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

CHRISTIAN R. AGUIRRE-HODGE,

Plaintiff,

v.

CHARLES LARSON,

Defendant.

OPINION and ORDER

18-cv-994-jdp

Plaintiff Christian R. Aguirre-Hodge, appearing pro se, is currently an inmate at New Lisbon Correctional Institution. Aguirre-Hodge alleges that when he was incarcerated at Fox Lake Correctional Institution, defendant Dr. Charles Larson refused to provide him with bottled water, causing him to suffer migraine headaches and dangerously unstable blood pressure. Aguirre-Hodge brings claims under the Eighth Amendment to the United States Constitution and Wisconsin medical malpractice law.

Larson has filed a motion for summary judgment. Dkt. 54. I will grant that motion and dismiss the case because there no evidence suggesting that Aguirre-Hodge's medical problems were caused by contaminated water or that Larson failed to properly treat his problems.

UNDISPUTED FACTS

Almost all of Larson's proposed findings of fact are undisputed. Aguirre-Hodge has not filed a brief or supporting materials opposing Larson's motion for summary judgment. Instead, he filed a motion to strike Larson's summary judgment motion as untimely, which I denied because the court had previously given Larson an extension of time to file his motion and the court received Larson's motion by that deadline. Dkt. 62. I gave Aguirre-Hodge another chance

to submit a summary judgment response. But instead Aguirre-Hodge has filed a submission asking for reconsideration of my decision denying his motion to strike, and stating that in any event he "will not file a response but . . . will file an appeal." Dkt. 64.

I will deny Aguirre-Hodge's motion for reconsideration because I did not err in accepting Larson's motion for summary judgment: it was timely filed by the extended deadline previously issued by this court. Because Aguirre-Hodge has refused to file a response to Larson's summary judgment motion, I will consider most of Larson's proposed findings of fact as undisputed. *See* Prel. Pretrial Conf. Packet, Dkt. 41-1, at 8 ("If a party fails to respond to a fact proposed by the opposing party, the court will accept the opposing party's proposed fact as undisputed."). But because Aguirre-Hodge has filed a verified complaint stating under penalty of perjury that his allegations are true, Dkt. 34, I will consider that document as Aguirre-Hodge's declaration. *See Ford v. Wilson*, 90 F.3d 245, 246–47 (7th Cir. 1996) (verified complaint can be admissible evidence at summary judgment if it otherwise satisfies the requirements for a declaration).

The following facts are undisputed unless otherwise noted.

Plaintiff Christian Aguirre-Hodge was housed at Fox Lake Correctional Institution (FLCI) from January 2016 to September 2018. During that time, defendant Charles Larson was a physician at FLCI.

Aguirre-Hodge has a history of chronic migraine headaches and he was seen by a specialist at the University of Wisconsin Headache Clinic years before his transfer to FLCI. Aguirre-Hodge states that when he was transferred to FLCI, there were notifications around the prison telling inmates with high blood pressure to contact the Health Services Unit. I take

Aguirre-Hodge to be saying that these notices were issued because of the presence of contaminants like lead in the water at FLCI.

Larson saw Aguirre-Hodge multiple times each year from 2016 to 2018. Aguirre-Hodge first reported complaints of migraines to Larson in August 2016. Larson examined Aguirre-Hodge, discussed the case with a psychiatrist, and reviewed the recommendation of the UW Headache Clinic. Larson changed the medication that Aguirre-Hodge was taking for his migraines.

Larson followed up with Aguirre-Hodge multiple times, examining Aguirre-Hodge and adjusting his medications. Medical staff worked with Aguirre-Hodge to ensure that Larson was taking his medications as directed. Aguirre-Hodge reported benefit from verapamil, one of the several medications that Larson had prescribed.

In March 2017, Larson saw Aguirre-Hodge for headaches, conducted an examination, and found no clinical reason to order bottled water because he thought the water was not affecting Aguirre-Hodge's chronic headaches. In September 2017, Larson arranged for Aguirre-Hodge to be seen again by a neurologist from the UW Headache Clinic.

Aguirre-Hodge also suffers from high blood pressure. Staff recorded Aguirre-Hodge's blood pressure dozens of times while Aguirre-Hodge was at FLCI. Larson describes Aguirre-Hodge's blood pressure as "stable" and "never near dangerous levels." Dkt. 59, ¶¶ 25, 32, 41.

Aguirre-Hodge states that after he was transferred to New Lisbon Correctional Institution, his blood pressure became "dangerously unstable" and he received new medications for his increasingly severe migraines after previous "conservative" treatments had failed. Dkt. 34, at 3.

I will discuss additional facts as they become relevant to the analysis.

ANALYSIS

Aguirre-Hodge contends that Larson violated his rights under the Eighth Amendment and under Wisconsin medical malpractice law by refusing to provide him with bottled water, thus forcing him to drink tap water contaminated with lead and causing or exacerbating his migraines and high blood pressure.

The Eighth Amendment prohibits prison officials from acting with conscious disregard toward prisoners' serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). A "serious medical need" is 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 is serious if it is life-threatening, carries risks of permanent serious impairment if left untreated, results in needless pain and suffering, significantly affects an individual's daily activities, *Gutierrez v. Peters*, 111 F.3d 1364, 1371–73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). A defendant "consciously disregards" an inmate's need when the defendant knows of and disregards "an excessive risk to an inmate's health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Snipes v. Detella*, 95 F.3d 586, 590 (7th Cir. 1996). 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).

Aguirre-Hodge also contends that Larson committed medical malpractice under Wisconsin law by failing to prescribe him bottled water. Under Wisconsin law, "medical malpractice" is a claim that a medical care provider's actions fell below the requisite standard of care. *See, e.g., McEvoy by Finn v. Grp. Health Co-op. of Eau Claire*, 213 Wis. 2d 507, 529–30 (1997). This type of claim, "as all claims for negligence, requires the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages." *Paul v. Skemp*, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 625 N.W.2d 860.

Aguirre-Hodge's claims fail for two reasons. The first is that under either the Eighth Amendment or Wisconsin medical malpractice law, a plaintiff must show that the defendant's actions or inactions caused him to be injured. The facts here do not raise a reasonable inference that Aguirre-Hodge was injured by lead in FLCI's water. Aguirre-Hodge is not a medical professional, so he is "not competent to diagnose himself, and he has no right to choose his own treatment." *Lloyd v. Moats*, 721 F. App'x 490, 495 (7th Cir. 2017).

Neither side submits facts detailing the extent of the lead problem at FLCI. I am aware from related litigation that the water at FLCI had at times exceeded the Environmental Protection Agency's "action level" for lead and copper in years preceding the events of this case, and that the Department of Corrections took steps to remediate, but not eliminate, these metals in the water. *See Stapleton v. Carr*, 438 F. Supp. 3d 925, 927 (W.D. Wis. 2020). However, the mere presence of lead in the water at FLCI is not enough to show that it caused Aguirre-Hodge's problems.

There are medical care cases where it is obvious to a lay person that a plaintiff is correct in blaming a particular cause for his injuries. That is not the case here. Aguirre-Hodge alleged that materials at the prison notified inmates with high blood pressure to speak with medical

staff about the water, which is consistent with notifications discussed in my *Stapleton* decision. But that alone doesn't prove that lead harmed him. Aguirre-Hodge would need an expert to make the link between the contaminants and his medical problems.

Aguirre-Hodge made an expert disclosure in which he asks the court to use the report issued by Alfred Franzblau, a medical and toxicology expert that this court appointed to review the medical records of the numerous plaintiffs, including Aguirre-Hodge, proceeding with individual medical-care cases in this court regarding the FLCI water. Dkt. 48; *see also Stapleton*, Case No. 16-cv-406-jdp, Dkt. 170 (W.D. Wis. Apr. 3, 2020). But Franzblau's report does not support Aguirre-Hodge's theory. Instead, Franzblau opines that it is unlikely that Aguirre-Hodge suffered any acute or chronic toxic effects from the metals that Franzblau considered (arsenic, copper, lead, and manganese). And in particular, he stated that "it is unlikely that any of the 14 inmates [including Aguirre-Hodge] has experienced any chronic symptoms or other chronic toxic effects . . . from ingestion of lead in the drinking water at FLCI during the time period in question." Dkt. 33, at 13. He came to this conclusion in large part because "the risk of chronic toxic effects related to lead (such as high blood pressure or cancer) is generally related to cumulative (i.e., many years) or lifetime exposure to lead, and not brief episodes of over-exposure, such as those lasting for a few months, as in the situation at FLCI." *Id*. at 14. And the "time in question" in Franzblau's report included the periods during which the FLCI water exceeded the EPA's actions levels for lead and copper; Aguirre-Hodge was not transferred to FLCI until after those periods.

Aguirre-Hodge assumes that his medical problems were caused by contaminants in the FLCI water. But his mere speculation that the water caused his injuries is not enough to create a disputed issue of material fact making a trial necessary. *See, e.g.*, *Herzog v. Graphic Packaging*

Int'l, Inc., 742 F.3d 802, 806 (7th Cir. 2014) (While nonmovant "is entitled . . . to all reasonable inferences in her favor, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." (citation omitted)). That alone is reason enough to grant Larson's motion for summary judgment.

A second reason to grant Larson summary judgment is that Aguirre-Hodge fails to show that Larson provided him inadequate medical care. For his Eighth Amendment claim, that would mean that Larson acted with conscious disregard toward Aguirre-Hodge's medical problems and the danger that lead posed toward him. The record shows that Aguirre-Hodge's blood pressure was routinely monitored and that Larson considered it stable, and that Larson repeatedly saw Aguirre-Hodge for his migraines, modifying his treatment as needed and sending him back to the UW Headache Clinic. Larson also states that, at least by the times of the events in this case, he had been assured at multi-disciplinary meetings that the FLCI water was being monitored by the Department of Natural Resources and that it was safe for human consumption. There is not any evidence suggesting that Larson thought the water was a danger to Aguirre-Hodge yet disregarded that danger, or suggesting that he more generally disregarded Aguirre-Hodge's migraines or high blood pressure.

As for Aguirre-Hodge's medical malpractice claim that Larson should have provided him bottled water, Aguirre-Hodge cannot prevail without expert testimony showing that Larson failed to meet the standard of care under these circumstances. *See, e.g., Carney-Hayes v. Nw. Wisconsin Home Care, Inc.*, 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524. Sometimes this court will recruit counsel to assist a litigant in obtaining an expert for this type of issue. But given the dearth of willing counsel available to take pro bono cases, this court should not recruit counsel "if the plaintiff's 'chances of success are extremely slim.'" *Watts v. Kidman*,

42 F.4th 755, 766 (7th Cir. 2022) (quoting *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981). I consider it extremely unlikely that recruited counsel would be able to find an expert who would opine that Larson failed to meet the standard of care here, particularly because court-appointed expert Franzblau has already concluded that it is unlikely that Aguirre-Hodge was harmed by the water.

Because Aguirre-Hodge fails to show that the FLCI water caused him harm or that Larson provided him inadequate care, I will grant Larson's motion for summary judgment and dismiss the case.[1]

ORDER

IT IS ORDERED that:

1. Plaintiff Christian R. Aguirre-Hodge's motion for reconsideration, Dkt. 64, is DENIED.
2. Defendant Chares Larson's motion for summary judgment, Dkt. 54, is GRANTED.
3. The clerk of court is directed to enter judgment accordingly and close this case.

Entered January 27, 2023.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge

[1] Larson also contends that he is entitled to qualified immunity on Aguirre-Hodge's Eighth Amendment claim. Because I am dismissing that claim on the merits, I need not consider Larson's qualified immunity argument.