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

DEVON GREEN,

Plaintiff,

v.

JEFFREY MANLOVE,

Defendant.

OPINION AND ORDER

19-cv-797-wmc

Pro se plaintiff Devon Green brings this action under 42 U.S.C. § 1983 against defendant Dr. Jeffrey Manlove, who Green claims has been acting with deliberate indifference to his knee injury in violation of his Eighth Amendment rights. On February 2, 2021, this court issued an order dismissing Green's first amended complaint for failure to state a claim, but giving him an opportunity to file a second amended complaint. (Dkt. #13.) Green has taken that opportunity, and his proposed amended pleading (dkt. #14) is now ready for screening as required by 28 U.S.C. § 1915A. For the following reasons, the court will allow Green to proceed on an Eighth Amendment claim against defendant Manlove.

ALLEGATIONS OF FACT[1]

Green is currently incarcerated at Waupun Correctional Institution, where Dr. Manlove is a physician. In September of 2017, Green alleges that he severely

[1] For screening purposes, the court assumes the following facts based on the allegations in plaintiff's complaint and the medical records attached to it, which are deemed part of that pleading. *See* Fed. R. Civ. P. 10(c); *see also Witzke v. Femal*, 376 F.3d 744, 749 (7th Cir. 2004) (explaining that documents attached to the complaint become part of the pleading, meaning that a court may consider those documents to determine whether plaintiff has stated a valid claim). At this stage, the court resolves all ambiguities and draws all reasonable inferences in plaintiff's favor. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

hyperextended his right knee while playing basketball. Dr. Manlove treated Green in the health services unit ("HSU"), and instructed him to ice his knee, take ibuprofen, and to rest his knee as much as possible for a few weeks. Green alleges, however, that this treatment was ineffective and that from 2017 through 2018, he "constantly complained that he was in need of surgery, because his knee bothered him a lot," but nothing more was done. (Dkt. # 14 at 2.)

Green "shortly after" re-injured his right knee when about 20 convention oven racks fell on him while he was working in food service. (Dkt. #14 at 2.) He was again treated in the HSU, and Manlove allegedly offered the same conservative treatment as before despite Green's intervening complaints of ongoing knee problems. In support, Green attaches to the complaint a medical restrictions form indicating that he was approved for an ace wrap bandage and ice four times a day from May 24 through June 1, 2018. (Dkt. #14-2.) Green further alleges that by this point his "knee had really immobilized him," but does not also allege that any diagnostic testing was done, or any additional treatment given, at that time. (Dkt. #14 at 2.) Rather, Green claims that he was assigned to a top bunk on the highest tier in his unit, meaning that he had to climb up numerous flights of stairs and up a ladder on a regular basis.

Green alleges that although he "complained over and over again" about these circumstances, his activities were never limited, risking "more damage to [Green's] knee," and he was denied a lower bunk restriction in August of 2019. (Dkt. #14 at 2, 14-3.) Although this bunk restriction was later approved for three months on November 7, 2019, and permanently on June 18, 2020, Green claims that he had to complete six weeks of physical therapy first. (Dkt. ##14-4, 14-5.) Only then, alleges Green, did anyone

acknowledge how serious his knee injury actually was.

On January 6, 2020, Green underwent a CT scan of his right knee at Waupun Memorial Hospital to address his ongoing right knee pain and hyperextension injury. (Dkt. #14-1.) The results indicated tricompartmental osteoarthritis (osteoarthritis affecting all three compartments of Green's right knee), and a bipartite patella (a kneecap consists of two bones instead of one), but no fracture. (Dkt. #14-1.) The complaint does not indicate whether anyone from the HSU ever reviewed the CT scan results with Green or how those results affected his treatment, if at all. Neither the complaint nor the attached records show approval for a surgical consult, or any ongoing treatment beyond ice three times a day and a lower bunk restriction. (Dkt. #14-6.) Green seeks "legal compensation." (Dkt. #14 at 3.)

OPINION

The court understands Green to be alleging that defendant Dr. Manlove failed to provide timely, adequate medical care when Green first injured his right knee in 2017, and after it was re-injured in 2018, causing Green to suffer needlessly for years. To state an Eighth Amendment claim, plaintiff must allege facts supporting an inference that his medical treatment demonstrates "deliberate indifference" to a "serious medical need." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997).

A serious medical need "is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 810 (7th

Cir. 2000) (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997)). Here, Green alleges that he severely hyperextended his right knee in 2017, and re-injured it in 2018, and that his knee "bothered him a lot" and eventually "really immobilized him." (Dkt. #14 at 2.) Moreover, the CT scan results indicate pervasive osteoarthritis. Although it is unclear from the complaint how Green's injury is currently affecting him, his allegations are sufficient to satisfy the serious medical need requirement at the pleading stage. *See, e.g.*, *Gaston v. Ghosh*, 498 F. App'x 629, 632 (7th Cir. Dec. 20, 2012) (knee injury that caused severe pain and required further evaluation and treatment was a serious medical need); *Diaz v. Godinez*, 693 F. App'x 440, 443 (7th Cir. May 15, 2017) (holding that back pain, even if treatable with over-the-counter pain medications, can constitute a serious medical need).

"Deliberate indifference" means that a defendant must have been aware that a plaintiff was at a substantial risk of serious harm but failed to take reasonable measures to abate it. *Farmer v. Brennan,* 511 U.S. 825, 847 (1994). The focus of Green's amended complaint is on Dr. Manlove's alleged failure to timely treat his knee injuries and pain by not ordering an MRI or otherwise taking Green's knee complaints seriously until 2020. Specifically, Green claims that the doctor persisted in ineffective treatment (ice, ibuprofen, ace wrap bandages) despite Green's reports of ongoing knee pain and requests for surgery. The court finds these allegations sufficient to allege deliberate indifference on the part of Dr. Manlove. *See Petties v. Carter*, 836 F.3d 722, 730-31 (7th Cir. 2016) (holding that persisting in a course of treatment known to be ineffective, and inexplicable delay in medical treatment for prisoner, which serves no penological interest, can both support an inference of deliberate indifference).

While the court grants Green leave to proceed against Dr. Manlove on an Eighth Amendment claim, he should be aware that he will ultimately need to come forward with admissible evidence permitting a reasonable trier of fact to conclude that this defendant actually acted with deliberate indifference to his serious medical need. This is a much higher standard than that applied at the initial screening stage. Indeed, a mere disagreement between a prisoner and his doctor about the proper course of treatment generally is insufficient, by itself, to establish an Eighth Amendment violation. *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014). Specifically, going forward, it will be Green's burden to prove that his condition constituted a serious medical need. Additionally, he must also prove that the doctor (1) knew his condition was serious and required treatment or caused serious pain and suffering, and (2) deliberately ignored his need for proper treatment.

ORDER

IT IS ORDERED that:

1) Plaintiff Devon Green is GRANTED leave to proceed on an Eighth Amendment deliberate indifference claim against defendant Jeffrey Manlove.

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 state 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 plaintiff's complaint if it accepts service for the defendant.

3) For the time being, plaintiff must send defendant a copy of every paper or document 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 the defendant's 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 his obligation to inform the court of his new address. If he fails to do this and defendants or the court is unable to locate him, his case may be dismissed for failure to prosecute.

Entered this 4th day of March, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge