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

DAVID M. WILSON,

Plaintiff,

v.

DR. PAUL SUMNICHT, MICHAEL THURMER and DR. BURTON COX,

Defendants.

OPINION AND ORDER

10-cv-789-slc

In this civil action for monetary, declarative and injunctive relief, plaintiff David M. Wilson, an inmate at the Wisconsin Secure Program Facility (WSPF), is proceeding on an Eighth Amendment claim that defendants Dr. Paul Sumnicht, Michael Thurmer and Dr. Burton Cox acted with deliberate indifference to Wilson's multiple sclerosis. Specifically, Wilson alleges that defendants Thurmer and Sumnicht canceled his physical therapy so that he could be transferred from the Waupun Correctional Facility (WCI) to WSPF. Wilson further alleges that defendant Cox failed to provide him physical therapy at WSPF when he complained of increased leg pain in May 2010. Before the court is defendants' motion for summary judgment on all of Wilson's claims. Dkt. 28.

Having considering the undisputed facts and the parties' arguments, I conclude that a jury could not reasonably concluded that any of the defendants acted with deliberate indifference to Wilson's serious medical needs. Therefore, I am granting defendants' motion and dismissing this case.

PRELIMINARY MATTERS

Defendants object to several of Wilson's proposed findings of fact and responses to their proposed findings of fact on the grounds that he fails to cite any evidence in support of the fact or the evidence that he does cite fails to say what he claims it does. The parties were advised of these requirements in the court's *Procedure To Be Followed On Motions For Summary Judgment* attached to the Preliminary Pretrial Conference Order. *See* dkt. 17 at 16-18. Therefore, proposed facts or responses to proposed facts not correctly supported by evidence in the record were not considered by the court.

In addition, defendants object to Wilson's reliance on the expert opinion of Alexander Ng, Ph.D., a clinical exercise physiologist (*see* dkt. 47, Exh. 6 and 6A) on the ground that Wilson failed to make the disclosures that Federal Rule of Civil Procedure 26(a)(2) requires for expert witnesses. Further, the court made clear in the pretrial conference order that Wilson had to make these disclosures by March 9, 2012. Dkt. 17 at 4-5. Apparently, it was within Wilson's power to have done this: Dr. Ng signed his answers to Wilson's two questions on January 17, 2012.

Additionally and more substantively, Dr. Ng's general observations in response to Wilson's questions don't help Wilson much. Dr. Ng begins by announcing that he does not know either Mr. Wilson or his neurologist at the U.W. Hospital personally. As a result, although Dr. Ng has an overarching opinion in response to Wilson's first broad question about a multiple sclerosis patient's need for physical therapy for balance as prescribed by his neurologist, Dr. Ng qualifies this by noting that the variable nature of MS affects each person differently, so that clinical care should be decided by a neurologist familiar with the patient. Similarly, in response to Wilson's second broad question about the risks presented by a failure

to provide physical therapy, Dr. Ng begins by observing that it is difficult to answer this question definitively without knowledge of the patient's clinical record or the specifics of the rehabilitative prescription. *See* dkt. 47-1, (Exh. 6A). As a result of these procedural and substantive shortcomings, the court will not consider Dr. Ng's opinion.

FACTS

From the parties' properly proposed findings of fact, and granting all inferences from those facts in favor of Sanders, I find the following to be undisputed for the purpose of deciding the motion for summary judgment:

I. The Parties

Plaintiff David M. Wilson currently is incarcerated by the Wisconsin Department of Corrections (DOC) at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin. From December 28, 2007 to February 11, 2010, Wilson was an inmate at the Waupun Correctional Institution (WCI).

Defendant Michael Thurmer is the warden at WCI. He does not provide medical services to inmates and has no day-to-day supervisory control over health service employees or their treatment decisions.[1]

[1] Although Wilson cites DOC Health Services Policy and Procedure 100:01, "Autonomy and Authority" as evidence of the warden's authority in medical decision-making, this policy actually only supports defendants' proposed fact. *See* dkt. 42, Exh. D at 15. The policy states that the warden must "[e]nsure that clinical judgments and health care within facility rests with qualified health care professionals" and "[e]nsure development of and compliance with policies and procedures related to the designated health authority." (The health authority is either the onsite health services manager or nursing coordinator.)

Defendant Dr. Paul Sumnicht is a physician at WCI. Defendant Dr. Burton Cox is a physician at WSPF. As physicians at state correctional institutions, Drs. Sumnicht and Cox diagnose and treat inmate illness and injuries and arrange for professional consultation when warranted.

II. Inmate Health Services

Health services units (HSUs) in DOC correctional institutions allow inmates to submit non-emergency health requests on a daily basis in a confidential manner: when an inmate has a medical concern or wishes to be seen in the HSU, he fills out a health service request (HSR) form, which is placed in a request box in the inmate's housing unit. The HSRs are brought to the HSU overnight, documented, triaged for immediacy of care, then acted upon by qualified health care professionals.

Inmate patients are notified of both the receipt and disposition of their HSRs. HSU staff return the pink copy of the HSR to the patient, unless the patient is seen the same day. If an inmate's HSU request is for non-urgent follow-up care, HSU staff schedule the inmate for an appointment. Due to the number of inmate requests versus the number of HSU staff available, it can take up to two months for an inmate to be seen by a nurse practitioner or doctor.

As an inmate's primary physician, a DOC physician is responsible for determining the best course of treatment for his/her patients. DOC policy governs how physicians may obtain approval to refer inmates offsite for non-emergency care. If a physician determines that an inmate has a medical issue that requires him to go off-site to see a specialist or to receive a procedure that cannot be performed at the institution, then the physician must submit a Class III request to the Bureau of Health Services (BHS).

Class III requests are reviewed in two ways. DOC health care providers may use an electronic database to submit the request to BHS staff for approval or denial. Alternatively, a health care provider may present the request to a committee of doctors and nurse practitioners for review. The committee meets approximately once a week. The objective of the committee's review is to determine whether the Class III request is the proper treatment for the inmate's medical issue and whether the request is medically necessary. If the Class III request is approved, then the submitting physician will be notified and HSU staff at the inmate's institution will make an appointment for the inmate to be seen off-site by a consulting physician.

A consulting physician may make recommendations concerning a course of treatment for an inmate. Such recommendations are made to the institution's treating physician. The treating physician is not bound by the recommendations of the consulting physician or therapist, but may adopt or reject any or all of the recommendations in light of the treating physician's own medical judgment and in light of security and other institutional concerns. This is similar to the managed care model used by HMOs. (Dr. Cox has referred past Multiple Sclerosis (MS) patients to neurologists for treatment and always has followed the recommendations of outside neurologists specific to the patient. Dkt. 42, exh. C at 1-2.)

III. Multiple Sclerosis

In 2006, Wilson was diagnosed with multiple sclerosis (MS), an inflammatory disease in which the fatty myelin sheaths around the axons of the brain and spinal cord are damaged, leading to demyelination, scarring and a broad spectrum of signs and symptoms. MS affects the ability of nerve cells in the brain and spinal cord to communicate effectively with each other.

Almost any neurological symptom can appear with MS, and the disease often progresses to physical and cognitive disability. Symptoms may include: changes in sensation, such as loss of sensitivity or tingling, pricking or numbness, muscle weakness, muscle spasms or difficulty moving; difficulties with coordination and balance; problems in speech or swallowing; visual problems; fatigue; acute or chronic pain; and bladder and bowel difficulties. Cognitive impairment or varying degrees of symptoms of depression or unstable mood also are common.

Symptoms of MS usually appear in episodic acute periods of worsening (called relapses, exacerbations, bouts, attacks or "flare-ups"), gradually progressive deterioration of neurological function or a combination of both. MS relapses often are unpredictable, occurring without warning and without obvious inciting factors at a rate rarely above one and a half relapses per year (or more commonsensically, no more than two relapses in three years).

Several subtypes or patterns of MS progression have been identified. Subtyping studies the past course of the disease in a patient to attempt to predict its future course in that patient. Subtypes are important not only for prognosis but also for therapeutic decisions. Wilson has a relapsing-remitting subtype of MS, which is characterized by unpredictable relapses followed by periods of months to years of relative quiet (remission) with no new signs of disease activity. In this subtype, deficits suffered during attacks may either resolve or leave sequelae.

The cause of MS remains unknown. There is no known cure for MS. Treatments attempt to return function after an attack, prevent new attacks and prevent disability. The prognosis for MS is difficult to predict; it depends on the subtype of the disease, the individual patient's disease characteristics, the initial symptoms and the degree of disability the person experiences as time advances.

Avonex (Interferon beta-1a) is a drug in the interferon family used to treat MS. Interferons have been shown to produce a substantial reduction in the rate of MS relapses and to slow the progression of disability in MS patients. It is believed that interferon drugs achieve their beneficial effect on MS progression because of their anti-inflammatory properties. The most common side effects of Avonex are injection site disorders, flu-like symptoms, poor results on liver function tests and blood cell abnormalities. Other possible side effects include depression, seizures or liver problems.

MS flare-ups frequently are treated with medication to return loss of function in muscles. Bursts of medications such as prednisone can modify the immune system to help return normal muscle function. Flare-ups can also be treated by changing medications.

IV. Treatment of Wilson's MS at WCI (December 2007 - February 2010)

As a starting point, Warden Thurmer never was aware of any of the specific medical care that WCI's health care professionals provided to Wilson.

On October 17, 2007, Wilson was approved for physical therapy (also abbreviated as "PT"). (A June 22, 2006 discharge summary from UW Hospital and Clinics stated that "PT notes decreased balance, transfer skills and endurance and would benefit from continued PT as an outpatient.") After Wilson saw a nurse practitioner at WCI on January 7, 2008, orders were entered for him to start this physical therapy. Dr. Sumnicht's practice at WCI is to order physical therapy when a patient's function deteriorates to where he cannot perform required institutional functions like stand for count or personal activities required for daily living. Dr.

Sumnicht will order physical therapy to improve an inmate's level of functioning, such as retraining balance after a MS flare up.

A physical therapist evaluated Wilson on January 24, 2008 in order to obtain a baseline of his abilities. Wilson reported a slight balance deficit when he got up in the morning, lasting about 10 minutes. Wilson was performing a home exercise program ("HEP") that had been taught at his previous institution and which seemed to ameliorate his balance deficit. Wilson also reported pain, stiffness and swelling in his right hand and second and third MCP joints; unspecified symptoms in his right elbow with pulling; and left leg weakness. The therapist reviewed balance and strengthening exercises with Wilson and discussed ways that Wilson could improvise isometric exercises, given that T-bands were not allowed in inmate cells at WCI. Wilson was to use the new isometric exercises and the balance exercises he previously had been taught to address his left leg symptoms. The therapist's care plan stated:

> P.T. is approved for two sessions @ times of exacerbation. Baseline eval was done today & will await further need of pt. He will be continuing HEP & small ball (racquetball) to be ordered for grip strength.

Following a nurse visit on February 4, 2008, Dr. Sumnicht ordered that Wilson continue to receive weekly Avonex injections and to have blood draws every three months to monitor for possible side-effects of the Avonex therapy.

On February 14, 2008, Wilson was seen by Dr. Nicholas Stanek at the University of Wisconsin Neurology Clinic for a follow-up evaluation of his MS. Dr. Stanek noted that Wilson's neurologic symptoms had waxed and waned since his last visit (July 12, 2007). Wilson reported numbness in his hands, which was unchanged since his original diagnosis. Wilson also was experiencing episodic symptoms of imbalance, especially with sudden changes in position.

It was noted that Wilson was treating the episodic imbalance by performing physical therapy exercises. Dr. Stanek's impression was that Wilson's relapsing-remitting MS appeared to be stable with Avonex. Dr. Stanek recommended that Wilson remain on Avonex and continue to have blood draws for liver enzyme monitoring every three months. He also recommended that Wilson continue physical therapy exercises to maintain his balance and coordination.

On June 11, 2008, back at WCI, Wilson submitted an HSR to see the physical therapist, stating that his MS had been flaring up, his shoulder and hands had been hurting and his balance had been off. Wilson saw the physical therapist on June 19, 2008 and reported increased pain in his right shoulder for two weeks as well as recent pain and stiffness. The therapist noted that Wilson had pain to palpitation to his shoulder joint and deltoid but the strength in his shoulder, biceps and triceps continued to be a 5/5 overall. The shoulder pain limited Wilson's range of motion and his right hand was swollen. The therapist instructed Wilson on various shoulder and grip exercises and wanted to see him in one to two weeks for re-evaluation.

Dr. Sumnicht began treating Wilson's shoulder pain in June 2008 and sought approval for Wilson to receive occupational therapy. Occupational therapy is a musculo-skeletal rehabilitation from the neck to the finger tips. Physical therapy is musculo-skeletal rehabilitation of the whole body. From September to December 2008, while incarcerated at WCI, Wilson had one evaluation for physical therapy, one evaluation for occupational therapy and 17 sessions of occupational therapy.

On August 18, 2008, Wilson saw Dr. Stanek, who noted that Wilson's baseline neurologic symptoms of numbness and imbalance were unchanged and that Wilson was treating

his imbalance with physical therapy exercises. Dr. Stanek recommended that Wilson stay on Avonex at current dosing and continue his exercises to maintain balance and coordination.

Dr. Sumnicht saw Wilson on January 6, 2009 and noted that his MS was controlled with no nerve paralysis. Wilson's balance was on and off, and he still was experiencing hand numbness. Dr. Sumnicht renewed Wilson's restrictions and noted that occupational therapy reported a 45-50% improvement in Wilson's shoulder. Dr. Sumnicht also noted to have a doctor follow-up on his prior authorization for more occupational therapy. On January 22, 2009, Dr. Sumnicht noted that occupational therapy had helped Wilson increase the range of motion in his right shoulder and determined that no additional occupational therapy visits were needed.

On May 4, 2009, Dr. Sumnicht ordered a single cell for Wilson so that he would have more room to do general exercise and physical therapy exercises.

After May 14, 2009, there are no medical records indicating that Wilson saw a physical therapist for the remainder of his time at WCI. (Wilson asserts that he had a flare up in October 2009 and received physical therapy to treat it. In support, he cites a review summary in which Sumnicht stated: "I'm requesting and Neurology is recommending six months of continued management of Multiple sclerosis controlled on Avonex. A small balance flare-up responded [to] the PT exercises 3 weeks ago." Defendants maintain that the exercises refer to those that Wilson had been taught to do on his own.)

On August 10, 2009, Wilson was seen by Dr. Stanek via a "telemedicine" visit. Dr. Stanek noted that Wilson had been on Avonex for approximately three years and was tolerating the medication quite well. Wilson reported a flare-up of symptoms in January of 2009 that

lasted three weeks and consisted of balance problems and difficulty using his right leg. Dr. Stanek found Wilson's MS to be stable and recommended continuing treatment with Avonex. He further recommended that Wilson see him for a follow-up visit in six months for a detailed evaluation.

On November 16, 2009, Wilson had a follow-up appointment with Dr. Sumnicht to complete the Authorization Class III for his next neurology visit with Dr. Stanek. Dr. Sumnicht noted that Wilson's MS was doing well on Avonex. Wilson reported having a dizzy spell three weeks prior, which "responded" when he performed his physical therapy exercises. Dr. Sumnicht noted that Wilson had good arm strength but was unable to squat due to knee pain. Dr. Sumnicht submitted a request for six months of continued management of MS controlled on Avonex and noted that Wilson had a small balance flare-up that responded to PT exercises three weeks prior.

On February 1, 2010, Wilson saw Dr. Stanek, who noted that Wilson had been doing quite well since starting Avonex but had some mild, persistent problems with numbness of the hand and occasional difficulty with imbalance that is treated with physical therapy. Dr. Stanek noted that Wilson reported one brief episode of blurred vision the previous August that had lasted for one day. Wilson denied any recurrence of this particular symptom and denied any other new neurological symptoms. Dr. Stanek's opinion was that Wilson's MS was stable and that the Avonex medication was clinically quite effective and was well tolerated by Wilson. Dr. Stanek said Wilson should "continue his balance exercise program." Based on these recommendations, Dr. Sumnicht ordered a balance physical therapy evaluation.

On February 8, 2010, Wilson saw Dr. Sumnicht, who determined that it was not medically necessary to have Wilson work with a professional therapist. Therefore, Dr. Sumnicht discontinued his order for a physical therapy evaluation. (The parties dispute what took place during this visit. Dr. Sumnicht avers–and his medical progress notes reflect–that he examined Wilson and reported that Wilson's MS was stable and that orthotic shoes had been approved for him. According to Dr. Sumnicht, Wilson stated that he had had balance problems in the past, specifically with his right leg dragging, but that the right leg had returned to full use following the October 2009 flare-up. Dr. Sumnicht states that he observed Wilson do a heel to toe walk and that he checked Wilson's knee reflexes, which were normal and symmetrical. Dr. Sumnicht avers that he also observed Wilson stand on his toes with his eyes closed without difficulty and slide his heel down the opposite leg smoothly without wobbling. According to Dr. Sumnicht, this examination showed that Wilson had very good neurological balance and, therefore, did not need physical therapy. In response, Wilson has submitted an affidavit in which he avers that on February 8, 2010, he was brought to the nurses station from segregation in wrist and leg shackles to receive his Avonex injection. Although Wilson admits that he spoke with Dr. Sumnicht about whether to continue balance physical therapy, Wilson avers that Dr. Sumnicht did not examine him, and as a result, had no basis to conclude that Wilson no longer required physical therapy.)[2]

[2] Defendants argue that the court should disregard Wilson's averments because his medical record discredits them. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."). The relevant portions of the medical record consist of Dr. Sumnicht's handwritten progress notes. Although these contemporaneously-prepared notes are strong corroboration of Dr. Sumnicht's version of events, this does not make his account indisputable in the manner that an audiovisual recording of the February 8, 2010 appointment would. Therefore, Wilson's affidavit suffices to creates a dispute of fact.

V. Transfer to WSPF

DOC's Bureau of Offender Classifications and Movement is responsible for overseeing the program review process, which includes transfer decisions. The primary mechanism that the Bureau uses to make transfer decisions is the program review process. *See* Wis. Admin. Code § 302.17. The program review process is administered by the Program Review Committee (PRC) at each institution. The PRC is composed of a classification specialist appointed by the bureau director and at least one additional staff member appointed by the warden. *See* Wis. Admin. Code § DOC 302.16.

The program review process generally consists of a pre-hearing investigation of an inmate's overall behavior, the results of which are submitted to the PRC for review. *See* Wis. Admin. Code § DOC 302.17. The PRC holds a hearing at which it will interview the inmate and provide him the opportunity to present additional information, to make a statement and to offer his opinion as to what the PRC should do. The PRC then makes a recommendation regarding custody classification, transfer, and program or treatment assignment. Finally, the PRC establishes a date, not to exceed 12 months, for the inmate's next program review. A PRC hearing may be held prior to the date established at the previous PRC hearing if there has been a significant change, if an adjustment committee recommends an earlier hearing based on a conduct report, or if the inmate, bureau director or warden requests one. *See* Wis. Admin. Code § DOC 302.17(11).

Recommendations to transfer an inmate require a unanimous vote by the PRC and must be approved by the director of the Bureau. If the PRC cannot reach a unanimous decision, then

the classification specialist refers the case to the classification section chief and the warden to decide. If *they* cannot reach a unanimous decision, then the classification section chief refers the case to the director of the Bureau who makes the decision. *See* Wis. Admin. Code § DOC 302.17(6), (8).

Steve Wierenga requested an early PRC hearing for Wilson in February 2010 to consider his transfer to WSPF because Wilson had been found guilty of a major conduct report (sometimes abbreviated "CR") on January 21, 2010. Specifically, Wilson had been found guilty of establishing himself in a leadership position of The Gangster Disciples Nation, an unsanctioned group, in violation of § DOC 303.20(1) & (3) (group resistance and petitions). The violation resulted in Wilson receiving 360 days of disciplinary separation.

A social worker met with Wilson prior to his PRC hearing and reported the following:

> Wilson was interviewed on 2/5/10 in an out-of-cell interview. He was advised that the purpose of the interview was to review his risk assessment for an upcoming early PRC recall, as he appears to meet the criteria for transfer to WSPF to serve the remainder of his conduct report disposition. Inmate Wilson wishes to appear before the Committee. He is not opposed to transfer to WSPF.

The PRC provided this statement about Wilson's hearing:

> The inmate appeared. This is an early review due to referral for placement at WSPF. At age 43, he is serving his 3rd incarceration. Offense description and prior record are noted in the classification document. MR date 1/16/2050, MD 8/29/2075. Initial PED 10/25/2015. Risk rating is high. Program needs/participation have been reviewed by the Social Worker. He remains in need of CGIP.
>
> Since admission to A&E 1/31/1996, he has received 16 minor & 6 major CR's. 1 major CR since his last PRC. His latest major CR was dated 1/21/2010 for Group Resistance & Petitions. He remains in Segregation.
>
> SPN at DCI and GBCI. There are no escapes, pending charges or ECRB issues.

> Inmate's institution adjustment has been poor noting receipt of 6 major CR's since A&E reception. There is 1 major CR during this review period.
>
> Form DOC 2056 was reviewed. Psychological & Health Services, and the Chief Psychiatrist in DOC Central Office have reviewed the inmate and no clinical or medical concerns are noted. He is cleared for transfer to WSPF.
>
> Per ss. DOC 302.07 & 302.09, the committee unanimously recommends Maximum custody with transfer to WSPF.
>
> A 12 month recall is set. No significant changes affecting custody are expected prior to next recall.
>
> Recommendation also considered projected time left to serve, negative institution adjustment and public perception/risk to public. Classification expectations are to improve institution adjustment and enroll in essential programming when available.
>
> Per s. DOC 302.18, inmate may request administrative review within 10 days of the receipt of the written decision. DCC area is 307. Inmate's ERP/CIP codes were reviewed: you are not legally eligible for ERP/CIP - excluded offense.

Form DOC 2056 (mentioned in paragraph 5 of the report, above) is completed when DOC is considering transferring an inmate to WSPF. The policy of DOC's Division of Adult Institutions is to not send inmates who are seriously mentally ill to WSPF. Based on this policy, all inmates who are being considered for transfer to WSPF must undergo a mental health screening to ensure that they are not seriously mentally ill. The DOC 2056 form is part of the mental health screening process and is filled out by the appropriate staff member in an institution's Psychological Services Unit.

DOC Health Services Policy and Procedure 300:06 further states that the facility that is transferring an inmate is responsible for reviewing that inmate's medical chart prior to transfer in order to determine whether to put a medical hold on the transfer, either because treatment

for a medical condition should be completed prior to transfer, or because the receiving facility cannot accommodate the health care needs of the patient.

Information regarding the special medical needs of an inmate being transferred is communicated to the staff in the facility by the completion of a medical classification report, form DOC-3050. This report sets forth the activity level an inmate can participate in, special conditions such as hearing or visual impairment, and if there is a medical hold in place not to transfer the inmate to another facility until a particular date. The DOC 3050 form is completed by a physician, a nurse practitioner or a physician's assistant.

Medical professionals who complete medical classification reports have a large amount of discretion in deciding whether to place a medical hold on an inmate. Policy and Procedure 300:27 states only that "the medical hold section is completed whenever it is determined the patient/youth must remain at the current facility for a period of time." In Dr. Sumnicht's practice, medical holds are placed on inmates in order to complete therapy for an acute condition until it is stabilized, for example, treating an infection so that it cannot be spread, or completing a course of chemotherapy.

Wilson was transferred to the Wisconsin Secure Program Facility on February 11, 2010. Warden Thurmer was not involved in the decisionmaking process for Wilson's transfer. (Wilson unsuccessfully attempts to dispute this fact by pointing out that the warden is responsible for ensuring compliance with policy 300:27.) At no time did Thurmer direct Dr. Sumnicht to cancel any treatment for Wilson so that Wilson could be transferred to WSPF.

On February 11, 2010, before Wilson left WCI, a nurse met with him to go over his transfer screening and medical history. Wilson complained that his legs were hurting. There was

a referral to the special needs committee for special restraints, including a no kneeling restriction due to multiple sclerosis, an extra pillow to elevate his legs, orthotics, stockings and an extra mattress. Wilson's medical classification report–the DOC 3050 form–did not put a medical hold on his transfer to WSPF.

VI. Treatment at WSPF

On February 18, 2010, Dr. Cox met with Wilson at WSPF to review his labs, history of multiple sclerosis and neurology consultants. Wilson had no new complaints. He was scheduled for cardiovascular care clinic (CVCC) in six weeks. Dr. Cox ordered Avonex injections for Wilson every Monday. Based on his professional judgment and expertise, Dr. Cox did not believe physical therapy was medically necessary for treating Wilson's multiple sclerosis in February 2010 because Wilson was functioning well without deformity or instability.

Wilson received an Avonex injection once a week for his MS. At these appointments, a nurse would see him, take his vital signs, note them in his chart, and ask Wilson if he had any complaints. Wilson also received lab draws every six months. At these appointments, he was seen by the nurse and asked if he had any complaints, which were addressed as necessary.

On March 11, 2010, the special needs comfort group met to review Wilson's request for an extra pillow, mattress, kneeling restriction and special restraints. The group approved every request except the extra mattress.

On April 12, 2010, Dr. Cox saw Wilson for his cardiovascular care clinic, where Cox evaluated Wilson's hypertension treatment care plan and renewed his medications related to hypertension. Dr. Cox changed Wilson's prescription for 600 mg of ibuprofen to a prescription

for 500 mg of naproxen, which is similar to ibuprofen. Dr. Cox switched these medications for Wilson to see if the naproxen would work better for his aches and pains. 500 mg of naproxen is not necessarily stronger than 600 mg of ibuprofen, it just lasts longer.

On May 5, 2010, Wilson submitted an HSR that stated "In Jan., 10 [*sic*] the Neurology Doctor at U.W.-Madison gave an order for me to continue physical therapy for the symptoms of M.S., (multiple sclerosis) would you please look into this for me and let me know when I can receive the physical therapy I need." Dr. Cox responded to this request on May 10, 2010 by stating "Neuro consult of 02-01-10 simply states 'continue his balance exercise program.' Unfortunately, we don't have P.T. available yet. Continue home exercises." (The parties dispute whether WSPF had access to a physical therapist in May 2010.)

Despite being seen weekly in the HSU for his Avonex injection and submitting numerous HSRs, Wilson never complained to HSU staff of pain in his legs or other MS flare-ups in the months of April and May 2010. (Although Wilson attempts to dispute this fact, the HSRs and other evidence he cites in support do not show that any such complaints occurred in this time period).

Dr. Cox did not think it was medically necessary to have Wilson work with a professional physical therapist in April and May 2010 because Dr. Stanek had indicated that Wilson's MS was stable and he had not recommended that Wilson work with a physical therapist, only that he continue his physical therapy exercises.[3] Wilson had been trained on how to perform physical

[3] Although Wilson points out that Dr. Stanek stated on February 1, 2010 that Wilson had "occasional difficulty with imbalance which is treated with physical therapy," defendants are correct that Dr. Stanek did not actually recommend that Wilson should see and work with a physical therapist.

therapy exercises and had adequate space to do them.[4] Dr. Cox also relied on Dr. Sumnicht's February 8, 2010 evaluation of Wilson, which noted that Wilson had very good neurological balance. Wilson did not report any new neurological symptoms that would have lead Dr. Cox to believe that his condition had changed while at WSPF.

On May 14, 2010, Wilson filed an offender complaint with the inmate complaint examiner at WSPF regarding physical therapy, which became complaint number WSPF-2010-10251. Wilson's offender complaint stated in full (all *sic*):

> I wrote to H.S.U. asking can I receive the physical therapy that was last orderd by the neuro doctor in Madison (U.W.M) for M.S. Dr. Cox replied w/ "Unfortunately, we don't have P.T. available yet. Continue home (cell) exercise." I should receive the physical therapy that was requested not just in cell exercises. Please review.
>
> Thank you.

The Inmate Complaint Examiner (ICE) recommended dismissal of Wilson's complaint based on information that was relayed to her by HSU manager Ms. Miller. Miller told the ICE that "The records indicate that the last documentation states that he should continue his balance exercises. It does not say that PT needs to be continued. He has been provided the information necessary to learn the exercises and he should continue to do these exercises on his own." The ICE's recommendation for dismissal was accepted by the reviewing authority.

On June 2, 2010, Wilson filed an appeal with the corrections complaint examiner (CCE) in which he stated:

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[4] Wilson attempts to dispute this fact with an HSR showing that he first received an informational exercise packet on November 25, 2010. However, Wilson has failed to dispute other proposed findings of fact that Wilson had been shown physical therapy exercises as early as 2008. Although Wilson might have received a packet for the first time at WSPF in November 2010, he had been shown the exercises years before.

> On 5-5-10 I wrote to Health Services asking can I get my physical therapy. On 5-10 Doctor Cox replied that physical therapy was not available at the Institution. In 2-1- the neurology doctor at U.W. Madison requested that I continue physical therapy for M.S. After the Dr. Cox here replied I filed a I.C.E. of which the replied that the matter was not in there expertise to evaluate. Please look in to.

On June 3, 2010, the CCE recommended dismissal of Wilson's complaint. On July 24, 2010. the Secretary of DOC adopted this recommendation and dismissed Wilson's complaint, No. WSPF-2010-10251.

On October 17, 2010, Wilson submitted an HSR in which he requested "Please update and send my RX for naproxen 500, needed for pain from symptoms of M.S."

On October 18, 2010, during his appointment for his Avonex injection, Wilson complained to the nurse that during the past three weeks he has been experiencing blurry vision lasting a few minutes about twice a week. After examining Wilson, the nurse advised him to submit an HSR raising this new issue.

On October 21, 2010, Wilson submitted an HSR in which he reported that "for the past 3 weeks, twice a week I've been have very severe headaches w/blurry vision, that last for 3 or 4 minutes are these symptoms from M.S. – Please Reply." Dr. Cox responded that "headaches not typical of M.S. blurred vision, maybe, tho frequency & duration don't sound typical. Will have followup with Neuro Scheduled." Dr. Cox ordered a follow-up appointment with the neurologist at the University of Wisconsin Neurology Clinic; the earliest the neurological clinic could fit Wilson in for an appointment was February 17, 2011.

In an October 25, 2010 HSR, Wilson stated "Dr. Cox, can I please have a snack bag due to upset stomach from taking needed pain meds for nerve pain from M.S., in legs and the severe headaches I've been having."

On November 11, 2010, Wilson was seen in HSU by the nurse to discuss the February 9, 2010 order for his shoes. Wilson was told that it would be discussed with Dr. Cox the next time he came to WSPF; on November 29, 2010 Dr. Cox ordered extra depth shoes for Wilson.

In a November 16, 2010 HSR, Wilson wrote "Please inform me of the date that Dr. Cox upgraded my pain medication from Ibuprofen to naproxen 500 mg due to severe pain from M.S. symptoms."

In a November 28, 2010 letter to a registered nurse, Wilson complained that an exercise packet provided to him did not include exercises for his legs that could be done in his cell and that "my m.s. symptoms are pain in the legs with loss of some coordination in the foot."

On February 17, 2011, Wilson was taken to the University of Wisconsin Neurology Clinic for follow-up exam by Dr. Stanek on Wilson's multiple sclerosis. Dr. Stanek noted that in the year since he had last examined Wilson, Wilson's symptoms had continued to wax and wane. In addition, Dr. Stanek noted that Wilson had had a brief attack of blurred vision involving his right eye that occurred in November 2010, lasted several days and then resolved. Wilson complained of persistent problems with clumsiness in his right hand and numbness in his left foot. Otherwise, Wilson had had no new neurological symptoms in the past year. Dr. Stanek's impression was that Wilson's MS was stable on Avonex, that he had had a couple of minor flares ups but that overall, Wilson seemed to be doing well. Dr. Stanek recommended continuing the Avonex, decreasing blood monitoring to every 6 months, conducting a physical therapy evaluation for gain and leg weakness, and scheduling a followup exam with Dr. Stanek in a year, with a brain MRI study prior to the appointment. That same day, Dr. Cox recorded Stanek's recommendations in Wilson's medical chart.

On March 3, 2011, Dr. Cox ordered a consultation for Wilson with a physical therapist regarding Wilson's leg weakness secondary to multiple sclerosis. On March 17, 2011 Wilson received this physical therapy consultation. The therapist recommended 12 visits for Wilson to strengthen his left knee and ankle for gait and balance training.

On March 28, 2011, Dr. Cox submitted a Class III request on Wilson's for 6 to 12 visits for gain and balance training to improve Wilson's ambulation, balance and independence. Wilson was seen for physical therapy on March 31, April 14, 21 and 28, and May 3 and 12, 2011. On April 13, 2011, Wilson was returned to the University's clinic for an MRI. Wilson was discharged from physical therapy on May 19, 2011.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Deliberate Indifference

Prison officials violate the Eighth Amendment if they are "deliberately indifferent to prisoners' serious medical needs." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011) (citing *Estelle v. Gamble*, 429 U.S.97, 104 (1976)). This deliberate indifference standard has both an objective and subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Therefore, to survive summary judgment on his Eighth Amendment claim, Sanders must submit evidence showing: (1) that he had an objectively serious medical condition; and (2) that defendants were subjectively "aware of the condition and knowingly disregarded it." *Ortiz v. Webster*, 655 F.3d 731, 734 (7th Cir. 2011) (citing *Farmer*, 511 U.S. at 837; *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)).

Defendants do not deny that Wilson's MS constitutes a serious medical need or that they were aware of Wilson's medical needs. Defendants *do* deny that they were deliberately indifferent to these needs.

To prevail, Wilson must show that defendants "'acted with a sufficiently culpable state of mind,' something akin to recklessness." *Arnett*, 648 F.3d at 751 (quoting *Johnson v. Snyder*, 444 F.3d 579,584 (7th Cir. 2006)). "A prison official acts with a sufficiently culpable state of mind when he either knows of a substantial risk of harm to an inmate and either acts or fails to

act in disregard of that risk." *Id.* (citing *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011)). Allegations of negligence or medical malpractice are not enough: "deliberate indifference 'is more than negligence and approaches intentional wrongdoing.'" *Id.* (quoting *Collignon v. Milwaukee County*, 163 F.3d 982, 988 (7th Cir. 1998)). "A jury can infer deliberate indifference on the basis of a physician's treatment decision [when] the decision [is] so far afield of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." *Id.* (quoting *Duckworth*, 532 F.3d at 679) (alterations in original). A plaintiff satisfies this showing if he establishes that a physician's response was "so inadequate that it demonstrated an absence of professional judgment, that is, that 'no minimally competent professional would have so responded under those circumstances.'" *Id.* (quoting *Roe*, 631 F.3d at 857).

III. Dr. Sumnicht at WCI

Wilson alleges that Dr. Sumnicht acted with deliberate indifference to his medical needs when, in order to facilitate Wilson's transfer to WSPF, he discontinued Wilson's balance physical therapy that Dr. Stanek, a specialist, recommended in February 2010. Wilson argues that it was Dr. Sumnicht's practice to order physical therapy after a MS flare-up and that Dr. Sumnicht noted that Wilson had responded well to physical therapy following a flare-up in the fall of 2009. Defendants contend that Dr. Stanek did not recommend that Wilson work with a physical therapist in February 2010; he simply recommended that Wilson continue his self-exercise program. They also argue that Wilson mischaracterizes Dr. Sumnicht's statements concerning his practice of treating MS flare-ups, including Wilson's October 2009 flare-up.

Although Wilson is correct that refusing to follow the advice of a specialist can imply deliberate indifference, *see Gil v. Reed*, 381 F.3d 649, 662–64 (7th Cir. 2004); *Jones v. Simek*, 193

F.3d 485, 490 (7th Cir. 1999), Wilson has presented no evidence that shows or implies that this is what happened to him. In *Gil*, the court concluded that deliberate indifference could be inferred where a prison doctor canceled a specialist's prescriptions and substituted medication that the specialist had specifically warned was dangerous for persons with plaintiff's condition. 381 F.3d at 664. In *Jones*, the court found that deliberate indifference could be inferred where the plaintiff submitted evidence that a prison doctor waited six months before making a promised referral to a neurologist and then, once he did, refused without explanation to follow the neurologist's orders.

Here, the undisputed facts do not lead to the conclusion, or reasonably allow the inference, that Dr. Sumnicht made any decision to deny physical therapy to Wilson in reckless disregard of Dr. Stanek's recommendations.[5] As a starting point, on November 16, 2009, Dr. Sumnicht met with Wilson to prepare for his February 2010 visit with Dr. Stanek. At that appointment, Wilson reported that he had experienced a dizzy spell three weeks prior, which improved after he "performed his physical therapy exercises." Dr. Sumnicht also noted that Wilson had a small balance flare-up that "responded to PT exercises" three weeks earlier. Contrary to Wilson's assertions, these records do not show that Wilson was seeing a physical therapist or that Dr. Sumnicht had ordered physical therapy.[6]

Then, when Wilson saw Dr. Stanek on February 1, 2010, Dr. Stanek wrote in his progress notes that Wilson had occasional difficulty with imbalance that is treated with physical

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[5] Wilson questions Dr. Sumnicht's medical judgment because Dr. Sumnicht has admitted having treated only three people with MS. Although this shows that Dr. Sumnicht is relatively inexperienced with MS, it does not impeach his general medical competence.

[6] Wilson only cites to the medical record to support his contention; he has not submitted an affidavit stating that Dr. Sumnicht made different or other statements to him.

therapy and should "continue balance physical therapy." In a letter to Dr. Sumnicht dated the same day, Dr. Stanek wrote that Wilson "should continue to [*sic*] his balance exercise program." Wilson argues that these statements are equivalent to Dr. Stanek ordering physical therapy. Defendants contend that they are not, pointing out that Wilson had not seen a physical therapist in the two years prior to his examination by Dr. Stanek.

I agree with defendants that no reasonable factfinder reading Dr. Stanek's statements could conclude that Dr. Stanek was recommending treatment by a physical therapist. Wilson had been given a home exercise program as early as 2008 and had told his physical therapist at that time that he was performing the exercises. Dr. Stanek also referenced those exercises in his report of his February 2008 visit with Wilson. As defendants note, when Dr. Stanek later determined in February 2011 that Wilson might benefit from seeing a physical therapist, he ordered a physical therapy "evaluation" and did not refer merely to an "exercise program." This difference in wording supports the conclusion that in February 2010, Dr. Stanek had not ordered a change in the status quo that would add treatment by a physical therapist: he was suggesting that Wilson should continue with his self-directed exercise program.

In any event, even if it were possible to interpret Dr. Stanek's statements as a recommendation for actual physical therapy, Dr. Sumnicht did not act with deliberate indifference by failing to order it. Dr. Sumnicht understood Dr. Stanek to be discussing Wilson's home exercise program.[7] (For what it's worth, Dr. Cox at WSPF interpreted Dr. Stanek's notes the same way that Dr. Sumnicht did). With no evidence beyond Wilson's

[7] Dr. Sumnicht also avers that he performed his own examination of Wilson on February 8, 2010 and concluded from those results that it was not medically necessary for Wilson to work with a therapist. However, because Wilson has managed to place this fact in dispute, I am not considering it here.

speculation on this point, there is no basis to conclude that Dr. Sumnicht refused to order physical therapy for Wilson because he wanted to ensure that Wilson would be transferred to WSPF. There is no evidence showing or implying that Dr. Sumnicht had any role in–or even knew about–the decision to transfer Wilson to WSPF. That decision was made by an independent program review committee. At most, any arguable misunderstanding by Dr. Sumnicht as to what Dr. Stanek's actually was recommending might demonstrate negligence, if that. It does not show or reasonably allow the inference that Dr. Sumnicht was deliberately indifferent to Wilson's treatment needs for his MS.

In a related argument, Wilson suggests in his proposed findings of fact and responses to defendants' proposed findings of fact that Dr. Sumnicht violated DOC policies and procedures related to the transfer of inmates. Wilson cites policy No. 300:06, which states that "a facility transferring an inmate" is responsible for reviewing the inmate's medical chart prior to transfer to determine if a medical hold is needed. A physician, nurse practitioner or a physician assistant at the transferring facility is to complete a medical classification report (DOC form 3050) to communicate any special medical needs to the receiving institution. Policy No. 300:27 gives medical professionals completing these reports a large amount of discretion in deciding whether to place a medical hold.

I understand Wilson to be arguing that Dr. Sumnicht should have placed a medical hold on Wilson so that he could receive physical therapy at WCI. What actually happened is that a nurse reviewed Wilson's medical history and he was not placed on a medical hold. There is no evidence that Dr. Sumnicht had or should have had a role in screening Wilson for transfer to WSPF. Policy Nos. 300:06 and 300:27 do not require that an inmate's treating physician complete the necessary paperwork. Further, because it did not constitute deliberate indifference

to Wilson's treatment needs for Sumnicht not to refer Wilson for physical therapy, it follows that it cannot constitute deliberate indifference for Dr. Sumnicht not to place a medical hold on Wilson for the purpose of obtaining physical therapy at WCI.

In sum, Wilson has failed to meet his burden of showing that there is a genuine issue of material fact as to whether Dr. Sumnicht acted with deliberate indifference in refusing to order physical therapy for Wilson in February 2010. As such, defendant Sumnicht is entitled to summary judgment on Wilson's claim.

IV. Warden Thurmer at WCI

Wilson argues that defendant Thurmer deliberately allowed Dr. Sumnicht to circumvent prison policy and procedure with respect to his medical treatment in order to grease the skids for Wilson's transfer to WSPF. Wilson seeks to hold Thurmer liable for: (1) not ensuring that Dr. Sumnicht gave Wilson appropriate medical treatment and (2) not ensuring that Dr. Sumnicht followed correct procedure when Wilson was transferred to WSPF.

Although Thurmer was the warden, medical treatment decisions for his inmates were delegated to his institution's physicians and other trained care providers. As an administrator with no medical expertise or training, Thurmer was entitled to defer to the judgment of medical professionals like Dr. Sumnicht so long as Thurmer did not ignore Wilson or create problems for him. *Berry*, 604 F.3d at 440 ("the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so.") (citing *Hayes v. Snyder*, 546 F.3d 516, 527-28 (7th Cir. 2008); *Johnson v. Doughty*, 433 F.3d 1001,

1010-11 (7th Cir. 2006); *Greeno v. Daley*, 414 F.3d 645, 655-56 (7th Cir. 2005); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004)). *Cf. Richman v. Sheahan*, 512 F.3d 876, 885 (7th Cir. 2008) ("there is an exception for the case in which [a public employee] is responsible for creating the peril that creates an occasion for rescue.") As the Court of Appeals for the Seventh Circuit has explained, "[p]ublic officials do not have a free-floating obligation to put things to rights. . . . Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job." *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009).

In support of his claim, Wilson notes only that the warden has "ultimate responsibility for the welfare of the inmates . . . and for ensuring that the inmates have the level of health services commensurate with contemporary medical practice." Dkt. 38 at 9-10. But other than citing the warden's general responsibility for ensuring compliance with DOC policies and procedures, Wilson fails to adduce any evidence indicating that Thurmer had specific knowledge of or personal involvement in Wilson's medical care, in the decision to transfer Wilson to WSPF or in the administrative process of transferring Wilson to WSPF.[8]

Because Thurmer did not create the problem that Wilson faced and did not possess the requisite knowledge or expertise necessary to override Dr. Sumnicht's professional judgment, Wilson cannot show that Thurmer was deliberately indifferent to his medical condition. Further, because Wilson has failed to identify what DOC policies and procedures that Dr. Sumnicht allegedly circumvented or describe how he violated them, Wilson cannot show that

[8] Perhaps if there were some credible evidence of a conspiracy between WCI's administrators and medical staff to rush Wilson to WSPF in knowing disregard of Wilson's medical treatment needs, then Wilson might have a due process claim against Warden Thurmer, but there is no such evidence, and as already noted, the evidence does not show that the move disregarded any actual need by Wilson for physical therapy.

Thurmer failed to ensure Dr. Sumnicht's compliance with those policies and procedures. As a result, Thurmer is entitled to summary judgment on Wilson's claim against him.

V. Dr. Cox at WSPF

Wilson asserts that Dr. Cox acted with deliberate indifference when he refused to order physical therapy for Wilson in May 2010. He argues that Dr. Cox knew that Wilson was in constant pain and had prescribed stronger pain medication for it but would not authorize physical therapy that he knew Wilson needed. However, Wilson has failed to support this claim with any evidence. Although Wilson claims that he complained to Dr. Cox about being in constant pain, the HSRs and other evidence he cites in support do not show that he made any such complaints in April or May 2010.[9]

In May 2010, Wilson asked Dr. Cox to order the physical therapy that Dr. Stanek had recommended on February 1, 2010. However, as noted above, Dr. Stanek had not actually made such a recommendation. Dr. Cox reminded Wilson of this fact in his response to Wilson's HSR. Further, Dr. Cox did not think it was medically necessary to have Wilson work with a professional physical therapist in May 2010 because Wilson had not reported any increased pain, flare-ups or other new symptoms following his visit with Dr. Stanek in February 2010 that would have led Dr. Cox to believe that Wilson's condition had changed while at WSPF. When Dr. Stanek actually did recommend a physical therapy evaluation for Wilson a year later (in February 2011), Dr. Cox ordered it. As a result, Wilson has failed to show that Dr. Cox acted

[9] Several months later (in October and November 2010), Wilson did submit a series of HSRs that mentioned leg pain. However, these HSRs are irrelevant because they were submitted well after the period in question and indicate only that Wilson was taking pain relievers for his leg pain and headaches.

with deliberate indifference, entitling Dr. Cox to summary judgment on Wilson's claim against him.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Dr. Paul Sumnicht, Dr. Burton Cox and Michael Thurmer, dkt. 28, is GRANTED. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 7th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge