

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

MATTHEW D. RENNER,

Plaintiff,

v.

JAN COLE, JUDY SPAHN, BRAD MALCOLM,
CHRISTOPHER HANSON and
THE UNITED STATES OF AMERICA,

Defendants.

OPINION and ORDER

11-cv-419-bbc

In this civil action for monetary relief brought under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, plaintiff Matthew Renner is proceeding on claims that defendants Jan Cole, Judy Spahn, Brad Malcolm and Christopher Hanson violated his rights under the Eighth Amendment and the FTCA by failing to provide him adequate medical treatment for his appendix while he was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. Plaintiff is represented by counsel.

Now before the court is defendants' motion for partial summary judgment on the ground that plaintiff failed to exhaust his administrative remedies with respect to his Bivens

claim. Dkt. #33. (Defendants' motion does not apply to plaintiff's claims under the FTCA, which has separate exhaustion requirements.)

I am granting defendants' motion. Although plaintiff was physically incapable of filing an administrative grievance within the 20-day deadline for doing so, he should have filed a grievance as soon as it was reasonably possible for him to do so. Instead, plaintiff waited several days and his grievance was ultimately dismissed as untimely. Therefore, plaintiff failed to exhaust his administrative remedies and cannot proceed on his Bivens claims. The parties have also filed a stipulation regarding admissibility of certain evidence, dkt. #48, that I am granting.

From the parties' proposed findings of fact, I find the following facts to be undisputed and material to defendants' exhaustion defense.

UNDISPUTED FACTS

Plaintiff Matthew Renner was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin beginning on July 3, 2007. When he arrived, he received instructions regarding the administrative remedy process and was told that in order to properly exhaust his remedies, he must file a Request for Administrative Remedy (BP-9) within 20 calendar days of the date on which the incident arose.

On March 3, 2009, plaintiff was seen by a doctor at the prison regarding severe

abdominal pain. The doctor immediately suspected appendicitis and ordered plaintiff's transfer to a hospital in Portage, Wisconsin, where the diagnosis was a ruptured appendix. Plaintiff underwent emergency surgery. He became gravely ill and was transferred by helicopter to the University of Wisconsin Hospital in Madison, where he was hospitalized from March 4, 2009 until April 14, 2009. Plaintiff underwent four surgeries at the hospital in Madison.

On April 14, 2009, plaintiff was transferred to the Federal Medical Center in Rochester, Minnesota. At the time of his transfer, he had an open abdominal wound, a "JP drain" and abdominal sepsis. He required antibiotics and extensive rehabilitation because of his prolonged hospitalization. From April 16 through June 2, his JP drain had to be flushed out twice a day. Until June 16, plaintiff's open abdominal wound required daily treatment. After June 16, plaintiff continued to have episodic bouts of illness, including tachycardia, shortness of breath, restrictive lung disease and chest discomfort that required ongoing treatment by medication.

When plaintiff arrived at the medical center in Rochester, he could walk on a limited basis, and between April 15 and June 8, 2009, he could walk and participate in some recreational activities. On April 26, 2009, he was physically capable of filling out commissary request forms. Between April 27 and May 5, 2009, plaintiff participated in the disciplinary hearing process at the institution, signing forms and attending a disciplinary

hearing.

On May 19, 2009, plaintiff attended a four-hour admission and orientation program at the medical center in Rochester. The program contained a segment on the administrative remedy process, including instructions about deadlines. The program did not contain information about asking for waivers or extensions of administrative grievance deadlines.

The next day, on May 20, 2009, plaintiff initiated the administrative remedy process relating to his medical care at the Federal Correctional Institution in Oxford, Wisconsin, by raising his complaint with correctional counselor Jack Bakker. Bakker told plaintiff that informal resolution was not possible and gave him a BP-9 form.

On May 22, 2009, plaintiff completed an “inmate request to staff” form, inquiring about programming that would be available after he was transferred to another institution.

On June 16, 2009, plaintiff returned his completed BP-9 form to Counselor Bakker. Plaintiff did not ask for an extension of time for filing his BP-9 before he submitted it and did not include any reason for submitting it late. His BP-9 was rejected as untimely. On July 15, 2009, he filed a Regional Administrative Remedy Appeal (BP-10) to appeal the rejection. In his BP-10, plaintiff stated that he was unable to file a request for administrative remedy between March 3, 2009 and April 14, 2009 because of his hospitalization. The institution denied plaintiff’s appeal on the grounds that his BP-9 was untimely and his BP-9 and BP-10 were not signed. Plaintiff appealed by filing a Central Office Administrative

Remedy Appeal (BP-11) on August 6, 2009. The Bureau of Prisons concurred with the institution's rejection on the ground that the BP-9 was untimely.

OPINION

Under 42 U.S.C. § 1997e(a), a prison may not bring a challenge under Bivens “until such administrative remedies as are available are exhausted.” This means that a prisoner must “properly take each step within the administrative process.” Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002) (emphasis added). Because plaintiff is a federal prisoner, the exhaustion requirements are set forth in the Bureau of Prisons’ three-step administrative remedy procedure. 28 C.F.R. §§ 542.14; 542.15. An inmate must first submit an Administrative Remedy Request (BP-9), and then file appeals with the appropriate regional director (BP-10) and after that with the Central Office (BP-11) if he is not satisfied with the decision. The initial BP-9 must be filed within “20 calendar days following the date on which the basis for the Request occurred.” Id. § 542.14(a). However, “[w]here the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed.” Id. § 542.14(b). “Valid reasons for delay include . . . an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal.” Id.

Defendants contend that they are entitled to summary judgment on plaintiff's Bivens claim because plaintiff failed to exhaust his administrative remedies before filing suit. Defendants do not deny that plaintiff was physically incapable of preparing a BP-9 within

20 days of the date on which the basis for the request occurred, March 23, 2009. Thus, defendants concede that there were no administrative remedies “available” to plaintiff before the 20-day deadline expired. Hurst v. Hantke, 634 F.3d 409, 412 (7th Cir. 2011) (“[A] remedy is not ‘available’ within the meaning of the Prison Litigation Reform Act to a person physically unable to pursue it.”). However, defendants contend that plaintiff should have filed a BP-9 as soon as he was physically capable of doing so, which was at some point in late April or May 2009. Id. (prisoner physically incapable of filing grievance within deadline should have filed grievance “as soon as it was reasonably possible for him to do so”). Instead, plaintiff waited until June 16, 2009, more than 20 days after requesting a BP-9 form from his counselor and more than 90 days after the events giving rise to the grievance.

Plaintiff has failed to show that any genuine issue of fact exists about whether plaintiff was physically capable of filing a BP-9 before June 16, 2009, or even whether plaintiff filed his BP-9 within 20 days of the time he was physically capable of doing so. Plaintiff was receiving treatment for serious medical problems from the time he was transferred to the Federal Correctional Institution in Rochester, Minnesota from April 2009 to at least June 2009. However, plaintiff was able to walk starting around April 16, 2009. Also in April and May 2009, plaintiff was able to complete commissary request forms, participate in some forms of recreation, attend a disciplinary hearing, fill out disciplinary forms, attend an admission and orientation program and write to prison staff about

programming options. In light of these facts, there is no reason to believe that plaintiff was incapable of filing an administrative grievance until June 16, 2009. Plaintiff does not say that he was incapable of doing so.

Instead, plaintiff contends that he should be excused from the exhaustion requirements because there were no administrative remedies “available” to him under the Bureau of Prison’s administrative remedy process. He contends that because he was not aware that he could ask for an extension under the hardship exception in 28 C.F.R. § 542.14(b), there were no remedies available after the initial 20-day deadline for filing his BP-9 had expired. In other words, plaintiff contends that he should be excused from the exhaustion requirement because he believed his grievance would be rejected automatically as untimely.

Plaintiff’s argument is not persuasive. Although prisoners are required to exhaust only “available” administrative remedies, 42 U.S.C. § 1997e(a), Woodford v. Ngo, 548 U.S. 81, 102 (2006), an administrative remedy is still “available” under the Prison Litigation Reform Act “so long as the administrative authority has the ability to take *some* action in response to the complaint (even if not the requested action).” Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006). A remedy is not “unavailable” simply because the prisoner believes that his grievance will be rejected as untimely. As the Supreme Court and the Court of Appeals for the Seventh Circuit have explained, prisoners must attempt to exhaust their

remedies, even if they believe that such exhaustion would be futile. Booth v. Churner, 532 U.S. 731, 741 n.6 (2001); Dole, 438 F.3d at 809; McCoy v. Gilbert, 270 F.3d 503, 511 (7th Cir. 2001) (holding that inmate whose complaint arose more than 20 days before Prison Litigation Reform Act was enacted was not excused from filing grievance because Bureau of Prisons might have accepted untimely filing); Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 537 (7th Cir. 1999) (prisoner's perception that exhaustion would be futile does not excuse him from exhaustion requirement). Thus, plaintiff's belief that filing a late grievance would be futile did not make administrative remedies "unavailable."

Although plaintiff's medical problems prevented him from filing a grievance within the 20-day deadline, plaintiff was required to file a grievance "as soon as it was reasonably possible for him to do so." Hurst, 634 F.3d at 412. Plaintiff has not argued that he filed a grievance as soon as he was reasonably capable of doing so, and the facts do not support such a finding. Rather, plaintiff did not submit his BP-9 until 27 days after requesting the form and 63 days after arriving at the medical center in Rochester, Minnesota. It would have been "reasonably possible" for plaintiff to submit the BP-9 earlier. Therefore, plaintiff failed to exhaust his administrative remedies and his Bivens claims must be dismissed.

ORDER

IT IS ORDERED that

1. The stipulation regarding authenticity of particular documents, dkt. #48, filed by plaintiff Matthew Renner and defendants Jan Cole, Judy Spahn, Brad Malcolm and Christopher Hanson is GRANTED.

2. The motion for partial summary judgment filed by defendants, dkt. #33, is GRANTED. Plaintiff's claims under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) are DISMISSED without prejudice for plaintiff's failure to exhaust his administrative remedies.

Entered this 18th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge