

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

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JEREMIAH J. LAMBERT,

Plaintiff,

v.

DR. KENNETH ADLER,

Defendant.

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OPINION and ORDER

11-cv-418-bbc

In this civil action for monetary relief, plaintiff Jeremiah Lambert is proceeding on a claim that defendant Dr. Kenneth Adler violated his rights under the Eighth Amendment by failing to provide him adequate medical treatment for his ear. Defendant has moved for summary judgment, dkt. #17, arguing essentially that no reasonable jury could find from the undisputed facts that he was deliberately indifferent to plaintiff's serious medical needs. I am not convinced that this is correct; defendant's proposed facts leave a number of questions unanswered about his response to plaintiff's medical needs. Therefore, I will deny the motion for summary judgment, appoint counsel for plaintiff and set the matter for trial.

Also before the court is defendant's motion to strike plaintiff's expert Thomas Leitner. Dkt. #28. According to a declaration by Leitner that was submitted in conjunction with defendant's motion to strike, Leitner agreed to act as an expert only if plaintiff was represented by counsel. Because plaintiff has not obtained counsel, Leitner and defendant

have asked the court to withdraw the expert report that plaintiff filed with his summary judgment materials. Plaintiff concedes that Leitner agreed to participate only if plaintiff was represented by counsel. Thus, it was improper for plaintiff to submit Leitner's expert report and I am granting the motion to strike it.

Finally, plaintiff has filed a renewed motion for appointment of counsel. Dkt. #33. As discussed below, I am granting the motion and staying all further proceedings in this case temporarily in order to locate a lawyer who is willing to represent plaintiff at trial. After the court locates a lawyer, I will schedule a status conference to reset the schedule in this lawsuit.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed. (Disputed facts are noted in parentheses.)

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Jeremiah Lambert is a prisoner at the New Lisbon Correctional Institution. Defendant Dr. Kenneth Adler is a physician in the health services unit at the Jackson Correctional Institution, who sometimes works at the New Lisbon prison. Defendant is also an associate medical director under the supervision of Department of Corrections medical director David Burnett. As an associate medical director, defendant is the physician supervisor over physicians and nurse practitioners at the New Lisbon prison, as well as several other correctional institutions.

### B. Plaintiff's Requests for Treatment of His Ear Problems

In December 2008, plaintiff began experiencing pain, drainage and bleeding in his right ear. On December 8, plaintiff was seen by a nurse for his ear pain. The nurse concluded that plaintiff had a large amount of ear wax in his right ear and a week later, she performed irrigation on the ear. On December 27, plaintiff's right ear began bleeding and his hearing was muffled. He was seen by a nurse who prescribed Bactrim, an antibiotic, and Tylenol for his ear.

On January 22, 2009, plaintiff woke with blood on his pillow from his right ear. Plaintiff was seen by the health services unit staff, who told plaintiff to monitor the drainage and come back if it got worse. He did not receive any medication.

On March 8, 2009, plaintiff submitted a health service request complaining of pain and drainage in his right ear. He submitted a similar request on March 10, 2009 and approached a nurse about his ear problems on March 14, telling the nurse that he had pus draining from his right ear. Plaintiff went to the health services unit and the nurse examined his ear, noting "Yellow creamy pus." Plaintiff was given antibiotic ear drops.

On July 19, 2009, plaintiff submitted a health service request complaining that he had been experiencing pain in his right ear and was having difficulty swallowing food. Plaintiff stated in the request that the problem had been recurring since December 2008. On July 21, plaintiff was seen by a nurse, who noted that plaintiff had clear liquid in his right ear and tenderness in his right jaw, but no problems hearing. The nurse also noted that plaintiff had a "bubbled area" on his ear drum. The nurse asked plaintiff how long he had

been having problems with his ear and plaintiff told her “about a year.” The nurse referred plaintiff to defendant, who was working at the prison that day.

Plaintiff told defendant that he had been having problems with his ear for a year. Defendant asked plaintiff what types of medication he had received for the problem and plaintiff told defendant that he had been given antibiotic ear drops and pills, ear wax drops and pain pills. Defendant looked into plaintiff’s ear with an otoscope. He noted in plaintiff’s medical file that plaintiff’s hearing was intact with “right pinna/canal within normal limits.” He also noted that plaintiff’s ear drum had “bubbles” and a “small bloody bleb,” which was a blister-like bump. Defendant made a diagnosis of “serous otitis” and noted that the “bleb” on plaintiff’s ear drum was of “unclear significance.”

(The parties dispute whether they had a conversation about plaintiff seeing a specialist. According to plaintiff, defendant told him that he did not see anything to worry about and that plaintiff might just be congested. Plaintiff responded, “Something ain’t right. I’ve been having this problem since last year; sharp pains, drainage that sometimes smells bad, blood on my pillow, different antibiotics. I want to see someone else, a doctor that deals with ear infections.” Plaintiff says that defendant responded by saying, “You’re being overdramatic. You think you’re the first inmate to ask to see a specialist, you’re not! You guys don’t think about who has to pay for your health care. Sending you out is not free, so we can’t just send you guys out whenever you think something is wrong. Sometimes you guys are just looking for a field trip.” Plaintiff responded by saying he was not looking for a field trip, but that he just wanted someone to look at his ear and explain to him why he

kept having these problems. He asked defendant, “Who do I have to talk to about seeing a specialist?” Defendant responded by saying, “There is no other doctor to see unless I decide to send you out, and I don’t see that happening.” Plaintiff told defendant that, “This doesn’t seem right; I’ve been dealing with this since December . . . .” Defendant cut him off by saying, “We’re done here, you can leave now.” Plaintiff asked what he should do about the pain in his ear, and defendant told him, “I said we’re done here, you can leave now or I’ll call the [correctional officers] and you can deal with them.” Defendant denies that this conversation occurred.)

Defendant prescribed plaintiff Sudagest, a non-antibiotic over-the-counter oral decongestant and made a plan for a followup appointment with a nurse in one week. The cost of the Sudogest was \$1.43. At the time, defendant knew that the bloody bleb on plaintiff’s ear drum was not normal, could be a presentation of an infection and was not caused by congestion. He also knew that Sudogest would not treat the bloody bleb. Plaintiff never saw defendant again about his ear.

On September 8, 2009, plaintiff submitted a health service request complaining of pain, uncomfortable pressure and bad smelling drainage from his right ear. He was seen by a nurse the next day. The nurse did not give him any medication. He submitted another health service request about his ear on September 20, 2009. On September 21, plaintiff was seen by a nurse. He told her that he had drainage daily from his ear, that it smelled bad at times and that his hearing was affected. The nurse noted that plaintiff’s ear drum was “red with white stripes.” Later that day, plaintiff was seen by a nurse practitioner, who noted

that plaintiff had “9 months of chronic recurring ear infections, ear canal cheesy wax, and red [ear drum] edema.” The nurse practitioner prescribed plaintiff Amoxicililn and Cortomycin, both antibiotics.

On October 5, 2009, plaintiff was seen by a Dr. Heinzl. During the visit, plaintiff told Heinzl that “the smelly drainage went away with the antibiotic drops and oral antibiotics” temporarily. Heinzl noted that plaintiff seemed to have decreased hearing. There were no nasal symptoms and the canal was okay. Heinzl noted that plaintiff’s ear drum had moderate redness and a white stripe. Heinzl gave plaintiff a diagnosis of “serous otitis media, chronic” and ordered an audiogram. The audiogram was completed the next day and showed that plaintiff had suffered hearing loss. Heinzl also submitted a request to the prior authorization committee that plaintiff be referred to an ear, nose and throat specialist.

The prior authorization committee met by telephone on October 6, 2009 to consider Dr. Heinzl’s referral. The objective of the committee’s review was to determine whether the request was the proper treatment needed or whether an alternative treatment would be best to treat the medical issue. The committee consisted of approximately seven physicians, who were board certified in family practice, internal medicine, surgery and other specialties, and five nurse practitioners and was chaired by defendant. The committee decided unanimously not to refer plaintiff to a specialist and recommended a trial of Cipro, an antibiotic, for 21 days with a followup appointment in two months. In making its decision, the committee did not review plaintiff’s file, only Heinzl’s request form. Following the committee’s

decision, Heinzl ordered Cipro and another audiogram for plaintiff and scheduled a followup clinic visit.

Sixteen days later, on October 22, 2009, plaintiff submitted a health service request, complaining about pain and drainage in his right ear. Heinzl saw plaintiff the next day and noted in his medical file that plaintiff had “muffled hearing, crackles, intermittent drainage” and his ear drum was “[s]omewhat distorted.” Heinzl prescribed a nasal spay and decongestant. Heinzl saw plaintiff again on November 3 and told plaintiff that he would submit another request for a consultation with a specialist in December.

On December 7, 2009, plaintiff was seen by Heinzl. Plaintiff told him that the drainage and pain were intermittent and improved temporarily with antibiotics. Heinzl noted that plaintiff’s right ear canal was “OK” but that his ear drum was “distorted, suggestive of fluid behind” it. Heinzl diagnosed “chronic serous otitis” and submitted a request to the prior authorization committee for a consultation with an ear, nose and throat specialist.

On December 8, 2009, defendant again chaired the committee that considered Heinzl’s request. The committee denied Heinzl’s request, recommending that Heinzl call an ear, nose and throat specialist for advice.

On January 19, 2010, plaintiff submitted a health service request complaining about pain and bad smelling drainage from his right ear. On January 20, he was seen by a nurse, who noted that plaintiff’s ear drum was red on the top and white on the bottom. The nurse gave him Amoxicillian.

On January 20, Heinzl called an ear, nose and throat specialist at the University of Wisconsin for advice about plaintiff's ear. The specialist recommended that plaintiff visit the clinic and be seen by a specialist. On January 21, Heinzl submitted a third request for a specialist consultation to the prior authorization committee. The committee approved the request on January 26.

### C. Plaintiff's Treatment at the University of Wisconsin

On February 22, 2010, plaintiff went to the ear, nose and throat clinic at the University of Wisconsin in Madison. He was seen by Dr. Thomas Pasic, who noted that plaintiff's "right ear exam [was] abnormal and shows a subtotal [ear drum] perforation with associated inflammatory middle ear changes," "associular erosion and drainage in the middle ear space" and "conductive hearing loss." Pasic gave plaintiff a diagnosis of "chronic otitis media with subtotal [ear drum] perforation" and noted that plaintiff's "current symptoms may be related to Chronic Otomastoiditis and/or presence of Cholesteatoma." Plaintiff received a CT scan of his ear, after which doctors at the clinic recommended that plaintiff undergo tympanoplasty and ossiculoplasty surgeries to correct his tympanic membrane perforation and chronic suppurative otitis media.

Plaintiff underwent the first surgery on August 11, 2010. After the surgery, Dr. G. Mark Pyle from the clinic noted that plaintiff had "Polypoid inflammation of the middle ear with perforation at the posterosuperior portion of the tympanic membrane. Inflammatory erosion of the long process of the malleus, the majority of the incus, and stapes

superstructure” and “[d]iffused inflammatory tissue around the chorda tympani nerve.” The severe infection prevented Dr. Pyle from reconstructing plaintiff’s ear during the first surgery.

Plaintiff was seen for post-surgery followup on September 15, 2010 and October 29, 2010. At the October 29 visit, Pyle concluded that the first surgery had resolved plaintiff’s severe chronic inflammatory polypoid otitis media and mastoiditis. He also noted that plaintiff had complete erosion of his ossicular chain and needed a second stage ossiculoplasty.

On July 6, 2011, Dr. Pyle performed ossiculoplasty on plaintiff’s right ear. Pyle used a titanium total prosthesis with cartilage taken from plaintiff’s outer ear. At plaintiff’s post-surgery followup, Pyle told plaintiff that the surgery had gone well and that the two surgeries had successfully eradicated plaintiff’s chronic infection and the hole in his ear drum. Pyle told plaintiff that the ear looked good but that it was unlikely plaintiff would gain a large amount of his hearing back.

Within a couple of months of the second surgery, plaintiff’s pain and drainage had subsided, but his hearing had not returned. He now uses a hearing aid in his right ear.

#### D. Defendant’s Expert Opinion

Defendant disclosed himself as an expert in this case and filed an expert report. In his report, he concludes that all of his treatment decisions related to plaintiff were made in accordance with accepted medical standards as described on uptodate.com, which he says

is a nationally recognized subscription medical website that is widely used by clinics and hospitals as a source for medical information. The website contains the following guidelines for referring a patient to an ear, nose and throat specialist:

- Patients with recurrent unilateral acute otitis media (meaning more than two episodes over a six month period) should undergo investigation for Eustachian tube or nasopharyngeal pathology. Fiberoptic nasopharyngoscopy and/or contrast MRI of the skull base and nasopharynx should be performed to rule out the possibility of a malignant process obstructing the Eustachian tube orifice.
- Patients with perforation (of the tympanic membrane) that persists for six weeks or longer (with or without suppurative drainage) should be referred to an otolaryngologist for further management.
- If a patient has symptoms of otitis media with effusion, a condition that usually follows acute otitis media, for 12 weeks, the patient should be referred to an ear, nose and throat specialist for consideration of tympanostomy tubes.

Defendant concludes that it would have been inappropriate to refer plaintiff to a specialist after his July 21, 2009 examination because plaintiff did not have the symptoms described on uptodate.com. Additionally, defendant notes that he gave plaintiff a diagnosis of serous otitis and that uptodate.com recommends treating serous otitis with oral decongestants unless symptoms have been present for more than 12 weeks.

Defendant concludes that the committee's recommendation against referral to a specialist on October 6 and December 8, 2009 conformed to the guidelines set out above.

## OPINION

### A. Defendant's Motion for Summary Judgment

Plaintiff contends that defendant's failure to refer him to a specialist to determine whether he was suffering from a serious ear condition and failure to provide him effective treatment constitute deliberate indifference to his medical needs in violation of the Eighth Amendment. To survive summary judgment on his claim, plaintiff must present evidence supporting the conclusion that he had an "objectively serious medical need" and that defendant was aware of his serious medical need and was "deliberately indifferent" to it. King v. Kramer, 680 F.3d 1013, 1018 (7th Cir. 2012) (citing Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)). The question is a close one because defendant was not saw plaintiff only once, was not regularly at the prison in which plaintiff was housed and was only one of a number of committee members deciding whether to send plaintiff to a specialist. I conclude however that it is too close to support a finding in defendant's favor and, for that reason, must go to trial.

Defendant concedes that plaintiff's ear problems were a serious medical need. Thus, the question is whether plaintiff presented enough evidence of deliberate indifference to survive defendant's motion for summary judgment. "Deliberate indifference" means that the defendant was aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). When the defendant is a medical professional, the standard for deliberate indifference requires the plaintiff to show that the defendant'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 by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996). This means that 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). Although this is a high standard, plaintiff is not required to show that he was “literally ignored.” Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005).

It remains a question of material fact whether defendant’s actions were so far afield from an appropriate medical response to plaintiff’s ear problems that they fell outside the bounds of his professional judgment. According to plaintiff, he told defendant at his July 21, 2009 appointment that he had been suffering from ear pain and drainage for more than a year and that neither antibiotics nor decongestants had offered relief. If this is true, it suggests that defendant knew then that plaintiff had a serious medical condition that required attention. According to plaintiff, defendant responded by telling plaintiff that there was nothing seriously wrong and that he would not authorize an expensive “field trip” for plaintiff. If defendant researched plaintiff’s documented history of ear troubles, he did not propose this as fact, so I must assume he did not. Ortiz v. Webster, 655 F.3d 731, 735 (7th Cir. 2011) (“Physicians cannot escape liability simply by ‘refusing to verify underlying facts’ regarding the potential need for treatment.”) (citation omitted). Defendant did nothing more than prescribe an over-the-counter decongestant he knew would not treat the bloody

bleb on plaintiff's ear drum, which defendant knew could be a sign of infection or a more serious ear problem. A jury could reasonably conclude from this evidence that defendant disregarded plaintiff's account of his symptoms, decided that he did not want to spend money referring plaintiff to a specialist and subsequently failed to apply appropriate medical judgment when assessing plaintiff. Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011) ("A prison physician cannot simply continue with a course of treatment that he knows is ineffective in treating the inmate's condition."); McGowan v. Hulick, 612 F.3d 636, 641 (7th Cir. 2010) (medical professional's actions may reflect deliberate indifference if he "chooses an easier and less efficacious treatment without exercising professional judgment.") (citation and quotation marks omitted).

Moreover, defendant relies wholly on uptodate.com to validate the treatment decisions he made without providing the court any evidence to support his reliance. It may be that this is an excellent source, but it is not possible to make that determination.

One could certainly argue that defendant should not be held responsible for the committee decisions to deny Dr. Heinzl's requests to send plaintiff to an ear, nose and throat specialist. After all, defendant was only one member, albeit the chair. This assumes, of course, that defendant made no statement or argument about plaintiff's need to see a specialist. Even a committee of 12 can be swayed by a good argument by one member.

Defendant could have avoided any question about his role in the rejections of Heinzl's first two requests by submitting an affidavit on the question, but he did not. The record contains no information about what defendant said or did not say about Heinzl's request. As

the moving party, defendant is responsible for showing that the committee acted in a neutral way, considering Heinzl's request in the same way it would have treated any other request on behalf of a prisoner in the same situation as plaintiff. Moreover, it is undisputed that neither defendant nor any other member of the prior authorization committee reviewed plaintiff's medical records or consulted medical guidelines when considering Heinzl's request. Rather, the committee referred only to Heinzl's written request, which stated that plaintiff had chronic serous otitis in his right ear, that he had had the condition "off and on for years" and that the problem persisted despite the use of decongestants, oral antibiotic and eardrops.

Defendant has proposed no facts that would allow a finding that the committee used medical judgment to decide that plaintiff should not see a specialist and should instead try another round of antibiotics. In fact, the record contains no evidence about how or why the committee made its decisions on Heinzl's requests.

Defendant contends that it can be inferred that he used medical judgment when treating plaintiff and deciding whether to send him to a specialist because defendant's decisions are supported by published medical guidelines. Defendant cites the guidelines published on uptodate.com, which state that a patient should be referred to a specialist if the patient has symptoms of otitis media with effusion for more than 12 weeks or has suffered from acute otitis media on more than two occasions in six months. As I have noted, the record includes nothing to show that this web site is authoritative.

But the guidelines raise larger problems. As plaintiff points out, the undisputed facts do not show that either defendant or the committee consulted these guidelines when making

decisions regarding plaintiff's treatment. More problematic for defendant though, is that his decisions are not clearly in line with these guidelines. Defendant says that plaintiff had symptoms of otitis media for only one week when he saw him in July 2009, rather than for 12 weeks. Additionally, defendant says that plaintiff had had diagnoses of suspected acute otitis media on only two occasions in the previous six months. Defendant does not address plaintiff's arguments and evidence showing that in July 2009 he had been suffering from ear problems and experiencing symptoms of pain and drainage for more than a year, that previous attempts to treat his ear with decongestants and antibiotics were unsuccessful and that he told this to defendant. Defendant does not explain why it matters whether plaintiff had been given a specific diagnosis of his ear problems by medical staff. Although prison medical staff may not have given plaintiff a specific diagnosis every time he complained about his ear pain, that does not necessarily mean that plaintiff was not suffering from a serious medical problem that required a specialist. From the undisputed evidence, a jury could reasonably conclude that defendant knew that plaintiff had a history of serious ear problems, failed to take reasonable measures to address them and now is attempting to justify his actions by relying on guidelines that do not quite fit the facts of the situation.

Finally, plaintiff has adduced evidence from which a jury could conclude that defendant's delay in approving a specialist caused plaintiff to suffer unnecessary pain and discomfort related to his recurring ear infections and his damaged ear drum. The evidence shows that plaintiff's pain, drainage and infections did not cease until he was referred to an ear, nose and throat doctor and underwent two surgeries performed at the UW-Madison ear,

nose and throat clinic. It may be that if defendant had sent him to a specialist sooner, he would have received surgery earlier and the time he suffered would have been reduced. King, 680 F.3d at 1020 (Eighth Amendment prohibits “the infliction of unnecessary suffering through the failure to provide adequate medical care for inmates”); Ortiz, 655 F.3d at 735 (“Because the evidence would permit a jury to conclude that Dr. Webster's inaction substantially and unreasonably delayed necessary treatment, Ortiz has done enough to survive summary judgment on his claim of deliberate indifference.”).

In sum, I conclude that plaintiff has submitted evidence sufficient to meet his burden at summary judgment. Therefore, I am denying defendant’s motion. This case will proceed to a trial.

B. Plaintiff’s Motion for Appointment of Counsel

The magistrate judge rejected plaintiff’s previous motion for appointment of counsel, concluding that plaintiff was not unable to afford his own counsel. Dkt. #14. However, I conclude that appointment of counsel is appropriate as this case approaches the trial phase. The trial will involve primarily testimony from medical providers and experts and an attorney will be more capable at preparing for and conducting examinations of such witnesses. Additionally, plaintiff has provided the court six letters from various attorneys that declined to accept his case despite his offer to pay them up to \$5000 for representation. He has also provided the court a recent prison account statement showing that he would not be financially capable of paying an attorney any more than he has offered already. (The trust fund account

statement shows a balance of \$976 with an average balance around \$1000.) Under the circumstances, it is appropriate to grant plaintiff's motion.

Accordingly, I will stay all further proceedings in this case temporarily in order to locate a lawyer who is willing to represent plaintiff. A lawyer accepting appointments in cases such as this takes on the representation with no guarantee of compensation for his or her work. Plaintiff should be aware that in any case in which a party is represented by a lawyer, the court communicates only with counsel. Thus, once counsel is appointed, the court will no longer communicate with plaintiff directly about matters pertaining to this case. Plaintiff will be expected to communicate directly with his lawyer about any concerns and allow the lawyer to exercise his or her professional judgment to determine which matters are appropriate to bring to the court's attention and what motions and other documents are appropriate to file. Plaintiff will not have the right to require counsel to raise frivolous arguments or to follow every directive he makes. He should be prepared to accept his lawyer's strategic decisions even if he disagrees with some of them and he should understand that it is highly unlikely that this court would appoint another lawyer to represent him if he chooses not to work cooperatively with the first appointed lawyer. After the court locates a lawyer to represent plaintiff, I will schedule a status conference to reset the schedule in this lawsuit.

#### ORDER

IT IS ORDERED that

1. Defendant Kenneth Adler's motion to strike Thomas Leitner as an expert, dkt.

#28, is GRANTED.

2. Defendant's motion for summary judgment, dkt. #17, is DENIED.

3. Plaintiff Jeremiah Lambert's second motion for appointment of counsel, dkt. #33, is GRANTED.

4. The current schedule for this case is STRICKEN and further proceedings are STAYED pending appointment of counsel for plaintiff. As soon as I find counsel willing to represent plaintiff, I will advise the parties of that fact. Soon thereafter, a status conference will be held to establish a new schedule for this case.

Entered this 23d day of July, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge