

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

JIMMY BRIDGES,

Plaintiff,

v.

BURTON COX, MARY MILLER, JOHN DOE
MEDICAL STAFF, JOHN DOE BUREAU
OF HEALTH SERVICES OFFICIAL,
PHYSICIAN HEIDORN, HEALTH
SERVICE MANAGER ZWIERS, HOLLY
GUNDERSON, TIMOTHY CORRELL,
BETH DITTMANN, PAUL SUMNIGHT,
BELINDA SCHRUBBLE, CYNTHIA THORPE
and RICK RAEMISCH,

Defendants.

ORDER

10-cv-534-bbc

Plaintiff Jimmy Bridges has filed a proposed complaint alleging that defendants were deliberately indifferent to his serious medical needs by failing to properly treat his knee pain or arrange for surgery. Plaintiff seeks leave to proceed with his complaint in forma pauperis. In a November 3, 2010 order, I informed plaintiff that because he has struck out under 28 U.S.C. § 1915(g), he could not obtain indigent status under § 1915 unless his complaint alleged facts from which an inference may be drawn that he is in imminent danger of serious

physical injury. (Plaintiff remains struck out even following the November 2, 2010 opinion in Turley v. Gaetz, 09-3847, 2010 WL 4286368, where the Court of Appeals for the Seventh Circuit held that "a strike is incurred under § 1915(g) when an inmate's case is dismissed in its entirety based on the grounds listed in § 1915(g)," rather than when only one claim out of several is dismissed under § 1915(g). Each of the cases in which plaintiff received a strike was dismissed in its entirety.)

In the November 3 order, I concluded that plaintiff's claims against defendants at the Waupun Correctional Institution and higher ranking officials at the Wisconsin Department of Corrections met the imminent danger requirement because plaintiff alleged that those defendants were currently denying him medical treatment. I concluded that his claims against defendants at other prisons did not meet the imminent danger requirement because those claims involved past harm. I gave plaintiff a chance to choose whether (1) to proceed with his imminent danger claims, at which point that claims would be screened but his other claims would be dismissed without prejudice; or (2) pay the \$350 filing fee and have the court screen all of his remaining claims. Plaintiff has responded by submitting an initial partial payment of the filing fee rather than the full \$350 fee. I take this to mean that he wishes to pursue only his claims regarding his treatment at the Waupun prison.

In addition, plaintiff informs the court that he is no longer incarcerated at the Waupun Correctional Institution. This has only a limited effect on this case because the

application of § 1915(g) depends on a plaintiff's status at the time he files his complaint—he still cannot proceed on his non-imminent danger claims because he did not submit the full \$350 filing fee for this case. Also, it means that he can no longer receive injunctive relief against defendants who work at the Waupun prison. However, he may still pursue his claim for money damages. His in forma pauperis status is not revoked even though he has been removed from the alleged imminent danger. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (case not mooted under 28 U.S.C. § 1915(g) when plaintiff transferred to new prison; § 1915(g) “only limits when frequent filers can proceed IFP, and says nothing about limiting the substance of their claims.”)

After screening plaintiff's complaint, I will allow plaintiff to proceed on his claims that defendants Paul Sumnicht, Belinda Schrubble, Cynthia Thorpe, Holly Gunderson and Rick Raemisch violated his Eighth Amendment rights by failing to provide him with knee surgery and inadequately treating his knee pain while he was incarcerated at the Waupun Correctional Institution.

I draw the following facts from plaintiff's complaint.

ALLEGATIONS OF FACT

In 2005 Dr. James Leonard of the University of Wisconsin Hospital diagnosed Osgood-Schlatter disease, pain “and chronic traction spurring pain with a long bony

outgrowth” in plaintiff’s knee. Leonard recommended surgery to remove the outgrowth. Burton Cox, a physician at the Wisconsin Secure Program Facility (where plaintiff was incarcerated at the time), ordered the surgery through the Department of Corrections Bureau of Health Services on December 16, 2005. On December 19, the Bureau approved the surgery. An MRI of plaintiff’s right knee on December 8, 2006 showed that plaintiff had developed chronic patella insertional tendinitis, causing him additional pain.

Ultimately, surgery was scheduled for October 8, 2007, but plaintiff was released on parole in July 2007. The Bureau of Health Services canceled plaintiff’s medical coverage once he was released on parole, so he did not receive the surgery. Over the next few years, plaintiff was reincarcerated at various Wisconsin prisons, but he never received the surgery despite x-rays showing that plaintiff had grown new bone spurs.

On February 22, 2010, plaintiff was transferred to the Waupun Correctional Institution. Nurse practitioner Gorske refused to give plaintiff any pain medication, directing him instead to purchase medication from the canteen, even though Gorske knew that plaintiff had no funds. Plaintiff was seen by defendant Paul Sumnicht, a doctor at the Waupun prison, after repeated sick call requests. Plaintiff told Sumnicht that without surgery, he would remain in intense pain and his ailments would only get worse. In response, Sumnicht prescribed “APAP” (a pain reliever) even though Sumnicht knew that would be ineffective. Also he prescribed ice, which was ineffective, and Votran gel, which caused

plaintiff's knee to swell and his pain to increase.

In early June 2010, the Votran gel was discontinued and the APAP pain reliever was found to be ineffective. Plaintiff was then prescribed analgesic balm, but it caused his knee to throb with pain and was discontinued. Sumnicht prescribed iontophoresis and physical therapy even though he was aware that these treatments had been tried previously with no improvement. In July 2010, plaintiff completed physical therapy but it was ineffective. At some point, Sumnicht denied plaintiff's request for surgery, stating that there was a budget concern and that plaintiff would have to get the surgery after being released from prison in November 2010.

Defendant health services manager Belinda Schrubble was aware of these facts yet refused to correct Sumnicht's treatment decisions.

Defendants Regional Nursing Coordinator Cynthia Thorpe and Bureau of Health Services employee Holly Gunderson were responsible for investigating plaintiff's inmate grievances and medical records to determine whether the treatment decisions were correct. However, after being made aware of plaintiff's problems, they did not correct Sumnicht's treatment decisions.

Defendant Rick Raemisch, Secretary of the Department of Corrections, is the final arbiter of inmate grievance appeals, and he affirmed the denial of plaintiff's grievances.

OPINION

I understand plaintiff to contend that defendants Paul Sumnicht, Belinda Schrubble, Cynthia Thorpe, Holly Gunderson and Rick Raemisch violated his Eighth Amendment rights by failing to provide him with knee surgery and inadequately treating his knee pain. (Plaintiff includes allegations that nurse practitioner Gorske refused to give him any pain medication, but he does not include Gorske as a defendant in his complaint.)

A prison official may violate a prisoner's rights 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). The condition does not have to be life threatening. Id. 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 significant 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 the officials are aware that the prisoner needs medical treatment, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

- (1) Do plaintiffs need medical treatment?
- (2) Do defendants know that plaintiffs need treatment?
- (3) Despite their awareness of the need, are defendants failing to take reasonable measures to provide the necessary treatment?

Plaintiff alleges that he suffers from a variety of knee ailments and experiences severe pain and that defendants delayed in providing him with surgery and otherwise provided him with inadequate treatment for his pain. These allegations are sufficient to state a claim for deliberate indifference. However, plaintiff should be aware that he faces a more difficult task at summary judgment or trial. Mere disagreement with a doctor's medical judgment, Edwards v. Snyder, 478 F.3d 827, 831 (7th Cir. 2007), inadvertent error, negligence, malpractice or even gross negligence in providing treatment is insufficient to establish deliberate indifference. Washington v. LaPorte County Sheriff's Department, 306 F.3d 515 (7th Cir. 2002). Thus, he will need to prove that the treatment he received at the Waupun prison was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" plaintiff's serious medical condition. Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir. 1996).

ORDER

IT IS ORDERED that

1. Plaintiff Jimmy Bridges is GRANTED leave to proceed on his claims that defendants Paul Sumnicht, Belinda Schrubble, Cynthia Thorpe, Holly Gunderson and Rick Raemisch violated his Eighth Amendment rights by failing to provide him with knee surgery and inadequately treating his knee pain while he was incarcerated at the Waupun Correctional Institution.

2. Plaintiff's complaint is DISMISSED with respect to defendants Burton Cox, Mary Miller, John Doe Medical Staff, John Doe Bureau of Health Services Official, Physician Heidorn, Health Services Manager Zwiers, Timothy Correll and Beth Dittmann.

3. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of

Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

Entered this 21st day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge