

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

ANTHONY P. HEARD, JR.,

Plaintiff,

v.

OPINION and ORDER

HSUM ADAMS, HUSAM KINYON,
PROVIDER GROSS,
and JOHN DOE ON CALL PROVIDER,

22-cv-265-jdp

Defendants.

Plaintiff Anthony P. Heard, Jr., appearing pro se, is a prisoner at Wisconsin Secure Program Facility. Heard alleges that prison medical staff delayed in treating his severe knee and back pain and cancer symptoms. He seeks leave to proceed in forma pauperis with his case, and he has made an initial partial payment of the filing fee as previously directed by the court.

The next step is for me to screen Heard's complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915 and 1915A. In doing so, I must accept his allegations as true, *see Bonte v. U.S Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010), and construe the complaint generously, holding it to a less stringent standard than formal pleadings drafted by lawyers. *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). I will allow Heard to proceed on claims under the Eighth Amendment and Wisconsin negligence law.

ALLEGATIONS OF FACT

Heard suffers from chronic knee pain caused by degenerative joint disease. Knee injections were “the only option that lessen[ed] the pain” Heard had been prescribed one or two injections a year. But in October 2019, Heard’s appointment to an outside provider was canceled, with one of the reasons given by defendants Health Service Manager Adams and assistant manager Kinyon that that an in-house medical provider could administer the injections instead, even though they knew that the prison did not actually have an internal provider to give him the injections.¹ As a result, Heard has still not received another injection.

Heard also suffers from chronic back pain. In May 2020, defendant “Provider Gross” ordered Heard a transcutaneous electrical nerve stimulator (TENS) unit and physical therapy. But Heard didn’t receive the TENS unit until a month later, only after Heard wrote to the Health Services Unit. At one point, Heard filed a grievance about the delay, with defendant Kinyon falsely telling the examiner that Heard had already received the TENS Unit; Heard believes that Kinyon’s false statement caused further delay in him receiving the unit.

Heard repeatedly complained about his back pain, but Adams, Kinyon, and an unidentified “John Doe” provider refused to send him to the hospital. Heard’s pain became so severe that he was eventually sent to the hospital, where he was given an MRI. He was diagnosed with degenerative spinal disc disease and providers also suspected potential cancer and performed a biopsy.

Shortly thereafter, Heard’s pain got worse, he couldn’t hold down food, he developed night sweats and chills, and he became so weak that he had to be transported in a wheelchair.

¹ Heard says that it was canceled “due to the pandemic,” Dkt. 1, at 2, so it’s possible he means to say that this cancellation was in 2020.

Heard complained about this symptoms, but defendants Adams, Kinyon, and the Doe provider did nothing. After Heard's sister complained to prison officials, Heard was taken to the hospital, he was formally diagnosed with cancer, and he started receiving treatment for it.

ANALYSIS

Heard contends that defendants violated the Eighth Amendment to the United States Constitution by delaying in treating his various medical problems. 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). Heard suffers from chronic knee and back pain, and he was ultimately diagnosed with cancer after his back pain worsened. Heard's maladies are enough to show that he had serious medical needs.

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).

Heard alleges that defendants Adams and Kinyon refused to follow through on obtaining him injections for his severe knee pain, even though that was the only effective treatment Heard had received, That is enough to state Eighth Amendment claims against Adams and Kinyon for consciously disregarding his knee pain.

Heard alleges that there was about a month-long delay in him receiving a TENS unit prescribed by defendant Gross, but Heard does not explain why Gross was responsible for this delay after he prescribed the unit. So Heard does not state a claim against Gross. Heard alleges that defendant Kinyon lied to a grievance examiner that Heard had received the unit even though he had not, which led to further delay. That is sufficient to state an Eighth Amendment claim against Kinyon for intentionally interfering with the investigation into the delay regarding the TENS unit. *Smith v. Knox Cty. Jail*, 666 F.3d 1037, 1040 (7th Cir. 2012) (Delay in treatment may constitute conscious disregard if delay unnecessarily prolongs prisoner's pain).

Heard also alleges that defendants Adams, Kinyon, and a Doe provider delayed in sending him to the hospital for his back condition both before and after he was diagnosed with degenerative spinal disc disease and potential cancer. In particular, they delayed arranging further treatment even after they knew that Heard was being assessed for cancer and that he was suffering severe symptoms in addition to his back pain. I will grant Heard leave to proceed on Eighth Amendment claims against Adams, Kinyon, and Doe for these delays. At the preliminary pretrial conference that will be held later in this case, Magistrate Judge Stephen

Crocker will explain the process for Heard to use discovery requests to identify the Doe provider and to amend his complaint to include that defendant's proper identity.

Heard also says that defendants were negligent in treating his medical problems, so I will construe his complaint as including state-law medical negligence claims. Under Wisconsin law, a negligence claim "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. For the same reasons that I am granting him leave to proceed on Eighth Amendment medical care claims against Adams, Kinyon, and Doe, I will allow him to proceed on medical negligence claims against them.

ORDER

IT IS ORDERED that:

1. Plaintiff Anthony P. Heard, Jr. is GRANTED leave to proceed on Eighth Amendment and Wisconsin-law medical negligence claims against defendants Health Service Manager Adams, Assistant Health Service Manager Kinyon, and John Doe provider.
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 defendants. Plaintiff should not attempt to serve defendants on his own at this time. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.
3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer or lawyers who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use 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 defendants or the court are unable to locate him, his claims may be dismissed for his failure to prosecute them.

Entered June 21, 2022.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge