

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

<b>ROY ALLEN THOMAS, JR.,</b>	)	
<b>Plaintiff,</b>	)	<b>Civil Action No. 7:04-CV-00497</b>
	)	
<b>v.</b>	)	
	)	
<b>COMMONWEALTH OF VIRGINIA,</b>	)	
<b><u>et al.</u>, Defendants.</b>	)	<b>By: Hon. Michael F. Urbanski</b>
	)	<b>United States Magistrate Judge</b>

**REPORT AND RECOMMENDATION**

Plaintiff Roy Allen Thomas, Jr., a Virginia inmate proceeding pro se, brings this action under the Civil Rights Act, 42 U.S.C. § 1983, with jurisdiction vested under 28 U.S.C. § 1343. In his complaint, Thomas lists a number of claims against correctional officers and medical personnel at Wallens Ridge State Prison (“WRSP”). Thomas claims deliberate indifference to his medical needs during his incarceration at WRSP. This matter is before the court for report and recommendation on a motion for summary judgment filed by defendants Dr. Thompson, Dr. Smith, Dr. Green, Nurse Gilbert, Nurse Yates, Nurse Hobbs, and defendants identified as Boyd and Rutherford (Docket No. 23). A Roseboro notice was filed following defendants’ motion for summary judgment, and plaintiff filed a response with the court indicating that he had already responded to it in previous filings. (Docket No. 25.) As such, the case is ripe for adjudication.

Plaintiff’s claim concern the institutional response to his complaints of back pain. Plaintiff has been seen frequently by prison medical staff about his back pain, but he complains that the treatment is too conservative and consists only of consisting of ibuprofen, exercise and weight loss. Plaintiff contends that his condition requires “side wraps,” a back brace, surgery or prescription pain

medication, but such courses of treatment have not been prescribed. In 2001, plaintiff filed a complaint making the same claims regarding treatment for his back pain, which was dismissed in 2003. Because plaintiff acknowledges that he has been treated, but takes issue with the course of treatment prescribed for him by prison medical personnel, this case presents no claim of constitutional magnitude. Therefore, it is recommended that defendants' motion for summary judgment be granted and the case be stricken from the docket.

## I

In his complaint, plaintiff alleges that since April 9, 2004 and before, defendants, doctors and medical staff at WRSP, have been deliberately indifferent to his serious medical needs. Compl. at 2. Specifically, plaintiff alleges that defendants are aware of his back problems but have refused over the period of several years to adequately treat his pain. See 9/8/04 Response at 2-6. Plaintiff alleges that Dr. Thompson and others, in the course of their treatment of him, became aware of his medical needs and refused to treat him as he contends is appropriate. See, e.g., id. at 5 (stating that plaintiff requested to be seen by Dr. Green and that at the time, plaintiff said he had a serious medical condition requiring treatment but that Dr. Green provided no medication); id. (stating that Nurse Yates had knowledge of plaintiff's medical condition and did nothing); id. at 6-7 (stating that Nurses Phipps, Rutherford, Gilbert, Hobbs, and Dr. Smith all had full knowledge of plaintiff's medical condition and did nothing).

In their motion for summary judgment, defendants focus on the fact that this is the second lawsuit plaintiff has brought asserting deliberate indifference to his lower back pain. Defendants note that the court dismissed the first complaint on March 31, 2003, stating that there was no evidence that defendants "ever perceived that their conservative course of treatment was inappropriate." Def. Mot.

Summ. J. at 1. Defendants contend that nothing in the factual and constitutional landscape has changed since Thomas' last suit, and that they have not been deliberately indifferent to his back condition. Rather, they assert that plaintiff merely disagrees with the treatment he has received. As such, defendants assert that there is no constitutional violation.

In his declaration, defendant Dr. Thompson, an attending physician at WRSP, recounts the course of treatment of plaintiff's lower back. Thompson Declar. ¶ 1. Acting on the advice of outside orthopedic specialist Dr. S.C. Kotay, Dr. Thompson states that defendants chose a conservative approach to treating plaintiff's back pain. Id. ¶¶ 5-6. Although plaintiff, following his visit with Dr. Kotay, indicated that he would like to have a back and knee brace, Dr. Thompson indicated that this was not the course of treatment directed by Dr. Kotay. Id. ¶ 6. On June 11, 2002, Dr. Thompson indicates that plaintiff again sought treatment for back pain, that Dr. Thompson advised him to lose weight and do back exercises, but that plaintiff chose not to do such exercises. Id. ¶ 7. Dr. Thompson indicates that plaintiff next sought treatment for back pain February and July 2003 and was treated conservatively. Dr. Thompson indicates that he explained the course of treatment to Thomas, and that neither a back nor knee brace were appropriate in a prison setting. Id. at ¶¶ 11-12. Dr. Thompson's affidavit indicates that he and Dr. Kotay believe that "there is really nothing we can do for Mr. Thomas medically." Id. ¶ 14.

Dr. Thomson's declaration states that Thomas was transferred from WRSP to Red Onion State Prison in April, 2004. Upon review of the records from Red Onion, Dr. Thompson averred that plaintiff complained of back pain and was offered treatment there on May 20, 2004, May 28, 2004,

and September 10, 2004. Id. ¶ 14. Dr. Thompson indicates that his review of the Red Onion medical records indicates that Thomas appears to be receiving conservative treatment there as well. Id.

The facts set forth in plaintiff's response to defendants' motion for summary judgment are consistent. In response, plaintiff contends that the exercise regimen prescribed for him was hard because of the concrete cell floor and left him in pain. Pl. Resp. Mot. Summ. J. at 8. Thomas' response also notes that he was advised by doctors that he had no nerve damage, and that additional medication was not appropriate. Id. at 3. Plaintiff's response acknowledges that his doctors recommended that he take ibuprofen for inflammation and pain which was available from the commissary. Id. at 8. In short, plaintiff disputes the professional opinion of the prison medical staff that additional medication or treatment beyond exercise and ibuprofen is not appropriate. Because there is no disagreement as to the facts, but only as to the legal conclusions that can be drawn from the facts, consideration of summary judgment is appropriate.

## 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. Fed. R. Civ. P. 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).

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. Fed. R. Civ. P. 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. In this case, there are no significant factual disputes between the accounts of events presented by plaintiff and defendant.

It is clearly established that prisoners are entitled to reasonable medical care and can bring suit 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). Inadvertent failure to provide treatment, negligent diagnosis, and medical malpractice do not present constitutional deprivations. Id. at 105-06. 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).

Further, a medical treatment claim cannot be brought against a supervisory official of a state jail unless plaintiff alleges that the supervisor was personally connected with a delay or deprivation of treatment. Miltier v. Beorn, 896 F.2d 848, 854-55 (4th Cir. 1990). Supervisory liability for constitutional violations inflicted by subordinates is not based upon notions of respondeat superior, but on the recognition that a supervisor's indifference to or authorization of misconduct may be a direct cause of constitutional injury. Id.

### III

The affidavits and records in this case demonstrate that there is no genuine issue of material fact. These facts further establish that Thomas sustained no constitutional violation. The record makes plain that plaintiff's complaints have not been disregarded and that he has gotten responses and medical treatment when he had asked for it. See (Pl. Resp., Exh. A) (stating plaintiff was seen by doctor on the same day as plaintiff filed grievance); id., Exh. BBE (stating plaintiff had been placed on sick call); (Def. Mot., Exh. A, at 1) (showing treatment on February 1, 2002 for back pain); id., Exh. B (showing April 15, 2002 treatment for back pain, and that plaintiff disagreed with doctor's treatment because "he wants an operation and wants a disc taken out. There [is] no way of convincing this man that an operation is not necessary on him" and that such an operation might make plaintiff's condition worse; id., Exh. C-F (showing treatment on April 16, 2002; June 1, 2002; June 11, 2002; Feb. 18, 2003; Feb. 24, 2003; Feb. 28, 2003; July 28, 2003; July 29, 2003; Apr. 16, 2004; Apr. 20, 2004; May 20, 2004; May 27, 2004; May 28, 2004; Aug. 9, 2004; Sept. 10, 2004; Sept. 17, 2004). The records indicate that plaintiff has received a host of treatment for his medical condition.

Having reviewed the evidence offered by defendants and plaintiff's response to defendants' submissions, the conclusion is inescapable that defendants' motion for summary judgment be granted. Thomas has presented no evidence that defendants knew of, and disregarded an objectively serious medical condition, medical need, or risk of harm. Rish v. Johnson, 131 F.3d 1092, 1096 (4th Cir. 1997). What the record shows is that plaintiff disagrees with the conservative course of treatment offered to him for his back pain and wants additional treatment in the form of a brace, surgery or medication which the medical professionals have not prescribed. Simply because plaintiff disagrees with the course of treatment prescribed by his doctors does not mean that any of his rights have been violated. Indeed, such complaints are not actionable under § 1983. Bowring, 551 F.2d at 48.

As plaintiff cannot show that defendants were "aware of facts from which an inference could have been drawn that a substantial risk of harm existed," and that defendants drew the inference and did nothing, plaintiff cannot recover. See Farmer v. Brennan, 511 U.S. 825, 837 (1994). Thomas disagrees with the medical care he has been provided and is attempting to bring thinly veiled medical negligence claim clothed in the U.S. Constitution for which relief under § 1983 is not appropriate. See Russell v. Sheffer, 528 F.2d 318, 320 (4th Cir. 1975). The doctors recommended exercise and weight loss as a conservative means of treatment for plaintiff's pain along with available over the counter medication for pain and inflammation, but plaintiff is unsatisfied and wants more. As the Bowring opinion makes clear, a federal court is not to intervene in a disagreement as to the appropriate course of treatment for a particular medical condition. As such, it is the recommendation of the undersigned that defendant's motion for summary judgment be granted.

**IV**

Further, as plaintiff's allegations in this lawsuit parallel allegations raised in his 2001 lawsuit that was dismissed by final order and opinion dated March 31, 2003, it is recommended that this dismissal be counted as a "strike" pursuant to 28 U.S.C. § 1915(g). See Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1996). In the earlier lawsuit, plaintiff protested the prison's conservative approach to the treatment of his back pain, and the same sort of complaint raised herein was dismissed as being not actionable under § 1983. Indeed, many of the records submitted by plaintiff in this case date from the period covered by the earlier suit. See Pl. Resp., Exh. B (dated Feb. 11, 2002); id., Exh. D (dated Apr. 7, 2002); id., Exh. E (dated March 10, 2002); id., Exh. F (dated March 18, 2002); id., Exh. (2) (dated December 23, 2002); id., Exh. (3) (dated Oct. 22, 2001); id., Exh. (4) (dated Feb. 12, 2002). While plaintiff continues to disagree with his medical treatment, he was advised in 2003 that his disagreement as to the course of treatment for his back pain did not state a constitutional claim, and Thomas has no basis upon which to bring a repeat lawsuit at this time. Under the terms of the PLRA, this repetitive suit is frivolous and malicious and requires imposition of "a strike" under § 1915(g).

## V

The Clerk is directed to immediately transmit the record in this case to the Honorable Samuel G. Wilson, 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 5<sup>th</sup> day of May, 2005.

/s/ Michael F. Urbanski  
United States Magistrate Judge