IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOHNNY LACY,

Plaintiff,

v.

ORDER

12-cv-397-bbc

DR. SCOTT A. HOFTIEZER, JAMES GREER,
DR. DAVID BURNETT and DR. BURTON COX,

Defendants.

- -

Plaintiff Johnny Lacy, a prisoner at the Wisconsin Secure Program Facility, brings this civil action alleging that defendant prison officials have failed to treat his various severe medical problems since he was transferred to the prison. In the August 30, 2012 screening order in this case, I construed plaintiff's complaint as including a motion for preliminary injunctive relief, which the parties have now completed briefing. (As a preliminary matter, I note that neither side filed proposed findings of fact, which they were directed to do in the court's June 1, 2012 screening order. However, because the parties' filings are relatively simple, I will construe plaintiff's affidavit, dkt. #10, as his proposed findings of fact. As for defendants, I will construe the affidavit of defendant Dr. Burton Cox, Jr., dkt. #16, as their proposed findings of fact.) Plaintiff has filed a motion for temporary restraining order that I will include in the discussion of his motion for preliminary injunctive relief. In addition, plaintiff has filed motions for appointment of counsel and a medical expert and defendants

have filed a motion for partial summary judgment based on plaintiff's failure to exhaust his administrative remedies.

After considering the materials submitted by the parties, I will deny plaintiff's motions for preliminary injunctive relief because plaintiff fails to show that he has a likelihood of success on his underlying claims. I will deny his motions for appointment of counsel and expert. Because I conclude that plaintiff has exhausted his administrative remedies with regard to the medical treatment of his hepatitis C, diabetes and severe pain, I will deny defendants' motion for partial summary judgment as to those diseases but grant the motion as to any claims plaintiff seeks to bring with regard to the treatment of his other maladies.

From the parties' submissions, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Johnny Lacy is incarcerated at the Wisconsin Secure Program Facility, in Boscobel, Wisconsin. (Although the parties do not present a clear timeline of plaintiff's incarceration, it seems that plaintiff was incarcerated at this prison from September 2002 to May 2008, from late 2009 to September 2010 and from January 31, 2012 to the present.) Plaintiff has hepatitis C, cirrhosis of the liver, type 2 diabetes, fibromyalgia, diabetic neuropathy, hypertension, esophageal varicies and ulcerative colitis.

Defendant David Burnett, Scott Hoftiezer and James Greer work at the Wisconsin Department of Corrections Bureau of Health Services; Greer is the director of the bureau, Burnett is the medical director and Hoftiezer is the assistant medical director.

B. Medical Treatment

Between January 2003 and October 2009, defendants Burnett, Hoftiezer and James Greer "[a]pproved all X-Rays, M.R.I.'s, medications (Narcotics), examinations off site, and some on site, Treatments related to certain types of diseases like Hepatitis-C-Virus, Cirrhosis, Heart problems." (I can infer from this fact that these defendants withheld approval for these treatments at some point after October 2009, but plaintiff does not explain whether these defendants have made any decisions regarding defendant Cox's treatment of plaintiff at the Wisconsin Secure Program Facility.)

In February 2006, plaintiff asked to be placed on the national donor list for liver and pancreas transplants. Defendant Dr. Burton Cox denied plaintiff's request, stating that he did not qualify for transplants because he was not "decompensating."

In 2008, while plaintiff was incarcerated at the Waupun Correctional Institution, Dr. Paul Sumnicht prescribed methadone for plaintiff. However, at some point before plaintiff was transferred back to the Wisconsin Secure Program Facility, Sumnicht canceled that prescription and lied by stating that plaintiff had been diverting his medication; in reality Sumnicht was retaliating against plaintiff for filing a complaint against him.

On February 4, 2009, Hoftiezer reviewed plaintiff's medical records in response to

plaintiff 's "express[ing] repeated dissatisfaction with the health care rendered at [the Waupun Correctional Institution]." Hoftiezer summarized the various treatments plaintiff was receiving for his various health problems and concluded that "the goals of his chronic pain treatment plan are being met," that he was not currently a candidate for a transplant and that "[plaintiff's] very serious health issues . . . are being properly addressed by medical staff at WCI, and in accordance with community medical standards."

Plaintiff was transferred to the Wisconsin Secure Program Facility on January 31, 2012. On February 1, 2012 defendant Cox ordered various laboratory tests for plaintiff. Cox saw plaintiff on February 14, 2012, for discussion of his pain problems, past work-ups and his requests for a "no kneel" restriction, methadone and an abdominal binder. After completing the examination, Cox determined that a binder was not needed. He prescribed a proton pump inhibitor medication and ordered x-rays of plaintiff's C-spine and bilateral knees for review of his chronic pain/degenerative joint disease.

On February 12, 2012, plaintiff filed a health service request, saying that he was in excruciating pain. Defendant Cox responded by stating that "You're going to have to learn to live with your pain without opiate narcotics. You were caught diverting you[r] methadone again."

On February 20, 2012, Cox ordered that plaintiff be given an extra pillow for his chronic pain, 400 milligrams of Ibuprofen four times a day for one year for pain and compression stockings to treat dependent edema. Also, Cox ordered analgesic cream for plaintiff's joint and muscle discomfort. On February 29, 2012, Cox ordered an ultrasound

for liver cancer surveillance and prescribed 2000 units of vitamin D four times a day for one year.

On March 15, 2012, plaintiff refused to come out of his cell to be seen by Cox for an appointment because he refused to kneel for escort. Cox ordered a podiatry consultation with the University of Wisconsin Hospital for review of plaintiff's Diabetes Type 2 management and neuropathy.

On April 9, 2012, Cox ordered "accuchecks" of plaintiff's blood sugar as needed for symptoms of hypoglycemia in addition to his regularly scheduled accuchecks. Plaintiff complained about shortness of breath on April 23, 2012. Defendant Cox ordered a chest x-ray in response. Cox also prescribed Reguloid capsules for constipation. On April 28, 2012, Cox renewed plaintiff's prescription for 80 milligrams 1 tab furosemide twice a day for one year. On April 30, 2012, Cox consulted with a Dr. Chan regarding plaintiff's diabetes Type 2 management. Cox ordered plaintiff 30 milligrams of milk of magnesia at bedtime as needed for 1 year for constipation.

On May 14, 2012, Cox continued plaintiff's prescription for 10 milligrams phytonadione (a vitamin K supplement to prevent bleeding in patients with cirrhosis) for one year. On June 6, 2012, Cox ordered a follow-up "telemed" appointment for plaintiff with the UW Gastrointestinal Clinic for his ulcerative colitis. On July 12, 2012, Cox discontinued plaintiff's prescription for diphenhydromine because of reports of probable diversion.

On July 19, 2012, Cox continued plaintiff's prescription of lisinopril at 20 milligrams

for one year for treatment of hypertension and prevention of diabetic kidney disease. Also, Cox ordered labs for hepatitis C/liver function monitoring to monitor for liver failure, an abdominal ultrasound and 500 milligrams Neomycin for six days for reducing blood ammonia level. Also on July 19, 2012, plaintiff was seen by Lisa Cervantes of the UW Gastrointestinal Clinic for his hepatitis C, cirrhosis and ulcerative colitis treatment plan.

On August 20, 2012, Cox ordered that an appointment be made to check plaintiff for his complaints of "abdominal bloating" and prescribed 25 milligrams of pregabalin three times a day for six months for neuropathic pain from diabetes and fibromyalgia.

On September 6, 2012, Cox saw plaintiff for review of his complaints of abdominal wall swelling and his request for a binder. Cox found the abdomen had general tenderness without masses and that the pain was probably associated with the hepatitis C and cirrhosis, so a binder was not indicated. Cox ordered a "U.S. abdominal" for hepatitis C and a vital sign check every month for one year. Cox changed plaintiff's prescription of lisinopril to losarten 50 milligrams once a day for one year and discontinued plaintiff's prescription for pregabalin at his request. On September 12, 2012, Cox prescribed plaintiff amitriptyline 25 milligrams at bedtime for one year for chronic pain/neuropathy.

In advanced cirrhosis, the liver no longer functions. Liver transplant is a treatment option for people who have end-stage liver failure that cannot be controlled using other treatments and for some people with liver cancer. For people with hepatitis C infection, a liver transplant is not a cure because hepatitis C infection is likely to recur in the new liver; usually it is necessary to continue treatment with antiviral medications even after the

transplant. The number of people waiting for new livers is much larger than the number of available livers, so liver transplant is reserved for people who are critically ill. It is defendant Cox's belief that Lacy does not meet the criteria for a liver transplant. Cox is treating plaintiff's hepatitis C and cirrhosis with medical monitoring and regular visits to the University of Wisconsin Gastrointestinal clinic.

Almost all pancreas transplants are done to treat cases of type 1 diabetes, which results when the pancreas cannot make enough insulin, causing blood sugar to rise to dangerous levels. Because type 2 diabetes occurs as a result of the body's inability to use insulin properly—and not because of a problem with insulin production in the pancreas—a pancreas transplant is not a treatment option for most people with type 2 diabetes. It is defendant Cox's belief that plaintiff does not meet the criteria for a pancreatic transplant. Cox is treating plaintiff's diabetic neuropathy with optimizing glucose control and amitriptyline.

Patients with liver disease may develop acute or chronic pain from a variety of causes. Narcotic (opioid) analgesic agents as methadone are extensively metabolized by the liver. Methadone is not advised in severe liver failure because it is especially toxic for patients with poor liver function. Cox also does not believe that methadone is appropriate for plaintiff because he understands that plaintiff has previously been charged with diverting and hoarding opiates. Defendant Cox has treated plaintiff's complaints of chronic pain with amitriptyline and ibuprofen, has recently changed the ibuprofen to sulindac (the records do not indicate when) and has considered adding cymbalta.

C. Inmate Grievances

On April 27, 2012, plaintiff filed inmate grievance number WSPF-2012-8827 requesting liver and pancreas transplants, attaching an ultrasound report and his "Diabetic Log." In the grievance he specifically discusses that the ultrasound report incorrectly concludes that his pancreas is normal because "it does not produce the amount of insulin necessary to control the glucose in [his] body . . . ." The ultrasound report, attached to the grievance, includes a heading stating "CLINICAL INDICATIONS: Hepatitus C hepatoma surveillance," and a finding that "[t]here is no evidence of hepatic cellular disease."

Plaintiff fully exhausted this grievance. In doing so, Corrections Complaint Examiner Welcome Rose responded to plaintiff's appeal, stating that plaintiff "has previously been denied Hepatitis C treatment" and that defendant Cox "does not indicate that there is much more that can be done for [plaintiff] in regards to his Hepatitis C."

Plaintiff has filed several other medical-related grievances during his current stint at the Wisconsin Secure Program Facility, but has not exhausted any of them.

DISCUSSION

A. Exhaustion of Administrative Remedies

Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all available administrative remedies before filing a lawsuit in federal court, meaning that the prisoner must "file complaints and appeals in the place, and at the time, the prison's administrative rules require." Burrell v. Powers, 431 F.3d 282, 285 (7th Cir. 2005) (citing Pozo v. McCaughtry,

286 F.3d 1022, 1025 (7th Cir. 2002)). To satisfy exhaustion requirements, the prisoner must give the prison grievance system "a fair opportunity to consider the grievance," which requires that the complainant "compl[y] with the system's critical procedural rules," Woodford v. Ngo, 548 U.S. 81, 95 (2006), and that the grievance "contain the sort of information that the administrative system requires." Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002). Because exhaustion is an affirmative defense, defendant bears the burden of establishing that a plaintiff failed to exhaust his available remedies. Jones v. Bock, 549 U.S. 199, 216 (2007).

In this case, it is undisputed that plaintiff suffers from a variety of serious medical needs. What is less clear are the precise contours of plaintiff's claims. In the August 30, 2012 screening order in this case, I noted that plaintiff has hepatitis C, cirrhosis of the liver, fibromyalgia, arthritis, high blood pressure and 53 "clips, pins and staples" inside his body. In his complaint, plaintiff alleges that he has received *no* treatment, even painkillers, for his medical conditions and severe pain after being transferred back to the Wisconsin Secure Program Facility in January 2012.

The purpose of the grievance procedure is to "alert prison officials to perceived problems and to enable them to take corrective action without first incurring the hassle and expense of litigation." Cannon v. Washington, 418 F.3d 714, 719 (7th Cir. 2005). Thus plaintiff has satisfied the exhaustion requirement only to the extent that he has raised particular treatment issues and exhausted his administrative remedies with regard to those issues. This is a problem for plaintiff because he suffers from many different maladies, yet

he has fully exhausted only one grievance concerning medical care in his current stay at the Wisconsin Secure Program Facility: a grievance regarding the denial of liver and pancreas transplants.

Defendants argue that because plaintiff has exhausted only this grievance, he has failed to exhaust his claims that defendants "have failed to provide him any treatment [for] his various medical conditions or medication to manage his 'severe pain.'" I agree with defendants to a certain extent; this grievance certainly does not give notice to defendants that plaintiff was concerned about treatment for the wide range of maladies from which he suffers. However, plaintiff's discussion of his diabetes in the grievance and his attachment of his "Diabetic Log" to the grievance, the discussion in the attached ultrasound report plaintiff's hepatitis C and Corrections Complaint Examiner Welcome Rose discussion of plaintiff's hepatitis C in response to his appeal gives reason to believe that defendants were put on notice that plaintiff filed his grievance because he was dissatisfied with the treatment of his diabetes and hepatitis C. Accordingly, I conclude that plaintiff has exhausted his administrative remedies with regard to his claims that defendants were deliberately indifferent when they failed to treat these diseases adequately.

With regard to treatment for plaintiff's severe pain, it is clear from his various filings that he believes defendants are being deliberately indifferent by refusing to provide him with methadone or other opioid medication. Defendants again argue that plaintiff exhausted only the grievance concerning transplants in his current stay at the Wisconsin Secure Program Facility. However, plaintiff's grievance history shows that in December 2010 and January

2011, while at the Waupun Correctional Institution, he filed two grievances regarding the reduction or discontinuation of his methadone and that these grievances were appealed to the corrections complaint examiner. It seems at least plausible that these grievances put defendants were put on notice of plaintiff's concerns about his pain medication, although the specifics are unknowable because the parties did not include them in their submissions. In addition, in previous cases I have concluded that § 1997e(a) does not require prisoners to file a new grievance each time a new instance of the same alleged conduct occurs. E.g., Freeman v. Berge, 2004 WL 1774737, *5 (W.D. Wis. 2004) (multiple instances of food deprivation). See also Johnson v. Johnson, 385 F.3d 503, 521 (5th Cir. 2004) (concluding that prisoner satisfied exhaustion requirements with first grievance about alleged failure to protect him from sexual assaults; prisoner was not required to file new grievance with each new sexual assault because "prisoners need not continue to file grievances about the same issue"). Therefore, I cannot conclude that defendants have carried their burden of proving that plaintiff failed to exhaust his administrative remedies on his claim concerning pain medication, so plaintiff will be allowed to move forward with that claim as well. I will grant defendants' motion for summary judgment on all of plaintiff's claims other than those concerning his severe pain and the treatment of his diabetes and hepatitis C.

B. Preliminary Injunctive Relief

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."

Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); see also Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 389 (7th Cir. 1984) ("[A] preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.").

To obtain a preliminary injunction, the moving party must first meet its threshold burden. Plaintiff must establish that (1) he has a reasonable likelihood of success on the merits; (2) denial of relief would result in irreparable harm to him while he waits for the resolution of his claims; and (3) traditional legal remedies are inadequate to remedy the harm. Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of America, Inc., 549 F.3d 1079, 1086 (7th Cir. 2008). "[I]f a plaintiff fails to meet just one of the prerequisites for a preliminary injunction, the injunction must be denied." Cox v. City of Chicago, 868 F.2d 217, 223 (7th Cir. 1989). If, however, plaintiff makes both showings, the court balances the relative harms and the public interest using a "sliding scale." Girl Scouts of Manitou Council, Inc., 549 F.3d at 1086.

Under the Eighth Amendment, prison officials have a duty to provide medical care to those being punished by incarceration. Snipes v. De Tella, 95 F.3d 586, 590 (7th Cir. 1996) (citing 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 it. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997).

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 when treatment is withheld, Gutierrez, 111 F.3d at 1371-73, "significantly affects an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), causes pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir 1996) 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).

From plaintiff's materials supporting his preliminary injunction motions, I understand that he is seeking liver and pancreas transplants, as well as methadone or other opiate pain medication to treat his severe pain. However, as a general rule, prison officials are not deliberately indifferent to a prisoner's medical needs simply because they deny the prisoner the particular medical treatment of his choice. Greeno v. Daley, 414 F.3d 645, 653 (7th Cir. 2005). It is not enough for plaintiff to show that he disagrees with defendants' conclusions about the appropriate treatment for his medical conditions, Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006), or even that defendants could have provided better treatment. Lee v. Young, 533 F.3d 505, 511-12 (7th Cir. 2008). "Mere differences of opinion among medical personnel regarding a patient's appropriate treatment do not give rise to deliberate indifference." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). Instead, plaintiff must show that the treatment "decision [wa]s 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." Id. at 261-62; see also Snipes, 95 F.3d at 590-91 (plaintiff must show that treatment decision was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate his condition").

Here, defendants have offered expert medical testimony that plaintiff's medical conditions have been treated appropriately and, in particular, that liver and pancreas transplants are not appropriate for plaintiff at this time. Defendant Cox states that a liver transplant "is a treatment option for people who have end-stage liver failure that can't be controlled using other treatments," that a transplant is "not a cure" for a person with hepatitis C and therefore plaintiff "does not meet the criteria" for a liver transplant. Dkt. #16. He that a pancreas transplant is not a viable treatment option for most people with type 2 diabetes and for that reason, plaintiff "does not meet the criteria for a pancreatic transplant." Id. Finally, Cox details the ways plaintiff's conditions are being treated, by conducting "accuchecks" of plaintiff's blood sugar, monitoring his liver function and providing various medications. Plaintiff provides no expert testimony indicating that the course of treatment is so far outside the scope of accepted professional standards as to show deliberate indifference by defendants. Accordingly, he fails to show any likelihood of success on his claim against defendants for failing to provide him with liver and pancreas transplants. Therefore, his motions for preliminary injunctive relief must be denied on this claim.

Turning to plaintiff's claim about methadone or opiate pain medication, plaintiff

believes that Dr. Sumnicht at the Waupun Correctional Institution ended his prescription for methadone for retaliatory reasons and non-medically based ones. (Sumnicht is not a defendant in this case because plaintiff's claims against him did not qualify under the imminent danger standard.) However, plaintiff has not proposed any findings of fact suggesting that his current medical provider, defendant Cox, is retaliating against him. In addition to Cox's belief that plaintiff has previously diverted his methadone, Cox testifies that opioid-based pain management is inappropriate because those substances are especially toxic for patients with impaired liver function and that as a general rule, it is best not to treat chronic pain with this type of medication. Cox has treated plaintiff's chronic pain with amitriptyline and ibuprofen, recently changed the ibuprofen to sulindac and has considered other medications such as cymbalta. Plaintiff has not submitted expert medical evidence indicating that Cox's approach is outside the scope of accepted practice, so at this point he fails to show a likelihood of success on the merits of his deliberate indifference claim regarding pain medication. I will deny his motions for preliminary injunctive relief on this claim as well.

C. Appointment of Counsel and Expert

All that remains are plaintiff's motions for appointment of counsel and appointment of an expert witness. In deciding whether to appoint counsel, I must first find that plaintiff has made a reasonable effort to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. Jackson v. County of McLean, 953 F.2d

1070 (7th Cir. 1992). Plaintiff has shown that he is indigent and that he has contacted several lawyers, all of whom have turned down his requests for representation.

The next question is whether plaintiff meets the legal standard for appointment of counsel. Litigants in civil cases do not have a constitutional right to a lawyer; federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. Pruitt v. Mote, 503 F.3d 647, 654, 656 (7th Cir. 2007). They exercise that discretion by determining from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Id. at 655. Thus far, plaintiff has done an adequate job of prosecuting his case. With respect to the complex medical issues surrounding plaintiff's deliberate indifference claims, it seems clear that plaintiff will need to prove the applicable standards of treatment and show what decisions by defendants were so outside the scope of those standard as to indicate deliberate indifference on their part. However, plaintiff does not have the right to appointment of counsel for the purpose of reallocating the time and cost of finding and hiring a medical expert. Although the court has the power to appoint an expert at defendants' expense, Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997), plaintiff has not persuaded me that it would be appropriate to do so in this case because he has not shown that he has tried and failed in obtaining an expert and it is not clear on the record at this point that an expert would substantially aid the court in adjudicating this matter. Accordingly, I will deny his motions for appointment of counsel and expert.

ORDER

IT IS ORDERED that

1. Defendants David Burnett, Scott Hoftiezer, James Greer and Burton Cox's motion for partial summary judgment based on plaintiff Johnny Lacy's failure to exhaust his administrative remedies, dkt. #22, is GRANTED IN PART. Plaintiff will be allowed to proceed on his claims that defendants acted with deliberate indifference by failing to adequately treat plaintiff's hepatitis C, diabetes, and severe pain. The remainder of plaintiff's claims are DISMISSED.

2. Plaintiff's motions for preliminary injunctive relief, dkt. ##1 & 20, are DENIED.

3. Plaintiff's motion for appointment of counsel, dkt. #25, is DENIED.

4. Plaintiff's motion for appointment of an expert, dkt. #26, is DENIED.

Entered this 4th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge