

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

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LARRY J. BROWN,

Plaintiff,

v.

BELINDA SCHRUBBE, PAUL
SUMNICHT and CYNTHIA THORPE,

Defendants.

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ORDER

10-cv-129-bbc

In a July 13, 2011 order, I granted defendants' motion for summary judgment on plaintiff's Eighth Amendment medical care claims. Judgment was entered July 14, 2011. Now plaintiff Larry Brown has filed a document that he calls a motion to alter or amend the judgment under Fed. R. Civ. P. 59, as well as two notices of appeal. I will deny the Rule 59 motion but grant plaintiff's request for leave to proceed in forma pauperis on appeal.

MOTION TO ALTER OR AMEND JUDGMENT

Plaintiff does not include substantive reasons to alter the judgment in his Rule 59 motion. Rather, his main argument seems to be that he has been impeded from submitting a more fully developed motion by being denied further legal loan funds. He states that he

cannot file a proper motion with the “one free envelope” he is given a week.

This argument is undercut by the fact that since plaintiff filed his Rule 59 motion, he has filed two notices of appeal in this court, one of which includes several pages of argument. Plaintiff has provided his reasons why he thinks the judgment should be altered, so it is unnecessary to consider his access to the courts argument. Instead, I will consider the arguments he raises in his second notice of appeal, dkt. #86, as a supplement to his Rule 59 motion.

Plaintiff argues first that I ignored his “central claim” that defendant Paul Sumnicht was deliberately indifferent to plaintiff by failing to diagnose his headaches, back and neck pain as permanent. Plaintiff seems to argue that had Sumnicht made such a diagnosis, Bureau of Health Services Policy and Procedure 300.07 would have required the prison to provide plaintiff comfort items such as an extra pillow and extra mattress. The problems with this argument are twofold. First as I explained in the July 13, 2011 order, the fact that defendant Sumnicht’s diagnoses differed from some of plaintiff’s previous diagnoses does not automatically mean that Sumnicht acted with deliberate indifference:

At any rate, plaintiff cannot escape summary judgment merely by showing that defendant Sumnicht’s diagnoses and treatment decisions differed from those of previous doctors. “[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. 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. The undisputed facts show an extensive history of treatment and attention by Sumnicht. Plaintiff has produced no evidence, such as expert testimony, suggesting that Sumnicht's treatment decisions were 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." Id. In short, the fact that defendant Sumnicht has not pursued the type of treatment that plaintiff prefers does not mean that Sumnicht has violated his Eighth Amendment rights.

Dkt. #80, at 22-23.

Second, in any event, nothing in Policy and Procedure 300.07 guarantees that a prisoner must receive any particular comfort item even if he has been given a diagnosis of a permanent medical condition. The policy states, "The Wisconsin Department of Corrections shall provide medical/dental restrictions/special needs based upon medical/dental necessity." When defendants moved for summary judgment, plaintiff had the opportunity to show that certain comfort items were medically necessary and that defendants acted with deliberate indifference by deciding otherwise. As explained above, plaintiff failed to do that.

Plaintiff's second argument concerns his dark prescription glasses for headache abatement. In the July 13, 2011 order, I noted that tinted-lens glasses were the only comfort item at issue that had actually been recommended for plaintiff by one of his previous doctors. (Dr. Peters recommended the dark-tinted glasses in 1989.) Plaintiff seems to argue that he should have been granted summary judgment on this claim because of this previous

recommendation. However, I explained in the July 13 order why defendants' motion for summary judgment should be granted on this claim:

I note initially that it is not clear whether defendant Sumnicht is an appropriate defendant for this claim because there is no evidence showing that he ever made specific determinations about tinted glasses, as opposed to decisions about the other comfort items. For that matter, it is unclear whether he was even aware of Peters's recommendation However, even assuming that Sumnicht was aware of the recommendation, it is clear that he did not agree with Peters's diagnosis of greater occipital neuralgia, for which the glasses were a treatment option. Instead he agreed with Drs. Moore, Rozental and Lotz, whose diagnoses centered around musculoskeletal problems. Sumnicht did not exhibit deliberate indifference by failing to order treatment for a malady he believed to be an incorrect diagnosis, particularly after two optometrists had found no medical need for the tinted glasses.

Finally, I note that it is unclear whether plaintiff is even pursuing a claim that he is suffering headaches as a result of being without the glasses. Instead, he now claims to be suffering from a variety of eye injuries, including cataracts, which are not conditions for which Peters recommended the glasses.

Dkt. #80, at 21-22.

Plaintiff seems to acknowledge the problems with his claim against defendant Sumnicht because he states that he would like to add Dr. James Richter (one of the optometrists who concluded that plaintiff had no medical need for tinted lenses) as a defendant. I will not allow plaintiff to add Richter as a defendant, not only because it is far too late in the proceedings to do so, but also because it is clear that plaintiff's claim against Richter suffers from the same problem as his other claims. Plaintiff states that I "pointed to no substantial evidence as to why [I] believed Dr. Richter, optometrist over Dr. Peters,

neurologist.” This statement illustrates the heart of the problem with plaintiff’s case: he fails to understand that defendants did not have to prove that their medical opinions were “better” or “more believable” than plaintiff’s previous doctors. Rather, the burden was on plaintiff to show that defendants’ medical opinions were a substantial departure from accepted professional judgment, and he failed to do so. Accordingly, I will deny plaintiff’s motion to alter or amend the judgment.

NOTICES OF APPEAL

Plaintiff has filed two notices of appeal and requests leave to proceed in forma pauperis on appeal. A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is in bad faith or the litigant is a prisoner and has three strikes. § 1915(a)(1),(3) and (g). Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). Although plaintiff has three strikes, he alleges that he is in imminent danger of serious physical harm. In addition, I do not intend to certify that his appeals are not taken in good faith. Therefore, I will grant plaintiff’s request to proceed in forma pauperis with his appeals.

The 1996 Prison Litigation Reform Act requires that plaintiff pay the \$455 fee for filing each of his appeals, beginning with initial partial payments that have been calculated

from a certified copy of his trust fund account statement for the six-month period immediately preceding the filing of his notice of appeal. 28 U.S.C. § 1915(a)(2). Plaintiff has submitted the necessary trust fund account statement. From the statement, I conclude that he qualifies for indigent status, and that he must pay initial partial payments to the clerk of this court in the amount of \$0.17 for each of his appeals.

If plaintiff does not have the money in his regular account to make the initial partial payments, he will have to arrange with prison authorities to pay some or all of the assessments from his release account. This does not mean that plaintiff is free to ask prison authorities to pay *all* of his filing fees from his release account. The only amounts plaintiff must pay at this time are the initial partial payments. Before prison officials take any portion of those amounts from plaintiff's release account, they may first take from plaintiff's regular account whatever amount up to the full amount plaintiff owes. Plaintiff should show a copy of this order to prison officials to insure that they are aware that they should send plaintiff's initial partial payments to this court.

Finally, I note that it is possible that plaintiff intended to file only one notice of appeal in this case but inadvertently submitted two documents styled as such. This court has no authority to waive the filing fee for the second notice of appeal, but plaintiff remains free to ask the court of appeals to waive the fee because the second notice is duplicative of the first.

ORDER

IT IS ORDERED that

1. Plaintiff Larry Brown's motion to alter or amend the judgment in this case, dkt. #83, is DENIED.

2. Plaintiff's motion to amend his complaint to include Dr. James Richter as a defendant, dkt. #83, is DENIED.

3. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #85, is GRANTED. Plaintiff may have until October 4, 2011, in which to submit a check or money order made payable to the clerk of court in the amount of \$0.17 as an initial partial payment of the filing fee for each of his appeals. The remainder of the \$455 fees must be paid in monthly installments according to 28 U.S.C. § 1915(b)(2). If, by October 4, 2011, plaintiff fails to pay the initial partial payments, I will notify the court of appeals so that it may take whatever action it deems appropriate with respect to these appeals.

Entered this 13th day of September, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge