IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD CHARLES WILSON,

ORDER

Plaintiff,

14-cv-222-bbc

v.

DR. LORI ADAMS, DR. PATRICK MURPHY
and WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

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In this civil action, plaintiff Donald Wilson is proceeding on claims that defendants Lori Adams and Patrick Murphy provided him inadequate medical care with respect to his Alzheimer's disease and problems with his neck and claims that the Wisconsin Department of Corrections failed to provide him appropriate accommodations for his disability. Now before the court is plaintiff's motion asking the court "[p]ursuant to Federal Rule of Civil Procedure 35(a) . . . for an order requiring defendants to produce plaintiff Donald C. Wilson for a physical examination to be performed by Dr. Paul Baek at the Aurora BayCare Medical Center, 2845 Greenbrier Road, Green Bay, WI 54311 at a time and date to be mutually agreed upon by the parties." Plt.'s Br., dkt. #35, at 1.

Defendants object to transporting plaintiff to Dr. Baek's office but they do not object to Baek's examining plaintiff at the prison. In his reply brief, plaintiff adds a request that he be seen first by a primary care physician in order to obtain a referral to Dr. Baek.

Specifically, plaintiff asks "that the Court order that, if necessary for purposes of obtaining a referral, he be produced for an evaluation by his primary care physician, Dr. Robert Mead, at Bellin Health Ashwaubenon, 1630 Commance Ave., Green Bay, Wisconsin, 54313 at a time and date to be agreed upon by the parties for purposes of an examination by Dr. Mead to provide a referral to Dr. Baek. In the alternative, Wilson asks that the court order defendant Dr. Murphy or another DOC physician to provide the necessary referral." Plt.'s Br. in Reply, dkt. #39, at 4.

Fed. R. Civ. P. 35(a) provides that the court may order a party to "submit to a physical or mental examination." However, "Rule 35 of the FRCP does not vest the court with authority to appoint an expert to examine a party wishing an examination of *himself*. Rather, under appropriate circumstances, it would allow the court to order a party to submit to a physical examination at the request of an *opposing* party." Brown v. United States, 74 Fed. Appx. 611, 614-15 (7th Cir. 2003) (emphasis added). See also Coleman v. Gullet, No. CIV.A. 12-10099, 2013 WL 2634851, at *13 (E.D. Mich. June 10, 2013) (citing Brown approvingly and reaching same conclusion involving prisoner plaintiff).

Furthermore, even if I may order defendants to arrange a medical examination of plaintiff, neither side points to any authority that would allow the court to order plaintiff transported *outside* his prison for a medical examination in pursuit of a civil lawsuit. Under 28 U.S.C. § 2241(c), the court's powers for issuing a writ of habeas corpus are limited to particular circumstances, none of which appear applicable in this case.

Ivey v. Harney, 47 F.3d 181 (7th Cir. 1995), is instructive on this point. In that case,

the prisoner plaintiff was proceeding on claims that he had received inadequate medical care in county jail. Later, while in state prison, the district court ordered the Illinois Department of Corrections to produce the plaintiff for a medical examination outside the prison even though the state was willing to have a physician examine plaintiff in the prison. The court of appeals held that neither 28 U.S.C. § 2241(c) nor § 1651(a) (which allows federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law") gave the district court authority to "order a custodian to transport the prisoner outside the prison to acquire evidence in a suit to which the custodian is not a party." Ivey, 47 F.3d at 186. Although Wisconsin Department of Corrections employees are parties to this suit, the court's reasoning in Ivey applies in this case. Cf. id. at 188 (Rovner, J., concurring) (noting potential that ruling would apply to state defendants). The court held that for the purpose of allowing inmates access to the courts, prisons "must permit lawyers and physicians access to the prisoner," but prisons may require the lawyer or physician to come to the prison rather than transport the prisoners, even if there are better legal materials or medical equipment at a location outside the prison. Id. at 186.

Without elaboration, plaintiff says that "due to expense and logistical issues, Wilson is not able to arrange for Dr. Baek to perform an evaluation at [the prison]." Plt.'s Br. in Reply, dkt. #39, at 2. I recognize that the costs of litigation are challenges for indigent plaintiffs and pro bono counsel, but plaintiff has not identified the source of any authority that would allow a court to order defendants to transport plaintiff for a medical examination

in support of plaintiff's own case or for the court to order defendants to provide a referral. Id. ("If expert assistance is essential, [plaintiff's] lawyers should find a willing physician in [a nearby location]. Or they should offer to compensate the Department of Corrections for the cost of transportation and security.").

Plaintiff says the prison policy endorses his requests because it is the prison's policy "to permit inmates reasonable access to the judicial process," Wis. Admin. Code § DOC 309.155(1), and to allow prisoners to be released under supervision for "rehabilitative purposes," §§ DOC 325.01(1)(a), .08(1)(c), but plaintiff has not shown that defendants are interfering with the judicial process or that release for a medical evaluation is related in any way to rehabilitation.

Plaintiff cites In re American President Lines, Ltd., 929 F.2d 226, 228 (6th Cir. 1991), for the proposition that a district court may order an opposing party to pay transportation costs associated with medical examinations, but that case did not involve prisoners and it does not provide authority for ordering defendants to transport plaintiff out of prison. Moreover, the Court of Appeals for the Seventh Circuit has not endorsed the view that indigent plaintiffs have a legal right to compel defendants to bear such costs and plaintiff has not shown that he has no other means of obtaining the evidence he requires. Cf. Brown, 74 Fed. Appx. at 614-15 (holding that defendant is not obligated to pay physical examination costs); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) ("The Supreme Court has never held that access to the courts must be free; it has concluded, rather, that reasonably adequate opportunities for access suffice.").

Defendants raise another objection to plaintiff's motion, which is that the motion is actually an attempt to receive medical care and not an effort to obtain evidence for trial under Fed. R. Civ. P. 35(a). I need not determine this issue because plaintiff has not identified any statutory or constitutional authority for granting his motion.

ORDER

Plaintiff Donald Charles Wilson's motion "for the production of Donald C. Wilson for a physical examination pursuant to federal rule of civil procedure 35(a)," dkt. #35, is DENIED.

Entered this 6th day of April, 2015.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge