

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

MICHAEL J. CAMPBELL,)	
)	
Plaintiff,)	Civil Action No. 7:00-CV-00046
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
WARDEN S. K. YOUNG, et al.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

This is a suit for compensatory, punitive, and injunctive relief brought by the Plaintiff, Michael J. Campbell, against the remaining Defendants, Correctional Medical Services, Inc., (“CMS”) and Charles C. Wilson, M.D., under 42 U.S.C. § 1983, alleging violations of the Eighth Amendment prohibition against cruel and unusual punishment for deliberate indifference to Campbell’s medical condition. This court has jurisdiction pursuant to 28 U.S.C. § 1331. This action is before the court on Dr. Wilson’s motion for summary judgment. Finding that there are genuine issues of material fact regarding whether Dr. Wilson was deliberately indifferent to Campbell’s medical needs, the court will deny Dr. Wilson’s motion for summary judgment.

I.

Plaintiff Michael J. Campbell is an inmate at Wallens Ridge State Prison, a facility in the Virginia Department of Corrections. On November 4, 1998, he learned from studying his medical records that he had been diagnosed on September 14, 1995, with the Hepatitis C virus, a condition that affects the liver.¹ (Mar. 15, 2000, Amended Compl. at 2.) On February 29, 2000,

¹Campbell assigns error to prison doctors for not disclosing to him his Hepatitis C condition. However, he admits that he knew that a Veterans Affairs hospital diagnosed and successfully treated his Hepatitis C condition in 1974. (Oct. 30, 2000, Campbell Aff. at 6-7.) He also states that the V.A. doctors told him to seek medications and treatment in the future should

Dr. Wilson, a medical doctor and an employee of CMS assigned to Wallens Ridge State Prison and Red Onion State Prison, saw Campbell. Campbell alleges that he discussed the possibility of receiving treatment for his Hepatitis C, at which time Dr. Wilson stated “I am not going to order medication for any prisoner with Hepatitis C, it cost [sic] \$25,000 a piece.”² (Id. at 6.) Campbell also states that he has been in constant pain for over two years, yet has only received pain medication for a few days.³ (Id. at 8.)

Dr. Wilson paints a different picture of his treatment of Campbell’s Hepatitis C, though he does not address Campbell’s assertion of deliberate indifference to his constant pain. Dr. Wilson states that hepatitis progresses “slowly and, in many patients, never results in cirrhosis, liver cancer, or other more serious condition.” (Wilson Aff. at 1.) Wilson also states that

[t]he treatment presently available for Hepatitis C usually involves a combination therapy of interferon and ribovarin. The treatment has side effects, some of them quite serious. They range from flu-like symptoms, experienced by most patients, to depression, cardiac failure, renal failure, liver failure, seizure disorder and, ironically, worsening of liver disease. (Campbell has been seen for suspected cardiac problems and has undergone mental health treatment; these factors would

he have any further problems. (Id. at 8.)

²In addition, Campbell has submitted an affidavit by James A. Steele, another inmate at Wallens Ridge State Prison. Steele also states that Dr. Wilson said to Campbell that “[h]e wasn’t having the state pay twenty five thousand dollars a year for an inmates [sic] treatment.” (Steele Aff., Mar. 15, 2000, Amended Compl., Exhibit B.) However, the court may not consider this affidavit because it is unsworn. “Since 1976, affidavits no longer need to be notarized and will be admissible if they are made under penalties of perjury; only unsworn affidavits will be rejected.” 10B Wright, Miller, & Kane, Federal Practice and Procedure: Civil 3d, § 2738 at 363. The affidavit also fails to state Steele’s basis of knowledge. See Fed. R. Civ. P. 56(e) (affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein”).

³Campbell indicates that his main symptoms are fatigue, jaundice of his eyes, severe pain in his right side, nausea, headaches, flu-like symptoms, and dark urine. (March 15, 2000, Amended Compl. at 9.)

have to be evaluated before treatment, even if it were otherwise appropriate.) Significantly, treatment is only effective in a relatively small percentage of patients. Because of the low success rate and the associated risks, and, yes, with some consideration for the cost of treatment as balanced against its success, guidelines promulgated by consensus groups such as the National Institutes of Health do not recommend treatment of all patients; indeed, treatment is clearly indicated only in a selected group of patients, those who are at greatest risk for progression to cirrhosis.

(Id. at 1-2.) Dr. Wilson explains that Campbell is not a candidate for that treatment because his blood tests do not indicate a “[p]ersistently elevated ALT [alanine aminotransferase],” which Wilson asserts is the primary method of monitoring liver function and Hepatitis C.⁴ (Id. at 2.)

Campbell asserts that other tests, more accurate than Dr. Wilson’s prescribed blood tests, could be done to determine the progression of his Hepatitis C and the condition of his liver. (Oct. 30, 2000, Campbell Aff. at 6.) Campbell also claims that Dr. Wilson’s reasons for disqualifying him are pretextual, asserting that his heart is “very healthy” and that he does not have any mental-health problems that should disqualify him from the Hepatitis C treatment program. (Mar. 15, 2000, Amended Comp. at 5; Oct. 30, 2000, Campbell Aff. at 5.)

After exhausting his administrative remedies, Campbell filed suit in this court on January 20, 2000. Campbell later moved to amend his complaint on March 15, 2000, and again on October 30, 2000, providing additional details and claims. The court granted those motions; however, most of the original defendants and added claims were dismissed by the court on April 17, 2000, and December 7, 2000, leaving Campbell’s claims against Dr. Wilson and CMS regarding deliberate indifference to his Hepatitis C. Dr. Wilson filed a motion for summary

⁴Dr. Wilson also states that Campbell is checked in this manner every six months, his last tests having been conducted in June 1999 and February 2000, results of which were normal. (Wilson Aff. at 2-3.)

judgment, asserting that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law on Campbell's claims of deliberate indifference.

II.

It is clearly established that prisoners are entitled to reasonable medical care and can sue prison officials 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. McMillian, 503 U.S. 1, 9 (1992); “[t]he 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). In order to establish that inadequate medical care rises to the level of a constitutional violation, a plaintiff must present facts sufficient to demonstrate (1) a sufficiently serious medical condition, and (2) deliberate indifference to that serious medical need. See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (finding that the “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment”).

To show deliberate indifference, a plaintiff must demonstrate that the defendant had actual knowledge of the plaintiff's serious medical need, see Farmer v. Brennan, 511 U.S. 825, 842-43 (1994), and that he or she drew a subjective inference that a failure to take corrective action would subject the plaintiff to unnecessary and significant pain and suffering or would expose the plaintiff to a substantial risk of serious harm, see Johnson v. Quinones, 145 F.3d 164, 167 (4th Cir. 1998). An assertion of mere negligence or malpractice is not enough, see Estelle, 429 U.S. at 106; Miltier v. Beorn, 896 F.2d 848, 851-52 (4th Cir. 1990); questions of medical judgment and

disagreements over the proper course of treatment generally do not rise to the level of a constitutional violation, see Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985). However, courts will not give deference to conduct that is “so grossly incompetent, inadequate or excessive ‘as to shock the general conscience or to be intolerable to fundamental fairness.’” Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970) (quoting Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966)); see also Wright, 766 F.2d at 849.

Here, there is no question that Campbell suffers from a serious medical condition, namely, Hepatitis C and the associated pain and symptoms; thus, the remaining issue is whether Dr. Wilson was deliberately indifferent to Campbell’s serious medical condition. Crucial to this determination is whether the proposed interferon and ribovarin treatment is medically necessary, i.e., whether denial of the treatment would subject Campbell to unnecessary and significant pain and suffering or would expose him to a substantial risk of serious harm. On that issue, the facts are in dispute as to whether Dr. Wilson withheld the interferon and ribovarin treatment for legitimate reasons or merely because the treatment is too costly.⁵ If Dr. Wilson did, in fact, say that he was denying the treatment solely because of its cost, that statement logically implies that the treatment is medically necessary and would otherwise be prescribed if cost were not a consideration. Although he denies that cost was a consideration in Campbell’s case, Dr. Wilson implicitly admits that the high cost of the treatment is a factor that he would consider if Campbell

⁵As for Campbell’s complaint that the pain and other symptoms that he suffers have been ignored, Dr. Wilson has failed to address these allegations. Although the plaintiff was provided with aspirin, this may not constitute adequate medical care. See West v. Keve, 571 F.2d 158, 162 (3d Cir. 1978).

was otherwise eligible for the treatment; this lends credence to Campbell's version of events and his theory for being denied the treatment. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986) (finding that, in considering a summary judgment motion, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). If a jury finds that Dr. Wilson did, indeed, tell Campbell that the only reason he was being denied treatment was because of the cost, then a reasonable jury could determine that Dr. Wilson deliberately ignored what he knew to be a life-threatening medical condition or at least that Dr. Wilson drew a subjective inference that his delay of treatment, merely due to cost, until a semi-annual blood test shows that Campbell's liver is failing would put Campbell at substantial and unreasonable risk of serious harm.⁶ Consequently, the court finds that there are genuine issues of material fact necessitating a trial.

III.

For the reasons stated above, the court denies Dr. Wilson's motion for summary judgment. The court will issue an appropriate order on this day.

ENTER: This ____ day of March, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

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⁶The court does not conclude that, if a treatment is medically necessary, cost may never be considered in determining whether to provide the treatment. The defendants have not raised a cost-benefit defense, so the issue is not squarely presented.

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WARDEN S. K. YOUNG, <i>et al.</i>,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

In accordance with the Memorandum Opinion entered this day, it is **ORDERED and ADJUDGED** that Defendant Dr. Charles C. Wilson’s motion for summary judgment is **DENIED**.

ENTER: This _____ day of March, 2001.

CHIEF UNITED STATES DISTRICT JUDGE