

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

FAIRLY EARLS,

Plaintiff,

OPINION AND ORDER

v.

18-cv-332-wmc

TIMOTHY DITTERS and
SALAMUIIAH SYED,

Defendants.

Pro se plaintiff Fairly Earls, a prisoner at Columbia Correctional Institution (“CCI”), filed this lawsuit pursuant to 42 U.S.C. § 1983, claiming that two CCI employees, Dr. Salamuiiah Syed and Nurse Timothy Ditters, violated his Eighth Amendment rights by acting with deliberate indifference to his medical emergency. Earls also asserts a claim of medical negligence against Dr. Syed. Although pending for some time, Earls’ complaint is still before the court for screening as required by 28 U.S.C. § 1915A. The court will grant Earls leave to proceed on Eighth Amendment claims against both defendants and a Wisconsin negligence claim against Dr. Syed.

ALLEGATIONS OF FACT¹

Throughout the relevant time period, Earls was incarcerated in CCI. In July of 2017, Earls began experiencing severe pain in his back, chest, stomach and hands, as well as muscle spasms in his back and chest. Earls first submitted a Health Services Request

¹ In addressing any *pro se* litigant’s complaint, the court must read the allegations generously, resolving ambiguities and drawing reasonable inference in the plaintiff’s favor. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

(“HSR”) to the Health Services Unit (“HSU”) on July 31, 2017. Despite that request, Earls did not receive medical attention until informing a patrolling officer of his ongoing symptoms on the night of August 2, 2017. In conjunction with a medical history that includes triple-bypass heart surgery, Earls’ symptoms prompted his transport to Divine Savior Hospital for further examination. While there, however, hospital staff informed Earls that he would only be checked for heart conditions.

Upon release from the hospital on the morning of August 2nd, Earls was brought back to the HSU to be seen by Nurse Ditters. Although Earls informed Ditters of the severe pain in his upper body and hands, Ditters chose neither to prescribe medication nor inquire further as to Earls’ condition before sending him back to his housing unit.

With his pain persisting, Earls informed his housing unit sergeant of his symptoms at 12:30 p.m. that same day. By this time, Earls’ hands had developed dozens of blisters in addition to the continuing pain. After the housing unit sergeant informed an HSU staff member of both Earls’ symptoms and his earlier hospital visit, Earls was taken to see Nurse Ditters for the second time that day. Ditters prescribed ibuprofen for a fever and acid reflux. Despite the declining condition of Earls’ hands, however, Ditters did not refer him to a physician. Earls was then returned to his housing unit once again.

Earls continued to request additional medical attention every day between August 3, 2017, and August 8, 2017, but he was not taken back to HSU until August 9, 2017, where he was seen by Dr. Syed. Upon examining Earls’ blistered hands, Dr. Syed declined to refer him to a skin specialist or prescribe him with any pain medication whatsoever. Instead, Dr. Syed diagnosed him with scabies and prescribed permethrin cream and

clindamycin, then had him returned to his housing unit.

Earls would continue without pain medication until August 14, 2017. That day, the HSU responded to one of his multiple HSR submissions and brought him in for examination. This time, a different nurse evaluated Earls. After taking his vitals and seeing his worsened physical condition, the nurse had Earls immediately transported to Divine Savior Hospital's emergency room.

At the time of arrival, Earls' symptoms included fever, dizziness, back and flank pain, diarrhea, nausea, and the continued blistering of his extremities. A physician from Divine Savior diagnosed Earls with Impetigo-Bullous-bilateral hands.² Earls was then given a one-gram injection of Ancef and a ten-day prescription for the pain medication Keflex.

Earls claims that if he had received adequate and timely care, his suffering would have been mitigated, and the prolonged duration without such care has left Earls with permanent nerve damage. Earls also claims the medication caused persistent diarrhea, which in turn led to hemorrhoids that required additional medical attention. He further claims that if his infection had been addressed earlier, then a lesser prescription may have been adequate, he may not have developed hemorrhoids, and the additional medical attention may not have been necessary.

²

Bullous impetigo is almost always caused by *Staphylococcus aureus* bacteria. It usually forms larger blisters or bullae filled with a clear fluid that may become darker and cloudy. The blisters start on unbroken skin and aren't surrounded by reddish areas. The blisters become limp and clear, and then burst open.

<https://www.healthline.com > health > impetigo> (last visited April 19,2021).

On August 16, 2017, Earls submitted an inmate complaint alleging inadequate medical treatment. His complaint was affirmed by CCI's inmate complaint examiner and the corrections examiner.

OPINION

The court understands plaintiff to be pursuing Eighth Amendment deliberate difference claims against nurse Ditters and Dr. Syed, as well as a Wisconsin medical negligence claim against Dr. Syed. The court will address each type of claim in turn.

I. Deliberate Indifference

A prison official has violated the Eight Amendment if he or she demonstrates “deliberate indifference” to a prisoner’s “serious medical need.” *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). “Serious medical needs” include: (1) life-threatening conditions or those carrying a risk of permanent serious impairment if left untreated, (2) the withholding of medical care that results in needless pain and suffering, and (3) conditions that have been “diagnosed by a physician as mandating treatment.” *Gutierrez v. Peters*, 111 F.3d 1364, 1371 (7th Cir. 1997).

“Deliberate indifference” encompasses two elements: (1) awareness on the part of officials that the prisoner needs medical treatment and (2) disregard of this need by conscious failure to take reasonable measures. Allegations of delayed care, even a delay of a just a few days, may violate the Eighth Amendment if the alleged delay caused the inmate’s condition to worsen or unnecessarily prolonged his pain. *See Estelle*, 429 U.S. at 104–05; *Petties v. Carter* 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that an

inexplicable delay in medical treatment for a prisoner that serves no penological interest can support an inference of deliberate indifference as an element for a prisoner's Eighth Amendment claim); *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010); *Grieverson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008) (guards could be liable under the Eighth Amendment for delaying treatment of broken nose for a day and half); *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007) (a plaintiff who painfully dislocated his finger and was needlessly denied treatment for two days stated a claim for deliberate indifference). Thus, plaintiff's claim has three elements under this standard:

1. Plaintiff had a serious medical need.
2. Defendants knew that plaintiff needed treatment.
3. Defendants consciously failed to take reasonable measures to provide the prisoner with the necessary treatment.

As an initial matter, the court will infer for the purposes of screening that the plaintiff's bullous impetigo constitutes a serious medical need, particularly given its alleged failure to improve and potential for infection if untreated. *See Staffa v. Pollard*, No.13-cv-5, 2013 WL 1498957, at *2 (E.D. Wis. Apr. 9, 2013) (allowing prisoner's deliberate indifference claim to proceed past screening based on his alleged serious medical need of having contracted several contagious skin conditions, including impetigo). Plaintiff has also alleged sufficient facts to infer deliberate indifference to proceed past screening against Nurse Ditters and Dr. Syed given his allegations that both: (1) knew he needed treatment and (2) had the opportunity to examine plaintiff after his symptoms of severe pain and blistering developed. As for their respective responses, while Ditters may have provided

plaintiff with ibuprofen for his other symptoms, it appears that he made no effort to address his skin condition. His failure to take any step to address Earls' skin condition supports a reasonable inference of deliberate indifference. In fairness, Dr. Syed is a closer call. On one hand, plaintiff alleges that Dr. Syed misdiagnosed him with scabies, which could support a finding of deliberate indifference since his symptoms worsened considerably, allowing for a reasonable inference that his treatment decision was blatantly inappropriate. On the other hand, scabies can develop into impetigo, *Scabies*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/scabies/symptoms-causes/syc-20377378> (last visited April 19, 2021), suggesting that plaintiff may have presented to Dr. Syed on August 9 with scabies. Still, at this stage, when the court must resolve every ambiguity in plaintiff's favor, the court will infer that Dr. Syed misdiagnosed him and allow plaintiff to proceed on this claim.

As plaintiff proceeds with these claims, however, he should be aware that clearing this initial screening hurdle does not relieve plaintiff of the burden to come forward with concrete evidence as this case progresses. For example, at summary judgment or trial, it will be plaintiff's burden to show that a reasonable jury could find in his favor on each element of his claim. *Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999). For example, plaintiff will be required to prove that defendants' conduct was "blatantly inappropriate," which may be difficult, especially as to Dr. Syed, who appears to have exercised some degree of medical judgment. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). This may even require his introducing expert opinions that only a medical doctor or psychologist can provide. *See Ledford v. Sullivan*,

105 F.3d 354, 358-59 (7th Cir. 1997) (distinguishing between deliberate indifference cases where an expert is unnecessary and those where the jury must consider “complex questions concerning medical diagnosis and judgment”).

II. Wisconsin Medical Negligence

Plaintiff also seeks to proceed on a claim of medical negligence against Dr. Syed. Jurisdiction is proper over this claim under 28 U.S.C. § 1367(a) (“district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution”). Moreover, under Wisconsin law, the elements of a cause of action in negligence are: (1) a duty of care or a voluntary assumption of a duty on the part of the defendant; (2) a breach of the duty, which involves a failure to exercise ordinary care in making a representation or in ascertaining the facts; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 307 (1987).

Plaintiff has alleged sufficient facts for his negligence claim to proceed past screening: (1) it is reasonable to infer that Dr. Syed had a duty towards plaintiff; and (2) it can further be inferred that Dr. Syed’s alleged misdiagnosis of scabies, and the resulting, inadequate treatment that followed, was a breach of duty, which caused the prolonged suffering, as well as potentially contributed to the permanent nerve damage and hemorrhoids due to delayed treatment. Accordingly, plaintiff may proceed against Dr. Syed on a negligence claim.

ORDER

IT IS ORDERED that:

1. Plaintiff Fairly Earls is GRANTED leave to proceed on Eighth Amendment deliberate indifference claims against defendants Dr. Syed and Ditters, and a Wisconsin medical negligence claim against Dr. Syed.
2. Pursuant to 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 defendant. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendants.
3. For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to the defendants' attorney.
4. 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.
5. If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.
6. Plaintiff's request for action motion and prompt hearing motion (dkt. ##15, 16) are DENIED as moot.

Entered this 19th day of April, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge