



Nelson v. Oregon Department of Corrections

2018 | Cited 0 times | D. Oregon | January 12, 2018

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BRANDON CHARLES NELSON, Case No. 3:15-cv-02437-MC

Plaintiff, OPINION AND ORDER v. OREGON DEPARTMENT OF CORRECTIONS; DR. THOMAS BRISTOL; DR. GEORGE DEGNER; DR. STEVE SHELTON, Defendants.

_____ MCSHANE, District Judge:

Plaintiff, a former inmate housed by the Oregon Department of Corrections (ODOC), filed suit pursuant to 42 U.S.C. § 1983 and alleged a claim of deliberate indifference to his serious medical needs arising from his medical treatment after a hip replacement surgery. Defendants now move for summary judgment under Federal Rule of Civil Procedure 56. For the reasons set forth below, defendants motion is granted and this case is dismissed.

BACKGROUND Plaintiff is a former inmate who was incarcerated at Columbia River Correctional Institution (CRCI) in Portland, Oregon, and the Oregon State Penitentiary (OSP) in Salem, Oregon during the time period relevant to his claims.

On March 23, 2015, Dr. Robert Zirschky, a physician at Willamette Surgery Center, performed hip replacement surgery on plaintiff and provided aftercare instructions that included physical therapy after surgery. DiGiulio Decl. Att. 1 at 47 (ECF No. 33); Pl. No. 40) Ex. 1. Plaintiff was transferred to OSP after his surgery. There, he was prescribed a pain

medication, Oxycodone, with one tablet to be taken every four hours for five days. DiGiulio Decl. Att. 1 at 22.

On March 26, 2015, plaintiff was observed walking with the assistance of a cane and going to the recreation yard. The next day, plaintiff was observed walking throughout the ward. Id. Att. 1 at 44-45. Dr. Ole Hansen prescribed four more days of Oxycodone. Id. Att. 1 at 22.

On March 28, 2015, plaintiff was noted to have full range of motion in his hip. Id. Att. 1 at 44. On March 29, 2015, plaintiff requested a reduction in his pain medication dosage and an increase in its frequency. Id. Att. 1 at 43.



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On March 30, 2015, Dr. Degner discontinued p replaced it with a prescription for Tramadol, with one to two tablets taken three times a day for three days, and then one tablet taken daily for three more days. DiGiulio Decl. Att. 1 at 21. The next day, Nurse Henkelman noted that plaintiff was ambulatory and encouraged him to increase his activity. Id. Att. 1 at 43.

On April 1, 2015, plaintiff had an x-ray and follow-up appointment with Dr. Becker, an orthopedist, who noted that p excellent without external support and that replacement was successful with no sign of complication. Id. Att. 1 at 42. Dr. Becker recommended that plaintiff be transferred back to CRCI with a low bunk for three months, remain medically idle for two weeks, perform only light work for three months, and perform the physical therapy exercises that had been shown to him. Id.

On April 4, 5, and 6, 2015, plaintiff requested and received dosages of Tylenol. Id. Att. 1 at 40. On April 10, 2015, plaintiff reported that he was experiencing pain since the expiration of his Tramadol prescription, and he was seen walking with a limp and the assistance of a cane. Id. Att. 1 at 37. Dr. Glenn Greeder prescribed Tramadol for five additional days to be taken as needed. DiGiulio Decl. Att. 1 at 20.

On April 15, 2015, plaintiff again requested a new prescription for Tramadol. Dr. Greeder denied the request and discussed policy regarding chronic narcotic use. Id. Att. 1 at 20, 37 Dr. Greeder informed plaintiff that he might experience pain from his surgery but that his condition did not warrant narcotics. Id.

On April 21, 2015, Dr. Thomas Bristol examined plaintiff and noted he was walking with an even gait and could get up and down from the exam table without difficulty. Id. Att. 1 at 38. Plaintiff reported continuing low back pain and asked for a renewal of his Tramadol prescription. Instead, Dr. Bristol ordered x-rays and a trial prescription for Mobic. Id. Att. 1 at 21, 38.

On April 24, 2015, plaintiff received x-rays on his lumbar spine. They showed little degenerative change and a potential pars fracture. DiGiulio Decl. Att. 1 at 12.

On April 26, 2015, plaintiff complained that the Mobic was not working and he could not sleep through the night without pain. Id. Att. 1 at 36. Plaintiff asked that he be allowed to participate in yoga and walking classes. Id. Dr. Bristol indicated that he had no objection to plaintiff taking yoga classes provided that he avoid hyperextension. Id. Att. 1 at 20, 36.

On May 5, 2015, plaintiff again saw Dr. Bristol with complaints of low back pain and again requested a prescription for Tramadol. Id. Att. 1 at 36. Dr. Bristol prescribed Tramadol for three weeks and encouraged plaintiff to exercise his back. Id. Att. 1 at 19, 36.

On June 1, 2015 plaintiff was seen by Dr. Bristol regarding his lower back and knee pain and requests for more pain medication. DiGiulio Decl. Att. 1 at 35. Dr. Bristol ordered knee x- rays and blood tests.



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On June 5, 2015, plaintiff had x-rays of both knees joint spaces with smooth articular surfaces Id. Att. 1 at 11, 18.

On June 18, 2015, plaintiff had a follow-up appointment with Dr. Bristol. Plaintiff again requested pain medication. Dr. Bristol diagnosed early osteoarthritis and prescribed a trial of Relafen. Id. Att. 1 at 18, 34.

On July 13 and 16, 2015 plaintiff was examined for complaints of back spasms and lumbar cramping that interfered with his ability to sleep. Dr. Bristol ultimately prescribed Neurontin and back exercises. Id. Att. 1 at 18, 33.

On August 11, 2015, plaintiff saw Dr. Bristol and again complained of persistent low back pain and muscle spasms. Plaintiff reported that the Neurontin helped for a short period of time and that he was exercising gently. Dr. Bristol believed the muscle spasms were secondary to degeneration and he increased dosage of Neurontin. Id. Att. 1 at 18, 33.

On August 17, 2015, plaintiff saw Dr. Bristol again and requested physical therapy for his chronic low back pain. Dr. Bristol noted plaintiff restricted, he had a mild right lumbar spasm, and his gait was fairly unremarkable. DiGiulio

Decl. Att. 1 at 32. Dr. Bristol ordered lumbar x-rays and indicated that he would present request for physical therapy to Therapeutic Level of Care (TLOC) Committee. Id. Att. 1 at 17, 32.

On August 20, 2015, Dr. Bristol presented request for physical therapy to the TLOC Committee. The TLOC committee denied request and recommended that he continue his home physical therapy plan. Id. Att. 1 at 5.

On August 21, 2015, x-rays were taken of lumbar spine area and compared to the x-rays taken on April 24, 2015. Dr. Roger Blair stated, least the left L5 pars. Based on the lateral views only I remain convinced of pars fracture on one

or both sides. Otherwise there is no other pars abnormality. Pedicles and transverse processes are Id. Att. 1 at 10.

On August 28, 2015, plaintiff met with Dr. Greeder to review the x-ray report and the Id. Att. 1 at 32.

On August 31, 2015, plaintiff was seen by Dr. Bristol for a follow-up appointment and reported that his back pain had continually worsened. Dr. Bristol ordered another set of lumbar x-rays and requested a consult with Dr. Becker. Id. Att. 1 at 4, 17, 31.

On September 3, 2013 plaintiff received additional spine x-rays. DiGiulio Decl. Att. 1 at 9. On



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September 9, 2015, plaintiff requested that his Neurontin prescription be renewed on a and Dr. Bristol denied his request. Id. Att. 1 at 31.

On September 28, 2015, plaintiff had further x-rays which confirmed a L-5 pars fracture. Id. Att. 1 at 8.

On September 29, 2015, Dr. Becker examined plaintiff and the x-ray reports and diagnosed spondylolisthesis, the slippage of a vertebra backward or forward, with instability symptoms. Id. at ¶ 6, Att. 1 at 29-30. Dr. Becker gave plaintiff a low back care sheet and prescribed an L-S corset to help his stability. Dr. Becker also ordered follow-up appointments as needed and recommended that plaintiff not stoop or lift and twist. Id.

On October 13, 2015, Dr. Bristol presented p for a back brace to the TLOC committee. The TLOC committee denied the request and suggested more exercises. DiGiulio Decl. Att. 1 at 3, 16, 28. On November 19, 2015, plaintiff requested a third daily Neurontin dose to ease his pain, and Dr. Bristol agreed. Id. Att 1 at 16, 28.

On December 17, 2015, plaintiff met with Dr. Bristol regarding the denial of his request for a back brace. Dr. Bristol explained that a change in the medical literature showed that the back brace was not beneficial for condition. Id. Att 1 at 27.

On December 30, 2015, plaintiff filed suit in this case. civil rights complaint raises a federal claim necessary medical care for his hip and back pain.

DISCUSSION Plaintiff alleges claims of deliberate indifference to his serious medical needs under the Eighth Amendment. *Estelle v. Gamble* *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, Specifically, plaintiff alleges the defendants failed to provide him with recommended physical therapy and ceased prescribing pain medication after his hip replacement surgery. Am. Compl. at 3 (ECF No. 9). Plaintiff further alleges that defendants failed to provide him with a back brace and adequate pain medication after he was diagnosed with a lumbar condition. Id.

Defendants move for summary judgment on grounds that the evidence does not demonstrate deliberate indifference to . To prevail, defendants must show that there is no genuine dispute as to any material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must construe the evidence and draw all reasonable inferences in the light most favorable to plaintiff. *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

To sustain a claim for deliberate indifference to his serious medical needs, plaintiff must establish the existe and that *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Id. (citation omitted). Deliberate



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indifference is established when a prison official knew that a prisoner disregarded that risk by failing to take reasonable measures to abate the risk. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Prison officials may demonstrate deliberate indifference by denying, delaying, or intentionally interfering with medical treatment, or by the manner in which they provide medical treatment. *Jett*, 439 F.3d at 1096; *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002). Where a prisoner alleges a delay in receiving medical treatment, *Hallett*, 296 F.3d at 746.

As recounted above, the record makes clear that plaintiff was not denied medically necessary treatment so as to constitute deliberate indifference. According to the evidence presented, plaintiff received pain medication after his hip replacement surgery, including narcotic and non-narcotic pain medication. Plaintiff also had numerous follow-up appointments with ODOC physicians, who responded to his complaints and prescribed him pain medication as needed. While explained that the requests were not supported by objective medical evidence and were not

warranted. ODOC physicians also referred plaintiff to an orthopedist, ordered numerous x-rays for comparison, and counseled plaintiff on stretching and exercising his back to alleviate his pain. See generally *supra* at 2-6; *DiGiulio Decl.* Granted, the TLOC committee did not approve physical therapy sessions or a back brace, even though both requests had been approved by physicians. To establish deliberate indifference on this basis, plaintiff must set forth sufficient facts suggesting the TLOC committee health. *Hamby v. Hammond*, 821 F.3d 1085, 1094 (9th Cir. 2016) (citation omitted). The record

does not suggest that the choice of treatment was medically unacceptable. The TLOC committee informed plaintiff that his request for outside physical therapy sessions was denied because he was on a home physical therapy plan and Dr. Becker had demonstrated and discussed the exercises plaintiff should be performing. *DiGiulio Decl.* Att. 1 at 5. Further, the TLOC committee found that a back brace was not medically warranted, and Dr. Bristol explained that a change in the medical literature did not support the use of a back brace for his condition. *DiGiulio Decl.* Att. 1 at 3, 16, 27. However,

the relevant standard is not whether plaintiff received the same care as a non-prisoner with the same medical issues. The standard is whether defendants intentionally disregarded a substantial risk of serious harm to plaintiff. *Farmer*, 511 U.S. at 847. The record clearly demonstrates that defendants were not deliberate

At most, the record reflects differences of opinion among medical providers and plaintiff regarding the need for physical therapy sessions and a back brace. The fact that plaintiff preferred different medical care does not render the chosen course of treatment deliberately indifferent. or between medical professionals concerning what medical care is appropriate does not amount to deliberate indiff *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), overruled in part on other grounds by *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc). Even if plaintiff contends that defendants



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misdiagnosed the severity of his medical conditions, inadequate medical treatment due to negligence or inadvertence does not rise to the level of a constitutional violation. *Gamble*, 429 U.S. at 105-06; *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (deliberate indifference) (citation omitted).

Given the undisputed facts of record, no genuine issue of material fact precludes summary judgment on claim.

CONCLUSION For the reasons explained above, plaintiff fails to establish deliberate indifference to his serious medical needs, and defendants Motion for Summary Judgment (ECF No. 32) is **GRANTED. IT IS SO ORDERED. DATED** this 12th day of January, 2018.

____s/Michael J. McShane_____ Michael McShane United States District Judge

