

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

January 25, 2024

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

ARTHUR MOORE,

Plaintiff - Appellant,

v.

DR. HODGE; CARLY REY-HAYES;
MARSHALL GRIFFITH; WILLIAM
LITTLE,

Defendants - Appellees.

No. 23-1209
(D.C. No. 1:22-CV-00829-DDD-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

Plaintiff Arthur Moore, a Colorado state prisoner proceeding pro se, appeals the district court’s dismissal of his fifth amended complaint brought under 42 U.S.C. § 1983. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court’s order dismissing Moore’s fifth amended complaint for failure to state a claim.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

A. Factual Background

Moore is a state inmate currently incarcerated at the Centennial Correctional Facility in Cañon City, Colorado. The operative complaint alleges violations of his rights under the Eighth Amendment to the United States Constitution by several Colorado Department of Corrections (“CDOC”) employees. Moore asserts that his medical providers, Dr. Hodge and Registered Nurse (“RN”) Carly Rey-Hayes, were deliberately indifferent to his serious medical needs. Additionally, he claims that Marshall Griffith, CDOC Step Three Grievance Responder, and William Little, Assistant Warden at Colorado State Penitentiary (“CSP”), failed to properly supervise Dr. Hodge and RN Rey-Hayes.

On June 29, 2021, Moore underwent cryotherapy, a specific treatment for prostate cancer, performed by Dr. Fernando J. Kim at Denver Health Medical Center. He was discharged on July 1, 2021, with instructions “to return to the Emergency Room should the following occur: fever, chills, shortness of breath, pain out of proportion, excessive or purulent wound drainage, new onset numbness/tingling, visual changes, or weakness to extremities.” Aple. Supp. App. Vol. I at 27. Between August 20, 2021, and September 15, 2021, Dr. Hodge informed Moore of the side effects of cryotherapy. Following the procedure, Moore experienced back pain, chest pain, shortness of breath, as well as pain during urination and blood in his urine, with the pain lasting for eight to nine days.

After returning to CSP, Moore alleges he reported pain during urination and blood in his urine to Dr. Hodge, who responded dismissively and instructed him to “stop complaining.” *Id.* at 9. These symptoms persisted for at least eight days.

On November 22, 2021, Moore initiated a Step-1 Grievance, asserting that Dr. Hodge intentionally denied him medical care by stating, “stop complaining.” *Id.* at 17. A response, dated December 14, 2021, noted that Moore was seen by Dr. Hodge on December 3, 2021, for Moore’s inability to urinate, along with other concerns. Dr. Hodge submitted a consult for urology and follow up labs were ordered. The response further provided, “Will follow up after ordered work ups are completed.” *Id.*

On December 22, 2021, Moore filed a Step-2 Grievance, which was not substantively reviewed due to procedural issues. On February 24, 2022, he filed a Step-3 grievance regarding his medical treatment. Griffith responded on March 30, 2022, stating:

In review of this matter I find that you have been evaluated by medical providers at CSP. I cannot second guess the medical, professional opinion of those professionals regarding your diagnosis and treatment, as I am not a medical professional. Your treatment appears to be adequate and appropriate for your condition. You may however request a private physician appointment at your expense, if approved, per AR 700-21. I do not find that DOC was or is deliberately indifferent to your medical condition and based upon the foregoing I cannot recommend any relief in this matter.

Id. at 19.

In February of 2022, Moore submitted another Step-1 Grievance, although a copy of the grievance is illegible. A response was issued on February 28, 2022, indicating that

the grievance was granted in part and that Moore was scheduled with a provider in March of 2022 to follow up and discuss his medical concerns.

Moore followed up with a Step-2 Grievance filed on March 6, 2022, asserting that RN Rey-Hayes failed to provide any medical care related to the pain and blood during urination. Moore's grievance was partially granted, and the response provided on March 28, 2022, noted that Moore was seen by a provider on March 25, 2022, for this issue and that the provider conducted tests and initiated an outside consult follow-up.

On March 26, 2022, Moore experienced pain and blood in his urine again. Dr. Hodge did not send him to the emergency room or provide pain medication, instead sending him back to his cell. This pain lasted for over eight days.

Following this, Moore filed a Step-3 Grievance on May 12, 2022, citing ongoing pain during urination and blood in his urine. A response was provided on June 21, 2022, by Officer Anthony Decesaro stating:

In review of this matter I find that you have been medically evaluated by providers at CSP. I cannot second guess the medical, professional opinion of those providers regarding your diagnosis and treatment, as I am not a medical professional. Your treatment appears to be adequate and appropriate for your condition. Recommendations by specialists are just that, recommendations, which do not necessarily have to be followed by DOC medical. You may however request a private physician appointment at your expense, if approved, per AR 700-21. I do not find that DOC was or is deliberately indifferent to your medical condition and therefore I cannot recommend any relief in this matter.

Id. at 22.

Several tests verified the presence of blood in Moore's urine; these included lab results from October 30, 2021, December 3, 2021, and March 26, 2022.

B. Procedural History

Moore filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado. In screening the complaint, the district court directed Moore to show cause as to why 28 U.S.C. § 1915(g) should not apply to the action.¹ Upon review of Moore's response, the district court determined that Moore had alleged he was in imminent danger of serious physical injury and granted him leave to proceed in forma pauperis under Section 1915(g).

The defendants then moved to dismiss Moore's fifth amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for relief. The magistrate judge entered a Report and Recommendation on May 17, 2023, recommending that the district court dismiss Moore's fifth amended complaint. Specifically, the magistrate judge concluded that Moore failed to state an Eighth Amendment claim because Moore's disagreement with Dr. Hodge and RN Rey-Hayes over the course of treatment did not show deliberate indifference and that Griffith and Little did not participate in any of the alleged constitutional violations. Moore filed timely objections. On June 13, 2023, the district court overruled Moore's objections, adopted the magistrate judge's recommendation, and dismissed Moore's fifth amended

¹ Section 1915(g) "precludes a court from allowing a *pro se* prisoner-plaintiff with three prior strikes to proceed in a civil suit unless he [or she] has prepaid the filing fee or can demonstrate the one exception to this otherwise absolute bar: that he is 'under imminent danger of serious physical injury.'" *Dubuc v. Johnson*, 314 F.3d 1205, 1210 (10th Cir. 2003).

complaint in its entirety without prejudice. Following the entry of judgment, Moore timely appealed the dismissal of his fifth amended complaint.

II. STANDARD OF REVIEW

We review de novo the district court's dismissal of an action under 28 U.S.C. § 1915(e)(2) for failure to state a claim, applying the same standards we employ to review dismissals under Federal Rule of Civil Procedure 12(b)(6). *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In conducting our review, we accept all well-pleaded facts as true, view them in the light most favorable to the plaintiff, and draw all reasonable inferences in their favor. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Because Moore appears pro se, we construe his filings liberally, but we do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

III. DISCUSSION

Moore argues the district court erred in dismissing his Eighth Amendment deliberate indifference claim. As an initial matter, Moore only referred to Dr. Hodge and not RN Rey-Hayes, Griffith, or Little in his objections to the magistrate's report and recommendation. Objections not timely and specifically raised to the magistrate's report and recommendation are deemed waived. *Soliz v. Chater*, 82 F.3d 373, 375–76 (10th Cir.

1996). Accordingly, any challenge to the dismissal of the Eighth Amendment deliberate indifference claims against RN Rey-Hayes, Griffith, or Little is waived.

With respect to Dr. Hodge, Moore asserts that Dr. Hodge did not provide any medical treatment to him. He contends this inaction resulted in a deliberate indifference to his serious medical needs in violation of his Eighth Amendment rights. The Eighth Amendment requires prison officials to “ensur[e] inmates receive the basic necessities of adequate food, clothing, shelter, and medical care.” *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998). Prison officials can be liable for deliberate indifference to a serious medical need when “intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

“Deliberate indifference” requires showing both an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The objective component turns on whether the medical need or harm suffered is “sufficiently serious.” *Id.* A “medical need is sufficiently serious if it 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.” *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000)).

The subjective component is satisfied if a prison official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists.”

Farmer, 511 U.S. at 837. However, “[d]isagreement with a doctor’s particular method of

treatment, without more, does not rise to the level of an Eighth Amendment violation.”
Gee v. Pacheco, 627 F.3d 1178, 1192 (10th Cir. 2010).

Moore fails to adequately allege that Dr. Hodge knew of and disregarded an excessive risk to Moore’s health or safety. Contrary to Moore’s assertions, he was treated on several occasions for pain during urination and blood in his urine. Moore was seen by Dr. Hodge for this issue, where follow up labs were ordered and a request for a urology consultation was submitted. Moore’s chief complaint that he should have been sent to the emergency room per Dr. Kim’s instructions or provided pain medication is a mere disagreement with the course of treatment he received. *See Gee*, 627 F.3d at 1192. Accordingly, Moore fails to state an Eighth Amendment deliberate indifference claim against Dr. Hodge

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s dismissal of Moore’s fifth amended complaint without prejudice. Because Moore has not established imminent danger of serious physical injury, we also deny his request to proceed in forma pauperis under Section 1915(g) on appeal.

Entered for the Court

Mary Beck Briscoe
Circuit Judge