

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON HUNTER : CIVIL ACTION
 :
 v. :
 :
 :
 DOCTOR MALINOV, et al. : No. 96-1195

MEMORANDUM AND ORDER

Shapiro, Norma L., J.

August 1, 2003

Plaintiff claims that the defendants failed to provide adequate medical treatment while he was incarcerated at a federal correctional facility, in violation of Estelle v. Gamble, 429 U.S. 97 (1976). Defendants, arguing that any alleged deficiencies in plaintiff's medical treatment did not rise to the level of an Eighth Amendment violation, have filed a motion for summary judgment. Because the plaintiff is unable to point to evidence sufficient for a reasonable fact-finder to conclude that the defendants were deliberately indifferent in violation of the Eighth Amendment, the motion for summary judgment will be granted.

FACTS¹

During an inmate's incarceration at a Federal Correctional Institution, he is provided with medical services by the Health Services Unit ("HSU"). (Def. Ex. C, Malinov Dep. P. 47) The clinical director at FCI Schuylkill ("Schuylkill"), where plaintiff Milton Hunter ("Hunter") was confined, was Dr. David Malinov ("Dr. Malinov"). (Id. At 13.) Medical care for inmates was also provided by physician's assistants ("PA"), and other technical and support personnel. (Def. Ex. D, Dr. Malinov Dec. ¶ 6).

Dr. Kenneth Moritsugu ("Dr. Moritsugu"), as the Medical Director and Assistant Director of the Bureau of Prisons ("BOP"), was responsible for establishing BOP medical policies. (Def. Ex. M, Dr. Moritsugu ¶ 2.). Administrators in each region and their staffs were responsible for implementing these policies. (Id.)

¹ Plaintiff, in his response, asserts that "[c]ontrary to the defendants' motion, certain material facts are very much contested." (Plaintiff's Memorandum of Law in Response to Defendants' Second Motion for Summary Judgment, p. 1 ("Plaintiff's Memorandum of Law")). However, upon comparing the facts asserted by each party, the facts are not in dispute. The only fact that plaintiff specifically challenges is defendants' claim "that Dr. Malinov 'did not follow specific patients nor was it part of his responsibility to review every patient's chart.'" (Plaintiff's Memorandum of Law, p. 14). To challenge this assertion, plaintiff cites the Bureau of Prisons Health Manual, which states that the Clinical Director "will review at least ten health records of the total patient load seen by the day shift at the end of each work day." (Moritsugu deposition, Exhibit B, pp. 164-165). The fact that Dr. Malinov, as the Clinical Director, is required to review a certain number of records every day does not contradict defendants' assertion that he did not follow specific patients or review every patient's chart. The material facts are uncontested, and this action is capable of resolution on a motion for summary judgment.

Programs to assure the quality of care provided to inmates was sufficient and consistent with community standards have included internal reviews every two years and external reviews every three years. (Id. at ¶ 5). Dr. Moritsugu and his staff provided advice to correct any deficiencies revealed by the reviews, but the regional administrators and wardens had responsibility for addressing problems. (Id. at ¶¶ 2-3.).

In 1994, a review of medical care at Schuylkill found the process of "identify[ing] and provid[ing] follow-up treatment to patients with chronic illnesses was inadequate." (Def. Ex. B, p. 147.). Prior to Dr. Malinov's tenure as the Clinical Director, an internal review rated the health services operation as deficient, based, in part, on "[l]ack of departmental leadership and direction." (Def. Ex. C, p. 1).

Hunter, an African American male, was convicted of federal charges on October 7, 1994, and was held in the District of Columbia Jail pending sentencing. (Def. Ex. A, Hunter Dep. P. 36). For several years prior to and during his incarceration in the District of Columbia Jail, Hunter had experienced problems urinating, including painful urination (known as dysuria), and the need to urinate frequently at night (known as nocturia). (Id. at 87. 117). Hunter alleges that previous tests had been performed, but his medical records show no evidence of any tests being performed prior to his arrival at Schuylkill. (Def. Ex. D, Dr. Malinov Dec. ¶ 20).

After sentencing, Hunter was confined to Schuylkill from January 18, 1995 until April 22, 1996. (Def. Ex. B, Tafelski Dec. ¶ 4.). When Hunter arrived at Schuylkill, his nocturia and dysuria were noted at his intake evaluation. (Def. Ex. F, Machak Dep. pp. 8-9). On April 2, 1995, Hunter first sought treatment for urinary tract problems. (Def. Ex. B, Attachment 2, p. 41). On April 5, he was treated for inflamed hemorrhoids and was instructed to return a week later for a rectal examination, but he failed to do so. (Id. at pp. 38-39). On May 6, Hunter complained of dysuria and nocturia, and was prescribed an antibiotic and antispasmodic. (Id. at 56). At that time, the PA made a note to consider a urological consultation if Hunter's condition did not improve. (Def. Ex. G, Steffan Dep. Pp. 18, 59).

On May 19, Hunter, again complaining of dysuria and nocturia, reported to the HSU, and was given a prostate specific anogen test ("PSA") and an acid phosphate test to check his prostate. (Def. Ex. B, Attachment 2, p. 57). After a consultation with a private urologist, Dr. Richard Greco ("Dr. Greco"), on June 2, 1995. (See id. at 54), Dr. Malinov reviewed Dr. Greco's report and recommendation that Hunter undergo three tests: a PSA, an intravenous pyelogram ("IVP"), and a cystoscopy with possible DVIU. (Def. Ex. D, Dr. Malinov Dec. ¶ 11). An IVP involves the injection of dye into a vein so that x-rays can be taken of the urinary tract; and a DVIU is a procedure to remove scar tissue. Dr. Greco did not recommend a biopsy. (Def. Ex. D, Dr. Malinov Dec. ¶ 11; Def. Ex. B, Attachment 2, p. 175). The PSA

and IVP were ordered. (Def. Ex. G, Steffan Dec. p. 19). When Hunter was seen for an unrelated medical problem on June 12, 1995, he had no complaints of urinary tract pain. (Def. Ex. B, Attachment 2, p. 54).

The HSU received the results of the PSA and acid phosphate tests on June 28. (Def. Ex. D, ¶ 12). Hunter's PSA tested at a level of 7, above the normal range of 0 to 4; the acid phosphate result was normal. (Id.) Dr. Malinov, in his professional judgment, did not believe the elevated PSA was a cause for alarm because: 1) the acid phosphate result was normal; 2) the consultant reported the prostate was normal to palpation; 3) the patient's history reported by Dr. Greco did not raise any other cause for concern; and 4) an elevated PSA could be caused by factors not necessarily indicative of prostate cancer. (Id., Def. Ex. C, Dr. Malinov Dep. p. 46). Dr. Malinov believed Hunter was not at risk of cancer, and the elevated PSA did not warrant repeat testing in the absence of other indicators. (Def. Ex. D, ¶ 12). He thought that other tests needed to be completed before referring Hunter for a transurethral resection of the prostate ("TURP"), a surgical procedure to enlarge the diameter of the prostate through which urine flows. (Def. Ex. C, Dr. Malinov Dep. p. 77). Plaintiff's expert, Dr. Stephen Strup ("Dr. Strup"), would testify that an African American patient with an elevated PSA should have follow-up tests, examinations, and ultimately a biopsy. (Pl. Ex. Q, Dr. Strup letter, p. 5). The record reflects a controversy within the medical profession on routine PSA

screening. (Def. Ex. I, Dr. Strup Dep. p. 61; Def. Ex. O, Dr. Strup Dep. pp. 21-22). This would create an issue of fact on the proper treatment, but not on deliberate indifference.

An IVP was attempted on August 25, but Dr. Malinov was unable to find a suitable vein. (Def. Ex. D, Dr. Malinov Dec. ¶ 13). On September 26, when Hunter complained again of dysuria and nocturia, a PA gave him an antibiotic and antispasmodic. (Def. Ex. F, Machak Dep. p. 16). A second IVP was attempted on October 12, 1995, but Dr. Malinov was again unable to locate a suitable vein. (Def. Ex. D, Dr. Malinov Dec. ¶ 15).

Hunter returned to the HSU on October 20, 1995, and again on December 13, when he was seen by Dr. Benjamin Platt ("Dr. Platt"), who did not believe the situation was urgent, but thought it might be appropriate to perform a TURP, and referred Hunter again to Dr. Greco. (Def. Ex. H, Dr. Platt Dep. pp. 8-10) Hunter returned to HSU on December 21, was given an analgesic, and told to increase his fluid intake. (Def. Ex. G, Steffan Dep. p. 27). Plaintiff's expert, Dr. Strup, avers that this would make matters worse. (Pl. Ex. Q, Dr. Strup letter, p. 6). When Hunter visited the HSU on December 26, Dr. Platt suggested a post void residual. (Def. Ex. G, Steffan Dep. pp. 34-36). This test would determine how much urine was not released, a good indicator of the severity of Hunter's condition. (Def. Ex. H, Dr. Platt Dep. P. 27).

Hunter was seen again by Dr. Greco on January 16, 1996. (Def. Ex. G, Steffan Dep. pp. 42-44). Dr. Greco recommended

Hunter undergo a TURP, and Hunter signed the necessary consent forms. (Id.) Dr. Malinov did not review Dr. Greco's consultation sheet, which was not completed. (Def. Ex. D, Dr. Malinov Dec. ¶ 16). Dr. Malinov did not know whether Dr. Platt spoke with Dr. Greco about Hunter's condition. (Id.) On February 8 and 9, Hunter, again reporting to the HSU, complained of the same urinary problems. (Def. Ex. G, Steffan Dep. p. 45). The PA ordered the blood tests required by Dr. Greco that had not been previously performed. (Id.) On February 21, 1996, the PA performed the post-void residual test, resulting in less than 100 cubic centimeters of urine retained. The PA did not record the actual volume, but had it been greater than 100 cc's, another consultation with Dr. Greco would have been arranged. (Def. Ex. G, Steffan Dep. Pp. 41-42, 50-52, 60)

Hunter, when seen by Dr. Platt on April 15, 1996, (Def. Ex. B, Attachment 2, p. 71), reported frequent but not painful nocturnal urination. (Id.) He was given a prescription for Motrin. (Id.) Dr. Platt noted that the plan was to proceed to surgery, but mistakenly noted that Hunter was refusing surgery. (Id.) On April 18, Hunter explained that he was not refusing surgery, but was refusing to be seen by a PA. (Def. Ex. B, Attachment 2, p. 72). Dr. Platt wrote another order referring Hunter to Dr. Greco. (Def. Ex. H, Dr. Platt Dep. p. 20). On April 22, 1996, Hunter was transferred to FCI Cumberland. His transfer papers noted that he needed a TURP. (Def. Ex. H, Dr. Platt Dep. p. 22).

During Hunter's entire time at Schuylkill, Dr. Malinov was not aware that biopsy had been requested by anyone. (Def. Ex. D, Dr. Malinov Dec. ¶ 18). At no time did any doctor recommend immediate surgery or emergency medical intervention. (Id. at ¶ 19). Had a biopsy been suggested, Dr. Malinov would have considered Hunter's problem more serious. (Def. Ex. C, Dr. Malinov Dep. p. 73).

While at FCI Cumberland, Hunter was referred to another private urologist, Dr. Robert Duggan ("Duggan"). (Def. Ex. P, Duggan Dec. ¶ 2). Duggan did not believe that surgical intervention was indicated; he prescribed medication. (Id.) On June 30, 1996, Hunter's PSA had risen to a level of 11, and a biopsy was performed that was negative for cancer. (Def. Ex. C, Dr. Malinov Dep. p. 72). After another post-void residual resulted in 300 cc's of retained urine, a TURP was performed on November 25, 1997. (Def. Ex. P, Duggan Dec. ¶ 4). Hunter experiences no continuing symptoms, and is no longer incarcerated. (Def. Ex. A, Hunter Dep. pp. 198, 46-7).

Defendant's expert, Dr. Philip Ginsberg ("Dr. Ginsberg"), who reviewed Hunter's medical care, stated that "[t]he use of antibiotics, non-steroidal anti-inflammatories and fluids was right by the book," and that antispasmodics are used for chronic prostatitis patients, such as Hunter. (Def. Ex. L, Dr. Ginsberg Dec., Attachment B, p. 3).

DISCUSSION

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed such a motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials [in their own] pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. See Celotex, 477 U.S. at

324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

Plaintiff brings the instant suit under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the Supreme Court held there may be an action against federal officials directly under the Constitution for violations of the Fourth Amendment. Id., at 397. That holding has been expanded to include violations of the Eighth Amendment. See, e.g., McCarthy v. Madigan, 503 U.S. 140 (1992) (discussing exhaustion requirements with respect to Bivens-type Eighth Amendment suits). Bivens-type suits are the federal counterpart of claims against state officials under 42 U.S.C. § 1983, so the standards applicable in § 1983 cases apply to Bivens-type cases. Paton v. La Prade, 524 F.2d 862, 871 (3d Cir. 1975).

Insufficient or improper medical treatment can “constitute[] the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment.” Estelle v. Gamble, 429 U.S. 97, 104 (1976). “To recover for denial of medical treatment, the prisoner must prove: 1) the prisoner suffered from a serious medical condition; and 2) the prison officials were ‘deliberately indifferent’ to the prisoner’s medical needs.” Calhoun v. Horn, 1997 WL 672629, at *3 (E.D. Pa., October 29, 1997) (quoting Estelle, 429 U.S. at 104).

The prostate problems Hunter suffered constituted a serious medical need; the repeated treatments and consultations

with urologists demonstrate that all parties involved recognized that.

The standard for determining whether a given official was deliberately indifferent to a serious medical need is "subjective recklessness as used in the criminal law." Farmer v. Brennan, 511 U.S. 825, 838 (1994). Deliberate indifference is more easily shown if the prisoner received no treatment, than if extensive treatment was ineffective in treating the problem. "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." Farmer, 511 U.S. at 844. As long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights.

The deliberate indifference standard in Estelle "affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients." Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979). "While the distinction between deliberate indifference and malpractice can be subtle, it is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights." Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990)

To prove that the prison officials were deliberately indifferent, Hunter must show more than mere malpractice; he must

show that defendants recklessly disregarded his serious medical needs. Hunter is unable to do so with respect to either Dr. Malinov or Dr. Moritsugu.

Dr. Malinov

During Hunter's fifteen months at Schuylkill, he was seen eleven times at the HSU for nocturia or dysuria. Dr. Malinov and his staff performed a battery of tests on Hunter to determine the cause of the problems he was experiencing. Based on the results of those tests, the medical staff provided treatment, and referred Hunter to an outside urologist on two separate occasions. The tests and analyses were consistently negative, except for an elevated PSA. That test suggested a prostate problem; despite repeated testing and analysis, defendants were unable to determine the cause of Hunter's ailment. A TURP had been recommended when Hunter was transferred to FCI Cumberland. The doctor at FCI Cumberland, after reviewing Hunter's medical condition, also believed no surgical intervention was then necessary, and attempted to treat Hunter's prostate problem medically. Later, when it was clear from tests that Hunter's condition was significantly worse, Duggan considered surgery an appropriate option.

Plaintiff's expert makes two criticisms of Hunter's care: 1) that the medical staff failed to follow-up in a consistent and effective manner; and 2) the PA's recommendation for Hunter to increase his liquid intake "could make symptoms . . . worse." (Def. Ex. K, Steffan Letter, p. 6). Neither of these

criticisms establish deliberate indifference. Hunter was seen eleven times in fifteen months. As defendants' expert noted, "Hunter certainly got more attention, care and treatment than patients with managed care health plans on the outside." (Def. Ex. L, Dr. Ginsberg Dec., Attachment B, p. 2). Even if the PA's recommendation to increase fluid intake "could make symptoms . . . worse," it would not amount to deliberate indifference in the absence of evidence that Dr. Malinov knew this and condoned the mistreatment.

In Estelle, the Supreme Court discussed several cases in which officials' conduct would constitute deliberate indifference. In one such example, a doctor chose "the easier and less efficacious treatment of throwing away the prisoner's ear and stitching the stump." Estelle, 429 U.S. at 104, n.10. In another, the "prison physician refuse[d] to administer the prescribed pain killer and render[ed] leg surgery unsuccessful by requiring [the] prisoner to stand despite [the] contrary instructions of the surgeon." Id. Hunter's claims regarding Dr. Malinov's treatment of his prostate problems do not show this level of deliberate indifference; he received considerable medical treatment, and on two separate occasions was referred to a private urologist for guidance in his treatment.

A prisoner claiming deliberate indifference can prove the subjective mental state of the official by circumstantial evidence. Farmer, 511 U.S. at 842. But construing all the direct and circumstantial evidence in Hunter's favor, as required

on a summary judgment motion, no reasonable jury could find that Dr. Malinov's actions constituted the "subjective recklessness" required to find deliberate indifference. Id.

Dr. Moritsugu

Hunter, citing a variety of deficiencies in the health care at Schuylkill, claims that Dr. Moritsugu was responsible for addressing them. Hunter argues that reported lack of documentation of quarterly evaluation of chronic care inmates, lack of documentation in reviewing the files of infectious disease patients, and lack of documentation of patient education shows Dr. Moritsugu's culpability, but none of these deficiencies relate to Hunter.

Hunter "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Hunter was seen eleven times over a fifteen month period. "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." Lewis v. Casey, --- U.S. ---, ---, 116 S.Ct. 2174, 2179 (1996) (finding that an inmate must demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.).

The serious medical condition must be that of the prisoner himself, rather than complaints that the prison facilities may not meet the serious medical needs of other hypothetical prisoners. See Calhoun v. Horn, 1997 WL 672629, at *2 (E.D. Pa., October 29, 1997); see also Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir. 1990) ("Deliberate indifference to a prisoner's serious medical needs can give rise to . . . a constitutional violation.") (emphasis added). The Eighth Amendment prohibits "unnecessary and wanton infliction of pain" upon a prisoner. Gregg v. Georgia, 428 U.S. 153, 182-183 (1976). Hunter's broad allegations that the prison facilities are insufficient in general does not establish deliberate indifference unless he can show his own medical care was negatively affected by the deficiencies.

Hunter argues Dr. Moritsugu was deliberately indifferent for inadequate supervision over the prison medical facilities that treated Hunter. But Hunter has not established deliberate indifference with regard to any of his treating medical personnel. "Because the Court has concluded that plaintiff has failed to allege any unconstitutional conduct on the part of defendant Malinov, there can be no liability on the part of . . . Moritsugu for acquiescence in unconstitutional conduct of defendant Malinov." Kahn v. Malinov, 1997 WL 310064, *4 (E.D. Pa., May 12, 1997). Since Hunter has insufficient evidence that Dr. Moritsugu was deliberately indifferent, the

motion for summary judgment on behalf of Dr. Moritsugu will be granted.

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ORDER

AND NOW, this 23rd day of December, 1997, upon consideration of defendant's Second Motion for Summary Judgment, plaintiff's response in opposition thereto, and defendant's reply thereto, it is **ORDERED** that defendant's Second Motion for Summary Judgment is **GRANTED**.

J.