes v. DeTella, 95 F.3d 586, 590-91 (7th Cir. 1996). Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997); Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, "deliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole, 94 F.3d at 261-62.

After considering the summary judgment materials submitted by the parties, I conclude that defendants' motion for summary judgment must be granted. Although plaintiff asserts that he has not been treated for his back ailments, the undisputed facts show the opposite: the history of plaintiff's appointments with defendant Heidorn and other medical staff at the Green Bay Correctional Institution shows that plaintiff was seen on many occasions in response to his complaints of back pain and swelling. In addition, plaintiff had several rounds of x-rays or other tests, none of which showed any identifiable problem. Nonetheless, he was given various treatments for his ailments, such as pain medication, analgesic balm, ice and stretching exercises. In short, the record shows generally that the medical staff has provided plaintiff with treatment in response to his complaints. I do not doubt that plaintiff believes he is suffering from various back ailments requiring

further treatment, but the Eighth Amendment does not entitle plaintiff to the treatment of his choice, Gutierrez v. Peters, 111 F.3d at 1374. He has not produced any evidence, such as expert testimony, suggesting that defendant Heidorn's treatment decisions were a substantial departure from accepted professional judgment. Estate of Cole, 94 F.3d at 261-62.

However, as I noted in the November 2, 2010 and January 31, 2011 orders in this case, plaintiff has raised the narrower issue that whatever treatments he has received, "the last time [he] was given 'ice or ibuprofen,' for chronic burning pains in his lower back . . . [was] May 13, 2008." Dkt. #110. I ordered two rounds of supplemental briefing on this issue. Defendants assert that plaintiff was provided with refills of Ibuprofen fourteen times between May and October 2008 and they supported this assertion with a copy of plaintiff's medications chart showing these refills. Also, they state that he never requested another refill or renewal of the medication after the prescription expired in January 2009. In addition, they explain that even without a prescription, plaintiff could have bought over-the-counter medication from the prison commissary when he was in general population and that medications would have been provided to him free of charge when he was in segregation. Finally, they state that ice treatment is typically used for acute injuries and on a short term basis, so there was no reason for further ice treatment beyond the week following plaintiff's slip in May 2008.

Plaintiff disputes much of defendants' supplemental materials. He says that, contrary to his medications chart, he never received Ibuprofen after May 13, 2008. In addition, he

was unable to purchase over-the-counter medication because he is indigent and no medication was provided to him free of charge in segregation. (He does not seem to dispute the medical opinion that ice treatment is for acute injuries, so I will focus on the disputes over pain medication.)

The problem for plaintiff is that even resolving all of these disputes in his favor, he has failed to put on any evidence suggesting that the named defendants in this case had anything to do with his being denied pain medication. Plaintiff has been given several opportunities to brief this issue but he continues to state broad generalities about being denied treatment rather than explaining how defendants were deliberately indifferent to his serious medical need. Liability under § 1983 must be based on a defendant's personal involvement in the violation. Palmer v. Marion County, 327 F.3d 588, 594 (7th Cir. 2003); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Over the course of this litigation, plaintiff has provided hundreds of pages of materials in support of his claims, but nothing to show how any of this material supports his assertion that defendants were personally responsible for denying him pain medication. For instance, plaintiff includes several health service requests with his supporting materials, but none of them have anything to do with any denial of pain medication.

The closest plaintiff comes to meeting this standard is by discussing his February 19, 2010 appointment with defendant Heidorn. Heidorn saw plaintiff for multiple complaints, including pain in his low and mid back and in his neck and "knots and swelling of [his] entire spine." It is undisputed that Heidorn's examination produced no findings of problems

or abnormalities and that the x-rays showed normal results. Plaintiff seems to think that simply because he came to Heidorn complaining of back pain, a jury could reasonably infer that Heidorn was deliberately indifferent by failing to prescribe him pain medication.

Undisputed facts provided by defendants indicate otherwise. It is undisputed that just like his other examinations, this one uncovered no physical problem in plaintiff's back. Also, Heidorn was under the impression that plaintiff had voluntarily stopped requesting refills of his previously prescribed Ibuprofen in October 2008. (Even crediting plaintiff's version of events, in which he was denied his prescribed Ibuprofen starting in May 2008, he provides no evidence suggesting that Heidorn knew that he was not receiving Ibuprofen.) In his affidavit, Heidorn states that because plaintiff never requested a refill of his medication after October 7, 2008 or a renewal of the prescription after it expired in January 2009, it "was logical to conclude that [plaintiff's] pain had subsided because he was not asking for his pain medication to be refilled any longer." In addition, Heidorn avers that plaintiff never requested pain medication, either at this appointment or any time after October 2008. Plaintiff has not proposed any findings of fact to refute Heidorn. Moreover, plaintiff does not provide any evidence that Heidorn knew he was indigent and therefore could not afford to buy pain medication from the commissary. In short, plaintiff fails to show that following the February 19, 2010 appointment, defendant Heidorn was deliberately indifferent to plaintiff's pain.

From a practical perspective, I note that defendant Heidorn avers that if plaintiff were to request an Ibuprofen prescription, he would prescribe the medication. I encourage

plaintiff to request that medication from Heidorn if he believes it will help his back pain.

As for defendants Zwiers and Pollard, plaintiff somewhat persuasively disputes defendants' assertions that Zwiers and Pollard have *no* involvement in medical issues (it appears that Zwiers reviews health service requests and that Pollard reviews inmate complaints), but plaintiff fails to submit any evidence indicating that Zwiers or Pollard took any specific action that harmed him. He states that Pollard told him if he kept challenging prison staff, Pollard "didn't care what happens" to him, but he does not explain how this relates to any treatment decision. Summary judgment must be granted as to these defendants because plaintiff does not show that they did anything to deprive him of treatment.

ORDER

IT IS ORDERED that

1. Plaintiff Dwayne Almond's motion to stop interference with his outgoing mail, dkt. #131, is DENIED.

2. The motion for summary judgment filed by defendants Richard Heidorn, Jeananna Zwiers and William Pollard, dkt. #97, is GRANTED.

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 1st day of March, 2011.

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