

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 29, 2024*

Decided March 29, 2024

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 23-1746

FIRAS M. AYOUBI,
Plaintiff-Appellant,

v.

WEXFORD HEALTH SOURCES, INC.,
et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 18-cv-01689-SPM

Stephen P. McGlynn,
Judge.

* This appeal is successive to case no. 19-2794 and is being decided under Operating Procedure 6(b) by the same panel. We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

ORDER

This appeal concerns the treatment Firas Ayoubi received for involuntary movements of his body and the associated pain while incarcerated at Pinckneyville Correctional Center, in Pinckneyville, Illinois. Ayoubi sued Wexford Health Sources, Inc., and prison officials involved with his medical care, asserting that they were deliberately indifferent to his medical condition in violation of his Eighth Amendment rights. He unsuccessfully sought a preliminary injunction to see a neurologist, and, on an interlocutory appeal, we affirmed because Ayoubi had no reasonable likelihood of success on his claims. *See Ayoubi v. Wexford Health Sources, Inc.*, 819 F. App'x 439, 441 (7th Cir. 2020). Later, the district court entered summary judgment for the defendants. That decision was correct, and we affirm again.

Shortly before arriving at Pinckneyville, Ayoubi saw a jail doctor about his movements; the doctor recorded that Ayoubi had a “disorder of [his] motor nervous system.” Once at Pinckneyville in early 2018, Ayoubi reported these movements and the pain. Based on lab test results, a nurse practitioner opined that electrolyte or thyroid-hormone abnormalities caused Ayoubi’s symptoms. He prescribed vitamin B12 injections, folic acid, and potassium; he also issued Ayoubi a temporary permit for low bunk or gallery.

A few months later, Ayoubi began to see prison doctors about his movements and pain. First, Dr. Percy Myers suggested that Ayoubi might have a form of chorea, involuntary movements caused by a neurological condition. Dr. Myers requested that a neurologist see Ayoubi about his condition. Dr. Alberto Butalid, the prison’s medical director, forwarded this request for collegial review, a professional process through which Dr. Butalid and a Wexford medical director determine whether a referral is necessary. After that review, they decided to observe Ayoubi in the prison’s infirmary and perform a neurological exam, in lieu of referring him to an outside specialist, so that prison staff could monitor his symptoms. Dr. Butalid also told Ayoubi that prison monitoring would combat “malingering” and that a referral is “expensive.”

Pinckneyville staff implemented this monitoring plan, and Dr. Butalid performed a neurological examination. He concluded that some of Ayoubi’s movements were involuntary, but he observed no other abnormalities. Dr. Butalid ordered lab tests and examined Ayoubi again, a month later, still seeing no abnormalities aside from the movements. While Ayoubi was in the infirmary, nurses also recorded their observations. The first recording notes “impaired comfort,” but otherwise during the first two days of his visit, Ayoubi did not tell nurses that he was in pain, and they noted

no uncontrollable movements. On the third day, Ayoubi was “shrug[ging]” his shoulder and had “twitching” in his shoulder. The observation from the final day states that Ayoubi was not complaining of pain or having uncontrollable movements.

A few days after Ayoubi left the infirmary, Dr. Butalid and the Wexford director discussed further treatment. They noted that Ayoubi’s “subjective complaints are not supported by the objective findings.” After conferring, they still declined to refer him to an outside neurologist, but they referred him to a behavioral health counselor. Ayoubi then saw that professional. After Ayoubi reported that he was doing well mentally and did not need mental health services, the provider discharged him, noting that Ayoubi appeared to have a “tic” that was “neurological.” Ayoubi asked the provider why he was referred for this treatment, and the provider made a gesture of a “money sign.”

Shortly thereafter, Ayoubi sought more treatment. He asked for another permit for a low bunk or gallery and pain medicine. A nurse practitioner, who spoke with Dr. Myers about the criteria for a permit, determined that Ayoubi did not meet the criteria and denied the request as well as pain medication. A few days later, Ayoubi had his final appointment with Dr. Butalid. He complained of “persistent twitching” and said he would bring Dr. Butalid his pre-Pinckneyville medical records. Dr. Butalid was soon assigned to a different prison and never saw Ayoubi again. Around a month later, Ayoubi saw Dr. Myers about involuntary movements and told Dr. Myers that he had hired a private neurologist. Dr. Myers promised to review the neurologist’s report if Ayoubi provided it but advised Ayoubi that a visit to him without the report was not necessary. Ayoubi next saw Dr. Myers in September 2018. He did not have the report, but he complained of pain from the involuntary movements. Dr. Myers prescribed ibuprofen, an over-the-counter drug that Ayoubi agreed was sufficient. The doctor also noted that he had seen Ayoubi “numerous times” in the infirmary and when Ayoubi walked but saw “no body contortions/movements.” When Dr. Myers saw Ayoubi a month later, Dr. Myers observed “no tremor” but “constant movement.” Ayoubi still did not provide the private neurologist’s report.

Ayoubi was soon transferred to another prison, where he received a referral for an MRI and an appointment with a neurologist. The neurologist noted that the MRI showed “brain atrophy” but wrote that the finding was “most likely unrelated to his current presentation” and that Ayoubi should be referred for neuropsychiatric and psychiatric testing. Ayoubi was later referred to a movement-disorder clinic.

Ayoubi sued prison staff for their deliberate indifference to the serious medical condition of his involuntary movements and his related symptoms. *See* 42 U.S.C. § 1983. He also sued Wexford, asserting that it maintained a policy of unconstitutionally

delaying or denying a referral to a specialist to save money. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). Some defendants settled and the others moved for summary judgment. During discovery, the court recruited counsel for Ayoubi. Ayoubi became displeased with his counsel's brief in opposition to the motion for summary judgment, so the court permitted Ayoubi to supplement his counsel's opposition brief. In opposing summary judgment, Ayoubi (and his counsel) relied on reports from Dr. Norman Kohn, a private neurologist. Dr. Kohn stated that ignoring Ayoubi's symptoms without an examination by a neurological specialist fell outside reasonable medical practice in the United States. The defendants moved to strike Dr. Kohn's reports as conclusory and for failure to disclose the report in accordance with Federal Rule of Civil Procedure 26(a)(2)(B). Ayoubi responded that the rule permitted disclosure 90 days before trial. *See* FED. R. CIV. P. 26(a)(2)(D)(i).

The court granted the defendants' motions. First, it observed that Rule 26 requires disclosures "at the times" the court orders, and Ayoubi did not comply with the court's deadlines; in addition, Dr. Kohn's reports were conclusory. On the merits, the court ruled that no evidence suggested that the defendants consciously ignored Ayoubi's complaints of involuntary movements, and in addition the associated pain was not an objectively serious medical need.

On appeal, Ayoubi argues that the district court wrongly entered summary judgment for the individual defendants. Under the Eighth Amendment, the defendants are entitled to summary judgment unless Ayoubi furnished evidence that they knew of and were deliberately indifferent to a substantial risk of harm to him from a medical condition. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *White v. Woods*, 48 F.4th 853, 862 (7th Cir. 2022).

Before we begin our analysis, we consider the order striking Dr. Kohn's opinion that the defendants should have sent Ayoubi to a neurologist. We review that ruling for abuse of discretion. *Novak v. Bd. of Trs. of S. Ill. Univ.*, 777 F.3d 966, 972 (7th Cir. 2015). Contrary to the defendants' assertion, we may reach this ruling even though Ayoubi did not cite it in his notice of appeal: That notice encompassed all the orders that merged into the final judgment. *See* FED. R. APP. P. 3(c)(4). Ayoubi appears to argue that because the reports were admitted at the preliminary injunction hearing, the defendants were not prejudiced. But the court permissibly struck the reports because they did not contain all the required disclosures, such as Dr. Kohn's compensation, a list of cases in which he had testified, and a timely resume. *See* FED. R. CIV. P. 26(a)(2); *Novak*, 777 F.3d at 973–74. Ayoubi does not explain how the report's omission of that required information was harmless at the summary judgment stage. In any case, Dr. Kohn's

opinion does not bear on the relevant substantive standard of this case. He opined that a delay in getting Ayoubi to a neurologist was not “reasonable,” but the relevant standard—on which he does not opine—is whether the delay reflected “deliberate indifference” to Ayoubi’s medical needs. This standard “mirrors the recklessness standard of the criminal law.” *Brown v. LaVoie*, 90 F.4th 1206, 1212 (7th Cir. 2024).

On the merits, we agree with the district court that the individual defendants are entitled to summary judgment on Ayoubi’s claim that they deliberately ignored his involuntary movements. The undisputed evidence shows a robust response to his symptoms: When Ayoubi first complained, medical staff conducted lab tests, prescribed vitamin and mineral supplements in response to the results, and temporarily allowed him to use a low bunk. When Ayoubi complained that his symptoms persisted, the staff examined Ayoubi and monitored him for days in an infirmary, where they saw only limited involuntary movements, and suggested behavioral care. Medical staff also observed Ayoubi outside of the infirmary, further suggesting that his involuntary movements were minimal. When Ayoubi told staff about an expert report that might influence their treatment, they said they would review it, but he never supplied it. Given their attention and responsiveness to his complaints, and the absence of evidence from Ayoubi suggesting that their attention and responses were reckless, it would be impossible for a rational jury to find that “no minimally competent professional would have” acted as the defendants did. *See Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014) (citation omitted).

For the same reasons, Ayoubi’s argument about the pain he associated with his involuntary movements is also unavailing. Viewing the record in Ayoubi’s favor, as we must, we will assume that Ayoubi complained about pain and that the pain was severe. (We note that the district court did not make these assumptions.) Ayoubi’s argument about his pain asks us to view separately the treatment he received for the movements and the treatment he received for the pain. But they cannot be separated this way because Ayoubi tells us that his pain arose from the involuntary movements. And as we explained above, on this record the individual defendants were not deliberately indifferent in their response to the movements: They sought to determine the movements’ origin. And Ayoubi has not produced evidence that the defendants were criminally reckless by waiting several months to prescribe ibuprofen while they attempted to discover the existence, nature, and cause of his symptoms.

Ayoubi offers several replies, but they are unpersuasive. First, he suggests that, by adhering to collegial review, Dr. Butalid and Dr. Myers did not follow their own professional judgment that he see a neurologist. But collegial review is a form of

professional judgment, and a mere disagreement between professional judgments is not evidence of deliberate indifference. *See id.* Ayoubi also argues that Wexford improperly had him monitored to see if he was “malingering” and to avoid the expense of a neurologist. But Ayoubi offers no evidence suggesting that monitoring him to verify his symptoms or to justify an expense was reckless. Finally, Ayoubi observes that he received a referral to a neurologist after he transferred prisons, but that fact alone does not show that the defendants’ care was unconstitutional. *See, e.g., Walker v. Wexford Health Sources, Inc.*, 940 F.3d 954, 965 (7th Cir. 2019). In any case, it does not appear that the referral resolved his movement issues—the neurologist simply referred him for further testing, including psychological testing (in line with the defendants’ referral to behavioral health).

Finally, we address summary judgment on Ayoubi’s claim that Wexford uses an unconstitutional cost-saving policy. Ayoubi cites statements made to him by medical staff suggesting that the treatment he received, and the denial of a referral to an outside neurologist, involved considerations of the cost. But healthcare providers may consider factors such as cost and administrative convenience while making treatment decisions, as long as those factors are not “considered to the exclusion of reasonable medical judgment.” *Roe v. Elyea*, 631 F.3d 843, 863 (7th Cir. 2011) (emphasis omitted). And the statements Ayoubi points to do not show that Wexford has a practice or custom of recklessly denying the treatment of serious medical needs in order to save money. *See Chatham v. Davis*, 839 F.3d 679, 685–86 (7th Cir. 2016).

We have considered the rest of Ayoubi’s arguments; none merits discussion.

AFFIRMED