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

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DOUGLAS BALSEWICZ,

Plaintiff,

v.

GARY HAMBLIN, RANDALL HEPP,
TAMMY MAASSEN, KENNETH ADLER,
SGT. CLARKK and SGT. HAGGLUND,
in their individual and official capacities,

Defendants.

OPINION AND ORDER

12-cv-153-slc[1]

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Pro se plaintiff Douglas Balsewicz has filed a proposed complaint under 42 U.S.C. § 1983 in which he contends that various prison officials violated his constitutional rights by failing to provide him with adequate medical treatment for his foot and back injuries. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made his initial partial payment as required by 28 U.S.C. § 1915(b)(1).

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the

[1] I am exercising jurisdiction over this case for the purpose of this order.

complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Having reviewed plaintiff's complaint, I conclude that he has stated a claim upon which relief may granted with respect to his claims under the Eighth Amendment and Wisconsin negligence law against defendants Kenneth Adler, Tammy Maassen, Sergeant Clarkk and Seargant Hagglund. However, the complaint fails to state a claim upon which relief may be granted against defendants Gary Hamblin and Randall Hepp.

In his complaint, plaintiff alleges the following relevant facts.

ALLEGATIONS OF FACT

Plaintiff Douglas Balsewicz is a prisoner at the Jackson Correctional Institution located in Black River Falls, Wisconsin. He was previously incarcerated at the New Lisbon Correctional Institution.

Defendant Gary Hamblin is Secretary of the Wisconsin Department of Corrections. The remaining defendants are employed at the Jackson Correctional Institution. Defendant Randall Hepp is the warden, defendant Tammy Maassen is manager of the medical department, defendant Dr. Kenneth Adler is the head doctor and defendants Sergeants Clarkk and Hagglund are correctional officers.

While incarcerated at the New Lisbon Correctional Institution, plaintiff was treated for various chronic foot and back injuries. He had a diagnosis of "narrowing of C-spine, C3, C4, C5, L-Cubital tunnel syndrome, L4, L5, deterioration of joint and bones and pinched nerve lower back and neck." Plaintiff received podiatric care from Dr. Helstad at the Black

River Falls Memorial Hospital. Helstad diagnosed "Morton's Neuroma, Capsultitis, Heel spur syndrome [and] Planter Fascia," began a treatment of cortisone injections and recommended that plaintiff receive orthopedic shoes for arch support. Plaintiff also received various prescriptions for his pain. In July 2007, he was prescribed Vicoden, which was switched to Percocet in August 2007, to methadone in March 2009 and finally to morphine in January 2010.

To facilitate his treatment, plaintiff was transferred to the Jackson Correctional Institution, where he was placed under defendant Adler's care. On March 25, 2010, two days after plaintiff's arrival, Adler discontinued plaintiff's pain medication and removed all of his medical restrictions, except the cane and the lower tier and bunk restrictions. Adler stated that plaintiff did not need a wheelchair, medication or other restrictions and needed to stop whining. Adler refused to permit plaintiff to have an extra mattress and pillow for his back pain and he told plaintiff that he intended to work on removing his walking cane. Plaintiff submitted a health services request to use a wheelchair and open-toed sandals because of his foot pain, and the request was denied.

On April 1, 2010, plaintiff was sent to Black River Falls Memorial to see Dr. Helstad. Helstad noted that plaintiff might need surgery for his left heel and recommended that plaintiff wear orthopedic tennis shoes (not canvas, state-issued shoes), wear open-toed sandals on the unit, use a wheelchair, be referred to chronic pain or neurology and receive better pain management. The next day, plaintiff filed another request for a mattress and pillow, which was denied, and a complaint against Adler for stopping his pain medication.

On April 4, 2010, plaintiff filed a health services request stating that on of his medications, Sulindac, was not helping with his pain. (It was not clear who prescribed the Sulindac, which is an anti-inflammatory used to reduce pain and swelling from arthritis.)

Adler called plaintiff to the health services unit on April 9, 2010. He gave plaintiff Carbamazepine (an anticonvulsant sometimes used to treat chronic pain syndromes) and said that plaintiff did not need an extra mattress, pillow or orthopedic shoes. In addition, Adler said that plaintiff did not need the cane, because an officer had seen plaintiff walking without it. Adler removed the cane restriction and permitted Sergeant Clarkk to take plaintiff's cane.

Plaintiff filed a complaint against Adler for ignoring Helstad's recommendation for orthopedic shoes and for removing plaintiff's cane. Four days later, plaintiff wrote a letter to Maassen complaining about Adler's level of care, to which she never responded. Maassen later responded to plaintiff's inmate complaint, stating that Adler had watched video showing plaintiff walking without his cane and walking without putting any weight on it.

Plaintiff notified health services on April 19, 2010, that his medication was causing side effects and they responded that he had an appointment on May 10. The May 10 appointment was rescheduled for June 18. On June 16, plaintiff wrote Adler, informing him that he was suffering severe pain and that the pain had worsened without the cane because he had to put all his weight on his foot. Plaintiff received a response that his appointment was rescheduled for July 12. During this time, Adler stopped all plaintiff's treatment with the podiatrist. Plaintiff informed Maassen of Adler's decisions, but she never responded.

On August 2, 2010, Sergeant Clarkk and Hagglund called Adler, complaining that plaintiff did not need to wear open-toed shoes and should be required to wear regular shoes in the meal hall. (The complaint does not explain how or when the medical restriction for open-toed shoes was reinstated.) Without seeing plaintiff, Adler changed plaintiff's medical restriction. Plaintiff filed a health services request on August 8, complaining that he had been unable to attend meals for two days. The response stated that Adler had discontinued plaintiff's medical restriction permitting open-toed sandals in the dining room and that plaintiff had no need for a wheelchair.

On August 10, 2010, a correctional officer ordered plaintiff be taken to the health services unit to be measured for a pair of orthopedic shoes. A nurse measured plaintiff and he received the shoes later that evening. That day, he sent Maassen a letter stating that the shoes were too big. The next day, another correctional officer came to his cell and retrieved the shoes. Plaintiff again wrote to Maassen, asking why the shoes were taken. When Adler saw plaintiff on August 20, 2010, Adler told him,"I told you no fancy shoes." Maassen later told plaintiff the shoes were given to him in error.

On August 26, 2010, Sergeant Hagglund told plaintiff that he could no longer use a wheelchair at meals because he did not have a medical restriction. When plaintiff tried to explain that he had a restriction, Hagglund replied, "Too bad it's not my problem." (Again, the complaint does not explain how or when the medical restriction permitting him to use the wheelchair was reinstated.) Plaintiff filed a complaint against Hagglund.

On August 29, 2010, plaintiff filed complaints against Adler for removing the

restriction permitting him to wear open-toed sandals and against Maassen for taking away his orthopedic shoes. On September 10, 2010, Adler reinstated plaintiff's restrictions for the cane, wheelchair and open-toed sandals and podiatry treatments.

On October 1, 2010, plaintiff was sent to the University of Wisconsin Hospitals in Madison, Wisconsin, where he was seen by Dr. Kalker, a podiatric surgeon. Kaller placed plaintiff in an aircast pneumatic boot, ordered an MRI and recommended a series of injections of a sclerosing agent for the Morton's Neuroma on his right foot.

Sergeant Clarkk again attempted to have plaintiff's medical restriction for open-toed sandals removed on October 9 and 10, 2010. Clarkk said that there was no reason for plaintiff to have this restriction and he would continue to call health services every time he was on plaintiff's unit.

On November 13, Adler told plaintiff that the MRI showed that his left foot had Plantar Fasciitis, growth hips in the heel and dark spots that Adler could not identify. On November 29, plaintiff returned to Kalker, who told him the MRI showed "among other things an Osteochondral defect of the left talar dome." Orthotics were cast and pain treatment was recommended. Adler saw plaintiff on December 13 and informed him that the orthotics would be approved but the dark spots on his left foot were arthritis, which he would have to live with. Plaintiff never received the recommended pain treatment. On January 7, 2011, plaintiff received the orthotics but was unable to wear them because of the swelling and pain in his foot. He notified health services but received no response.

On December 21, 2010, plaintiff returned to the University of Wisconsin Hospitals

for the first set of injections for his right foot. For the treatment to be effective, it had to be followed by the remaining injections within one and a half to two weeks. Plaintiff was never sent for the second round of injections. On January 6, 2011, plaintiff filed a health services request asking about the delay and was told that he could discuss it with Adler on January 14. The appointment was not kept. Between January 20 and February 28, plaintiff filed four inmate complaints and four health service requests asking about the delay and asking to be removed from Adler's care because his delays were interfering with the podiatric treatment. The health services unit repeatedly told plaintiff that he was not supposed to return to the hospital for additional treatment.

However, when plaintiff was sent back to see Kalker on March 18, 2011, Kalker told plaintiff that he was supposed to return for additional injections and recommended that plaintiff be rescheduled for the two to three more appointments. Kalker also recommended that plaintiff meet with a surgeon for the dark spots on his left heel, which were not arthritis. Plaintiff filed additional inmate complaints that day and the next.

On March 30, plaintiff again met with Adler, who prescribed Meloxicam (an anti-inflammatory used for arthritis pain) and told him to move around and exercise. On April 10, 2011, plaintiff filed a health services request stating that moving around made the pain worse and that he found it unbearable. The response was that he could see a doctor on April 11. When he was not seen on April 11, plaintiff filed another request and received the response "rescheduled for 4/12/11." When he was not seen on April 12, plaintiff sent another request on April 19 and received the response "discuss with MD on 4/29/11."

On April 19, Sergeant Hagglund told plaintiff he could no longer use a wheelchair except for visits to the health services unit. Plaintiff filed another inmate complaint. On April 29, Adler increased the Meloxicam although plaintiff informed him that the Meloxicam was not working for the pain in his feet or his back. Adler told plaintiff to go to REC and walked out. Adler saw plaintiff again on July 6, 2010, and told him it would be up to the foot surgeon what kind of pain medication plaintiff would receive.

OPINION

I. Eighth Amendment

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Id. at 104.

A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006). A medical need may be serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) or otherwise subjects the prisoner to a substantial risk of serious harm,

Farmer v. Brennan, 511 U.S. 825, 847 (1994).

"Deliberate indifference" means that the officials were 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). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. Estelle, 429 U.S. at 104-05; Gayton v. McCoy, 593 F.3d 610, 619 (7th Cir. 2010); Edwards v. Snyder, 478 F.3d 827, 832 (7th Cir. 2007). However, 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, 95 F.3d at 590-91. Thus, disagreement with a doctor's medical judgment, incorrect diagnosis or improper treatment resulting from negligence is insufficient to state an Eighth Amendment claim. Gutierrez, 111 F.3d at 1374; Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) ("[E]ven admitted medical malpractice does not give rise to a constitutional violation."). "[D]eliberate indifference may be inferred [from] a medical professional's erroneous treatment decision only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

Plaintiff's allegations suggest that he had a serious medical need. At summary judgment or trial, plaintiff will have to show that his conditions cause more than just mild discomfort and inconvenience but meet the requirements for a serious medical need.

Compare Pippin v. Frank, 2005 WL 1378725, *9-10 (W.D. Wis. 2005) (prisoner stated claim under Eighth Amendment by alleging that "he was forced to use a wheelchair for almost six months in 2003 because he did not receive corrective shoes"), with Franklin v. McCaughtry, 2004 WL 221982, *15 (W.D. Wis. 2004) (athletic shoes not necessarily required by Eighth Amendment simply because one doctor recommended them).

In addition, plaintiff has pleaded sufficient facts to allow the inference to be drawn that defendants Adler, Maassen, Clarkk and Hagglund were aware of his need yet failed to take corrective action. Adler was plaintiff's treating physician. Plaintiff sent various complaints to Maassen, Adler's direct supervisor, about Adler's interference with plaintiff's medical treatment. Burks v. Raemisch, 555 F.3d 592, 594 (7th Cir. 2009) (head of prison medical unit may be liable if she made decision not to follow up on ordered treatment). Clarkk and Hagglund believed plaintiff's foot condition did not require a wheelchair or special shoes and, on that basis, deliberately interfered with his medical restrictions. Plaintiff should be aware that, at summary judgment or trial, he must show that each defendant knew about his medical need, refused to provide him with necessary restrictions *or other reasonable alternatives*, and had the ability to do so.

With respect to plaintiff's Eighth Amendment claim against Alder, plaintiff should also be aware that it will not be enough to show that Adler diagnosed plaintiff's foot ailment incorrectly, gave him the wrong treatment or disagreed with his other physicians. Instead, plaintiff must show that Adler failed to use any medical judgment in his treatment of plaintiff.

Last, plaintiff's allegations are insufficient to state a claim against defendants Hamblin and Hepp. With respect to Hamblin, plaintiff alleges only that he is the secretary of the Wisconsin Department of Corrections and is responsible for protecting the constitutional rights of inmates. Similarly, with respect to Hepp, plaintiff alleges only that, as warden, he is responsible for care of the inmates and he failed to protect plaintiff from the other defendants' actions.

Under 42 U.S.C. § 1983, the statute authorizing lawsuits for constitutional violations, a person may not be held liable unless he was "personally involved" in the violation, which means that he participated in the alleged unconstitutional conduct. A person is not liable merely because she supervises someone who violates a plaintiff's constitutional rights. Burks, 555 F.3d at 593-94 ("Liability depends on each defendant's knowledge and actions, not on the knowledge or actions of persons they supervise."). Plaintiff has alleged no facts that would support an inference that Hepp or Hamblin were involved in the decisions not to provide plaintiff with pain medication or treat his foot conditions. Accordingly, they will be dismissed from the case.

II. State Law Negligence

Plaintiff also asserts that he has state law claims, which I interpret as negligence claims. Federal courts may exercise supplemental jurisdiction over a state law claim that is "so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

28 U.S.C. § 1367(a). Plaintiff's negligence claims are part of the same case or controversy as his federal claims for violation of his Eighth Amendment rights.

To prevail on a claim for negligence or medical malpractice in Wisconsin, plaintiff must prove defendants breached their duty of care to him and that he suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860. Considering plaintiff's allegations that defendants Adler and Maassen repeatedly failed to treat his foot problems or provide pain treatment or medical restrictions, it is possible to infer at this stage that they were negligent. Defendant Clarkk and Hagglund's actions caused plaintiff additional pain because they relied allegedly on unfounded medical intuitions about the necessity of his medical restrictions. Therefore, plaintiff may proceed on his state law negligence claims against these defendants. Again, however, plaintiff's allegations establish no basis from which a factfinder could infer that defendants Hamblin or Hepp acted or failed to act in some way that breached their duty of care or caused plaintiff injury.

Plaintiff should be aware that to establish a prima facie claim under state law for medical negligence against defendant Adler, he must show that Adler failed to use the required degree of skill exercised by an average physician. Wis J-I Civil 1023. Unless the situation is one in which common knowledge affords a basis for finding negligence, medical malpractice cases require expert testimony to establish the standard of care. Carney-Hayes v. Northwest Wisconsin Home Care, Inc., 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524.

ORDER

IT IS ORDERED that

1. Plaintiff Douglas Balsewicz is GRANTED leave to proceed on his claims that

a. defendants Kenneth Adler, Tammy Maassen, Sergeant Clarkk and Sergeant Hagglund violated his rights under the Eighth Amendment by acting with deliberate indifference to his medical needs, and

b. the actions of defendants Adler, Maassen, Clarkk and Hagglund were negligent under Wisconsin state law.

2. Plaintiff is DENIED leave to proceed on his claims against defendants Gary Hamblin and Randall Hepp, who are DISMISSED from the case.

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

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

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

6. Plaintiff is obligated to pay the balance of his unpaid filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fee has been paid in full.

Entered this 12th day of July, 2012.

BY THE COURT:
/s/
BARBARA CRABB
District Judge