

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

MICHAEL WATSON,)	
Plaintiff,)	
)	Case No. 7:04CV00084
v.)	Case No. 7:04CV00507
)	
F. SCHILLING, DR. GREENE,)	By: Michael F. Urbanski
Defendants.)	United States Magistrate Judge

REPORT AND RECOMMENDATION

Plaintiff Michael Watson, a Virginia inmate proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1343. Watson, incarcerated at Red Onion State Prison (“Red Onion”), filed three complaints in this court against several prison officials. The first complaint alleged a violation of procedural due process against D. A. Braxton and L. Mullins (Claim 1). The second complaint alleged deliberate indifference to a serious medical need by F. Schilling and Doctor Greene (Claim 2). The third complaint alleged deliberate indifference to a serious medical need and the tort of negligence against Nurse H. Bolling (Claim 3). Initially severed, these complaints were consolidated by Order dated October 14, 2004. The first claim has already been dismissed, and the undersigned has submitted reports and recommendation recommending that the claims against F. Schilling from the second claim, and Bolling on the third claim, be dismissed. This matter is before the court for report and recommendation on a motion as to summary judgment by defendant Greene as to the second claim. Plaintiff has filed a response to defendant’s motion noting disputes he sees in the factual record.

For the reasons outlined below, the undersigned recommends that Greene’s motion for summary judgment be granted. Essentially, as a review of his medical records indicate in very explicit

fashion, plaintiff has received medical care on a monthly, and sometimes daily, basis. Plaintiff disagrees with medical decisions made by prison doctors and wants to be treated as he directs out of concern for his future health. The behavior plaintiff has alleged in his complaint and his response to defendant's motion for summary judgment in no sense comprises a constitutional violation.

I

In his complaint, plaintiff alleges that Dr. Greene refused to provide him medical care between February and October, 2003, for a variety of medical complaints including headaches, tongue and genital lesions, testicular pain, a shoulder injury, and pain occurring in his heart, chest, kidneys, and lung. (Compl. ¶¶ 36-43, 47-87.) With his motion for summary judgment, Dr. Greene submitted copies of relevant medical records and an affidavit explaining the medical decisions he made during the time period in question.

On February 5, 2003, plaintiff complained that his tongue was sore and had bumps. (Medical records, hereafter "R.", at 1.) In plaintiff's response, he states that he has had problems with these bumps for years and that they started after he performed oral sex on a female. (Resp. at 1-2.) Dr. Greene examined plaintiff's tongue, observed its appearance, and prescribed an antibiotic, specifically Nystatin suspension. (R. at 1.)

On March 12, 2003, plaintiff advised Dr. Greene that the Nystatin did not work. Id. at 4. Dr. Greene prescribed a different antibiotic, Kenalog, as well as Motrin for complaints of back and chest pain. Id. In his response, plaintiff states that the Kenalog did not help. (Resp. at 2.)

On April 4, 2003, plaintiff complained of intermittent kidney pain and pain in his right and left chest wall, associated with breathing. (R. at 4.) In his response, plaintiff alleges that these pains caused

him to feel nausea and unable to eat, and functionally deprived him of the ability to sleep and exercise. (Resp. at 4.) Plaintiff's vital and neurological signs were normal. (R. at 4.) Plaintiff was described as "alert and talkative." Id. Plaintiff demanded a CT scan of the head, but Dr. Greene saw no medical need for a CT scan. Id. Dr. Greene diagnosed muscle spasms of the chest wall and prescribed Robaxin for the pain. Id.

Plaintiff alleges that on April 4, 2003, he requested a referral to an ear, nose, and throat specialist for his tongue, and he alleges that on other occasions he attempted to talk with Dr. Greene about his tongue condition. In his response, plaintiff states that he had demanded at this time to be seen by an "ENT specialist" because the prison doctors were "only guessing" as to what was wrong with him. (Resp. at 2.) Dr. Greene states that he has no recollection of such complaints. (Greene Aff. ¶ 9.) Dr. Greene saw plaintiff on various other occasions, however, and saw no medical reason to continue treatment or to make a referral regarding his tongue condition. Id.

Dr. Greene saw plaintiff on May 9, 2003, for complaints of headaches and a sore spine. (R. at 6.) Plaintiff's neurological signs were normal. Id. Plaintiff stated that he did not want any medicine. Id. Dr. Greene then determined to refer plaintiff to a neurologist for back pain. Id. However, on May 14, Dr. Greene cancelled the neurological referral. Id. In his affidavit, Dr. Greene states that he was unaware of any signs or symptoms suggesting that such a consultation was needed at that time. (Greene Aff. ¶ 11.) Dr. Greene notes that, without further signs and symptoms, a requested consultation would not have been approved by the appropriate authority. Id.

On June 27, 2003, on examination, Dr. Greene felt a small, moveable mass in plaintiff's scrotum. (R. at 7.) Dr. Greene determined that it did not require treatment. Id. Dr. Greene

prescribed an antibiotic and a decongestant. Id. Plaintiff then asked again for a referral to a neurologist for his complaints of “spine pain” and headache. Id. Dr. Greene reviewed plaintiff’s medical chart and again noted his previous conclusion that a referral was not needed at that time. Id.

On June 28, 2003, advised that plaintiff had swallowed a piece of metal, Dr. Greene prescribed a bottle of magnesium citrate to help the foreign object pass through the bowel. (R. at 8.) On June 30, 2003, Dr. Greene examined plaintiff for a rash on his penis and concluded that it was probably herpes simplex. Id. Dr. Greene prescribed Valtrex to reduce the incidence of herpes outbreaks. Id. Dr. Greene explains that he did not order a test for herpes because he had already prescribed medication for the suspected herpes condition.¹ (Greene Aff. ¶ 14.)

On July 18, 2003, Dr. Greene ordered an x-ray of plaintiff’s right shoulder based on complaints of shoulder pain. (R. at 9.) Dr. Greene also prescribed an antibiotic for a possible ear infection and an anti-inflammatory (Naprosyn) for back pain. Id. The radiology report on the shoulder x-ray was normal. (R. at 10.) In his response, plaintiff contends that Dr. Greene should have known that an x-ray would show nothing as x-rays are only good for showing bone injuries and not damage to the rotator cuff, muscles, or tendons. (Resp. at 2.)

On August 8, 2003, Dr. Greene examined plaintiff for a complaint of right-side jaw pain. (R. 12.) Dr. Greene diagnosed TMJ syndrome and changed the plaintiff’s medication from Naprosyn to Percogesic. Id. On August 15, 2003, Dr. Greene examined plaintiff for complaints of shoulder pain and testicle pain. (R. at 13.) Plaintiff claimed that the shoulder pain woke him up at night. Id. Dr.

¹ In a pleading filed on January 26, 2005, plaintiff acknowledged that a later test for herpes was negative.

Greene noted tenderness in the right shoulder area and ordered an MRI study of the right shoulder. Id.
Due to the persistent testicular pain, Dr. Greene also ordered an ultrasound of the testicles. Id.

Dr. Greene prepared request forms to the appropriate authority to request outpatient referrals for the plaintiff. (R. 14, 18.) On August 24, 2003, the utilization management authority advised that the recommended studies were not considered justified. (R. 15, 17-19.) Alternative treatment plans were suggested. Id.

On August 26, 2003, Dr. Greene changed his plan for management of plaintiff's pain. Instead of imaging studies, Dr. Greene prescribed close clinical observation of the testicle nodule and exercise and conservative medical treatment for the shoulder. (R. at 13); (Greene Aff. ¶ 20.)

On September 5, 2003, Dr. Greene diagnosed costochondritis, an inflammation of the junction between the upper ribs and the sternum, but plaintiff refused a prescription for pain medication. (R. 21.) On October 3, 2003, Dr. Greene saw plaintiff for complaints of pain in the right shoulder and the right fourth toe. Id. at 23. Dr. Greene recommended an x-ray for the right foot and toe and provided a steroid injection for shoulder pain. Id.

In his affidavit, Dr. Greene acknowledged the difference in medical opinion in places between himself and the utilization management authority, but stated that he knew of nothing to suggest that any person or entity involved in the medical decision-making process was deliberately indifferent to plaintiff's medical condition. (Greene Aff. ¶ 23.)

II

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56. Upon

motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Rule 56(c) mandates entry of summary judgment against a party who “after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Ordinarily, a prisoner proceeding pro se in an action filed under § 1983 may rely on the detailed factual allegations in his verified pleadings in order to withstand a motion for summary judgment by the defendants that is supported by affidavits containing a conflicting version of the facts. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). Thus, a pro se plaintiff’s failure to file an opposing affidavit is not always necessary to withstand summary judgment. While the court must construe factual allegations in the nonmoving party's favor and treat them as true, however, the court need not treat the complaint's legal conclusions as true. See, e.g., Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994); Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (court need not accept plaintiff's "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations") (internal quotations and citations omitted).

When a motion for summary judgment is made and properly supported by affidavits, depositions, or answers to interrogatories, the non-moving party may not rest on the mere conclusory allegations or denials of the pleadings. Rule 56(e). Instead, the non-moving party must respond by

affidavits or otherwise and present specific facts showing that there is a genuine issue of disputed fact for trial. Id. There are no significant factual disputes between the accounts of events presented by plaintiff and defendant. As such, it is appropriate to resolve this dispute under summary judgment.

III

It is clearly established that prisoners are entitled to reasonable medical care and can sue prisoners under 42 U.S.C. § 1983 for violations of the Eighth Amendment if such care is inadequate. However, prisoners are not entitled to “unqualified access to health care,” Hudson v. McMillan, 503 U.S. 1, 9 (1992); “the right to treatment is...limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.” Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977).

To prove a constitutionally significant deprivation of medical care, the inmate must first show that, "objectively assessed," he had a "sufficiently serious" need which required medical treatment. Brice v. Virginia Beach Correctional Center, 58 F.3d 101, 104 (4th Cir. 1995). A medical need serious enough to give rise to a constitutional claim involves a condition that places the inmate at substantial risk of serious harm, usually loss of life or permanent disability; a condition for which lack of treatment perpetuates severe pain also presents a serious medical need. Farmer v. Brennan, 511 U.S. 825 (1994); Sosebee v. Murphy, 797 F.2d 179 (4th Cir. 1986); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978).

Second, the inmate must demonstrate that each defendant was subjectively aware of plaintiff's need and its seriousness. See Johnson v. Quinones, 145 F.3d 164, 168-69 (4th Cir. 1998) (because evidence did not show that doctors knew inmate had pituitary gland tumor, failure to diagnose and treat

tumor did not state Eighth Amendment claim even though inmate ultimately went blind). The inmate must show that the official was aware of objective evidence from which he could draw an inference that a substantial risk of harm existed, that he drew that inference, and that he failed to respond reasonably to the risk. Farmer, 511 U.S. at 844.

Thus, officials show deliberate indifference to a known, serious medical need by completely failing to consider an inmate's complaints or by acting intentionally and unreasonably to delay or deny the prisoner access to adequate medical care. Estelle v. Gamble, 429 U.S. 97, 104 (1976); but see Belcher v. Oliver, 898 F.2d 32, 34 (4th Cir. 1990) (constitution does not require jail officials to screen pretrial detainee for suicidal tendencies without objective evidence of serious psychiatric need). Inadvertent failure to provide treatment, negligent diagnosis, and medical malpractice do not present constitutional deprivations. Estelle, 429 U.S. at 105-06. Therefore, the Fourth Circuit has expressed great reluctance in § 1983 cases to focus judicial scrutiny on medical judgments about the appropriateness of a specific course of medical treatment provided to an inmate:

[W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment. The courts will not intervene upon allegations of mere negligence, mistake or difference of opinion.

Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977); Russell v. Sheffer, 528 F.2d 318, 318 (4th Cir. 1975).

IV

Plaintiff's medical records make it clear that no one has been in any sense deliberately indifferent to his serious medical needs. Plaintiff does not contest that he has been treated on a monthly,

and sometimes daily, basis for each and every medical condition that he has alleged. What plaintiff does allege is that prison doctors have not treated him in the fashion that he explicitly directs and as such, he has fears about his future health. As plaintiff's allegations do not comprise any constitutional violation, it is the recommendation of the undersigned that defendant Greene's motion for summary judgment be granted.

It is proper to grant defendant Greene's motion for two other reasons. First, the evidence submitted by Dr. Greene establishes that this is a case where plaintiff disagrees with the doctor's medical judgment. Plaintiff states that he is "not going to allow [himself] to let [prison doctors] to keep giving him medicines and having to see them over and over again with no results." In Bowring, the Fourth Circuit explicitly disavowed second-guessing the propriety or adequacy of a physician's treatment. The record and plaintiff's response to Dr. Greene's motion for summary judgment indicate that second-guessing the propriety and adequacy of treatment is exactly what plaintiff is trying to do. See (Resp. at 5) ("[I]f I was in society, [I] could take myself and have tests done and see qualified doctors but [I] have no choice but to see what [I]'m forced to see.") The records submitted by Dr. Greene show in explicit detail that plaintiff was being provided access to health care on a sometimes daily basis, and that he was given medicines and when they did not work, different medicines were provided. In the two instances where the records indicate Dr. Greene considering whether or not plaintiff's medical condition should be referred, what is at issue is only the preference of the supervisory authority for more conservative treatment strategies, and not any denial of treatment per se. When they suggested these more conservative strategies, Dr. Greene, exercising his medical judgment, concurred.

It does not appear that anyone involved was deliberately indifferent to plaintiff's medical condition in any sense.

Additionally, while some of plaintiff's medical conditions would in and of themselves be "sufficiently serious" under the Supreme Court's decision in Farmer v. Brennan, see 511 U.S. 825, 844 (1994), plaintiff does not allege that any of these condition continues. He only alleges that he had fear that his condition may not have been properly treated. See (Compl. ¶ 29); (Resp. ¶ 24) ("[I] am trying to protect my health."). Plaintiff does not identify any "sufficiently serious" medical condition that Dr. Greene's failure to provide access to MRI or CAT scan diagnostics may of missed. Although plaintiff did not receive a test for herpes, he already was being given the medicine to treat it. Plaintiff does not allege what the ultrasound testing on his testicle would have shown. Plaintiff's fears, absent an actual serious medical condition, are not enough in and of themselves for him to have a claim under Farmer. See Kelly v. Alford, 2003 U.S. Dist. LEXIS 19016 at *5 (N.D. Tex. 2003) (holding that plaintiff's fears of a serious medical condition are not enough to constitute a serious medical condition); Bourbeau v. Doria, 1999 U.S. Dist. LEXIS 3355 at *9 (E.D. Ill. 1999) (same). As such, it is the recommendation of the undersigned that defendant Greene's motion for summary judgment be granted.

V

The Clerk is directed to immediately transmit the record in this case to the Honorable Glen E. Conrad, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties.

Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 9th day of March, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge