

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROY IRWIN ABBOTT,)
)
 Plaintiff)
)
 v.) Civil No. 03-07-B-K
)
 CELIA ENGLANDER, et al)
)
 Defendants)

***MEMORANDUM OF DECISION ON
MOTION FOR SUMMARY JUDGMENT¹***

This action was filed by Roy Abbott complaining that he had been denied adequate medical treatment, medication, and clothing at the Maine State Prison. Defendant Celia Englander has filed a motion for summary judgment. (Docket No. 30.)² Abbott has responded. I **GRANT** this motion for summary judgment.

Legal Standard

Englander is entitled to summary judgment only “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 [Englander] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is material if its resolution would “affect the outcome of the suit under the governing law,” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

² To the extent it is implicated by Abbott’s allegation, the Prison Health Service, Inc. joins in this motion. I have already recommended granting a motion for summary judgment filed by Jeffery Merrill on the grounds that Abbot did not exhaust his administrative remedies. Englander has not argued that the 42 U.S.C. 1997e(a) exhaustion requirement is applicable to Abbot’s claims against her and has waived the defense. See Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (“The 42 U.S.C. § 1997e exhaustion requirement is not jurisdictional and may be subject to certain defenses such as

nonmoving party,” *id.* I view the record in the light most favorable to Abbott and I indulge all reasonable inferences in his favor. See Feliciano De La Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000).³

Material Facts

Arthritis

Englander explains that she began work as the medical director of the Maine State Prison in September 2000 and is presently in this position. (Def. SMF ¶ 1.) Since Englander has been the medical director at the prison, the medical department has actively treated Abbott for arthritis. (*Id.* ¶ 2.) Englander asserts that various medications have been prescribed for Abbott’s arthritis. Since December 6, 2000, Abbott has received Feldene, a non-steroidal anti-inflammatory medication. On April 20, 2001, a physician’s assistant changed the prescription to Etodolac, another anti-inflammatory medication. This was changed back to Feldene a month later at Abbott’s request. On October 15, 2002, Abbott was given a trial of Disalcid. This was prescribed because of concern over the long-term effects of Feldene on the kidneys and stomach. In September 2003, apparently at Abbott’s request, his prescription was changed back to Feldene. (*Id.* ¶ 3.)

Abbott admits that Englander has been treating Abbott for arthritis but insists that she is not qualified to treat arthritis. He points out that on April 20, 2001, Englander sent Abbott to the Togus Veteran’s Administration Hospital (Togus) where a “knowledgeable doctor” put Abbott on

waiver, estoppel or equitable tolling.”).

³ I have set forth below all of the factual allegations that Abbott makes in his handwritten summary judgment pleadings. I was not able to decipher every word. I have not credited Abbott’s conclusory statements, such as, “That is a lie.” I have given Abbott the benefit of the doubt as to some of his factual assertions, probably much to Englander’s chagrin. However, Abbott’s pro se status does not relieve him of his duty to respond to the motion for summary judgment in accordance with the rules, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) (“[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment”), nor does it mitigate this Court’s obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

arthritis medication that helped. But shortly thereafter Abbot was told by the Prison that there would be no more Togus and Englander switched him back to the medication he had been on before because, Abbott contends, she did not know what else to put him on; in fact, she asked a (mere) nurse what to put him on. Englander knew, Abbott asserts, that the medication she was prescribing had no effect.

In addition to treating his arthritis with medication, Englander explains, the medical department referred Abbott to Midcoast Physical Therapy for evaluation. He was seen there on July 2, 2002, and the therapist advised weight loss and a self-directed exercise program. The therapist saw him in follow-up on September 6, 2002, noted that Abbott was feeling better, stated that there was no need for ongoing physical therapy, and advised range-of-motion exercises and weight loss. (Id. ¶ 4.) According to Abbott's records he has not had a complaint regarding arthritis symptoms since October 15, 2002. (Id. ¶ 5.) Abbott has repeatedly been advised to lose weight and become more physically active as ways of treating his arthritis. He has not complied with this advice. (Id. ¶ 6.)

Abbott states that he had nothing to gain by complaining as no help could be anticipated; why complain about this only to hear a doctor that is not qualified tell him things he knows are not true? He states that he does his range of motion exercises and does not eat all of each meal. He does not believe that anything would be gained by complying further with this advice.

Acid Reflux

Englander indicates that Abbott has acid reflux disease and that the medical department has treated this with a variety of medications. (Id. ¶ 7.) Until April 20, 2001, Abbott received a medication called Protonix. At that time, the Protonix was changed to Prevacid at the suggestion of a primary care physician who saw Abbott at Togus. The medication was later changed to Zantac. On August 14, 2001, Abbott complained that the Zantac was not working, and he was placed on a trial of Tagamet. When he complained that the Tagamet was not working, he was switched to Aciphex, and he is currently taking this medication. (Id. ¶ 8.) Englander states that Abbott was frequently non-compliant in taking these medications. Also, he was scheduled for an upper-GI series on July 18, 2001, to explore further his stomach complaints, but he refused to go to this appointment. (Id. ¶ 9.)

Abbott explains that at the present his acid reflux medication is good. However, he faults Englander for putting him on Zantac on August 14, 2001, knowing it would make him sick. He alleges that on August 14, 2001, he was put on Zantac because Prevacid was too expensive. Abbott also states that the Togus doctor gave him competent advice; the type of advice Englander was incapable of giving. Abbott reports that he always took his medication and asks why he should go to the doctor at the Prison if the doctor does not do what he asks. He states that the Togus doctor has time to see patients, like him, that the prison doctor will not help treat.

Memory Loss

Englander observes that in his complaint Abbott refers to a medication prescribed for “memory loss.” Englander believes he is referring to a drug called Aricept. This medication was prescribed before Englander came to the prison. It is specifically used to treat the effects of Alzheimer’s disease. Englander ordered the medication discontinued on February 8, 2001,

because she felt that Abbott did not have Alzheimer's disease. This impression is supported, Englander argues, by the many long letters to the medical staff contained in Abbott's medical chart; these are well-organized and do not show any mental impairment typical of Alzheimer's. (Id. ¶ 10.) Englander asserts that the medical department is aware of and has taken steps to address complaints of forgetfulness and mental impairment. Prior to Englander's arrival at the prison, Abbott was seen by Dr. Lash, a neurologist, on January 18, 2000, in response to his complaint of memory loss. She noted a very mild impairment. (Id. ¶ 11.) On December 13, 2000, Englander explains, Englander examined Abbott in the chronic care clinic. He complained of recent memory loss, episodes of confusion and forgetfulness. At that time, she diagnosed likely sub-cortical dementia secondary to long-standing untreated high blood pressure. A year later, on December 20, 2001, she no longer felt that the inmate had dementia, as his condition had improved and he was alert and oriented. Except for a transient episode of confusion on May 9, 2002, the inmate's records do not reflect any other complaints in this area. (Id. ¶ 12.)

Abbott responds that memory loss does not create the type of pain and discomfort one can write a so-called log letter about. The Togus doctor started him on Donepezil on April 20, 2001, to slow his memory loss. Englander stopped this because it cost too much. He explains that it is painful to go out to a doctor and thinks there is no point to make the effort as he knew that Englander would do nothing. In his view, Englander is not qualified to treat memory loss.

Eye Care

Addressing Abbott's eye care, Englander asserts that the records show that his eyes have been examined in March 2000, March 2002, July 2002, and November 2002. He was given new glasses as prescribed in March 2002 and again in August 2002. (Id. ¶ 13.) In an undated note authored by Abbott, he states that, since June 2001, he has received and lost five pairs of glasses. (Id. ¶ 14.) The chronic care record of December 12, 2002, notes that the inmate developed "dry eye" very recently. Since then, he has been provided with artificial tears eye drops for this condition and these are available to him on an as-needed basis. These are the only eye drops that have been prescribed. (Id. ¶ 15.)

Abbott states, in response, that he has never lost any glasses. He states that in November 2002 he went to an eye doctor outside the prison and that that doctor gave the prison a prescription for new glasses and told Englander that Abbott should be given eye drops. Abbott claims that he was not given eye drops on December 12, 2002.

Coldness

On April 1, 2002, Englander states, Abbott complained of being cold all the time. Personnel from the medical department discussed with the security staff providing an extra blanket for Abbott. In July 2002, responding to Abbott's continuing complaint, Englander ordered additional warm clothing for him. Abbott's records do not reflect any further complaints of this nature. (Id. ¶ 16.) Abbott responds that he complained of being cold in February 2002 and received clothes but not until July 2002.⁴

⁴ With respect to the complaint allegations concerning treatment of Abbott's Urinary track problems, Englander asserts that Abbott first complained of urinary incontinence during a chronic care clinic examination on December 12, 2002. At that time, Englander prescribed Ditropan XL for treatment of this problem. The medical records do not reflect any further complaints about this problem. (Id. ¶ 17.) Abbott states that at this time this condition is not a problem for him. I take this as a concession by Abbott that this condition is not a part of this dispute.

Discussion

The United States Supreme Court has explained that the Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’ Farmer v. Brennan, 511 U.S. 825, 837-38 (1994). With respect to medical care, the Court has recognized that inmates “must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). However, “an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’” Id. at 105-06. “Thus,” Estelle explains:

[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.

Id. at 106 (footnote omitted).

While Abbott is clearly dissatisfied with Englander’s care, the “record shows no evidence that prison officials acted with ‘reckless disregard’ towards his medical needs by ‘inaction or woefully inadequate action.’” Reed v. McBride, 178 F.3d 849, 854 (7th Cir.1999) (quoting Hudson v. McHugh, 148 F.3d 859, 863 (7th Cir.1998)). Englander has documented how Abbott was seen often and treated for his conditions. Abbott responds only with an articulation of his discontent with Englander’s treatment and by contrasting it to the Togus doctor’s medication choice which Abbott preferred. As record support for his factual assertions Abbott has provided medical records that demonstrate that he was diagnosed with arthritis in his left and right knees;

that the Togus doctor prescribed Donepezil and made notes concerning Abbott's inability to walk long distances due to severe foot and chest pain and indicating an impaired range of motion; Abbott's notation on a Togus "progress note" indicating that Abbott does his range of motion exercises and does his best to lose weight which is difficult given that diabetics need to eat more; a third doctor's notes prescribing glasses and eye drops, with Abbott's interlineations that the former took thirteen months to be provided and the latter took six months; a sheet with "impression and plan" apparently by Englander indicating some skepticism concerning Abbott's reported memory difficulties with Abbott's notation that some help would be too late because Englander did not care about Abbott's condition; a letter to Abbott by an independent living organization called "alpha One" dated June 11, 2002, instructing Abbott on how to go about requesting reasonable modifications under the Americans with Disabilities Act vis-à-vis Abbott's need for medical care, shoes, and warmer clothing, on which Abbott has written that the letter was received sixteen months following his requests for clothes and that he did not get more clothes until another eight months (two years total); and, finally, a copy of a "Dr. Donohue" newspaper column discussing rheumatoid arthritis with Abbott's elaboration that he has been told that he will die because of arthritis and lamenting that his condition is not a joke to Abbott while to Englander and the prison staff his condition -- which they know little about -- was treated as a joke.

Abbott's negative opinion as to Englander's qualifications and the quality of Englander's treatment is insufficient to raise a genuine issue of material fact calling into doubt that he received Constitutionally adequate medical treatment. Englander has provided a substantiated record of her treatment decisions vis-à-vis Abbott's various medical conditions that indicates that his complaints were addressed by medical appointments and follow-up medications and provisions. Abbott does not contest that she is properly licensed for her position. He offers only conclusory

statements concerning Englander's lack of skill and her lack of interest in learning more about arthritis. Abbott preferred the treatment provided by the doctor at Togus. Abbott's complaints are a classic example of an inmate's dissatisfaction with the medical care provided by the prison, a characterization that is supported by Abbott's own assertions regarding the futility of seeking treatment from the Prison staff because of his belief that they would not follow through with the treatment he requested. And while I do not dispute that his arthritis is a serious medical condition that causes pain, and that he has a right to treatment of his other medical conditions, Abbott has simply not put into dispute the facts concerning Englander's response to and treatment of his medical conditions that would support an inference that Englander exhibited a purposeful or reckless disregard of Abbott's medical needs within the meaning of Farmer, see 511 U.S. at 834, and Estelle, see 429 U.S. at 103; see also Reed, 178 F.3d at 854. My conclusion would be the same even if Abbott demonstrated that Englander's course of treatment amounted to medical malpractice claim, see, e.g., Estelle, 429 U.S. at 106; Snipes v. DeTella, 95 F.3d 586, 592 (7th Cir.1996); Toussaint v. McCarthy, 801 F.2d 1080, 1113 (9th Cir.1986). "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir.1976).

Conclusion

For the reasons stated above I **GRANT** summary judgment on behalf of Englander and Prison Health Services, Inc., the only remaining defendants in this action.

April 27, 2004

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

ABBOTT v. ENGLANDER, et al
Assigned to: MAG. JUDGE MARGARET J.
KRAVCHUK
Referred to:
Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/07/03
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

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