

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON**

CIVIL ACTION NO. 14-9-DLB

STEPHEN VILLARREAL

PLAINTIFF

V.

MEMORANDUM OPINION AND ORDER

J.C. HOLLAND, et al.

DEFENDANT

** ** ** ** **

This matter is before the Court upon the remaining Defendant, Dr. Jorge Vazquez-Velazquez's "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment" (Doc. # 17; Doc. # 19; filed under seal at Doc. # 23). Dr. Vazquez-Velazquez is the Regional Physician-Clinical Consultant for the Federal Bureau of Prisons ("BOP") at the United States Penitentiary ("USP")-McCreary, which is located in Pine Knot, Kentucky. In his response (Doc. # 24), Plaintiff, Stephen Villarreal¹ asserts constitutional claims under 28 U.S.C. § 1331, pursuant to the doctrine announced in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). As explained herein, Dr. Vazquez-Velazquez is entitled to summary judgment regarding Villarreal's claims.

¹ Villarreal dated his Complaint January 7, 2014, (Doc. # 1, p. 8), and on that date, he was confined in the USP-McCreary.¹ On January 14, 2014, the BOP transferred Villarreal to a Residential Re-Entry Management ("RRM") facility in San Antonio, Texas. Villarreal remained at the RRM until July 11, 2014, when he was released from BOP custody pursuant to earned Good-Conduct Time credits. See Carlos J. Martinez Declaration (Doc. # 17-1; Doc. # 19-1; filed under seal at Doc. # 23-1, ¶ 3) Villarreal lists his current address as 518 Seay Street, Seguin, Texas, 78155.

I. PROCEDURAL HISTORY

1. Villarreal's Complaint

In his *Bivens* Complaint, Villarreal alleges that between November 20, 2012, and January 14, 2014, he experienced various adverse side effects of Hepatitis C, such as nausea, fatigue, joint pain, liver pain, depression, anxiety, and loss of appetite, and that the USP-McCreary medical staff failed to adequately treat his Hepatitis C condition. Specifically, Villarreal claims that prison medical staff failed and/or refused to provide him with interferon and ribavirin, medications which he alleges would have given him a "Sustained Virological Load." (Doc. # 1, at 2). Villarreal asserts that the USP-McCreary medical staff informed him that he had been approved to receive these medications, but as of January 13, 2014, he had not received the treatment therapy. Villarreal further alleges that in May 2013, the BOP informed him that he would undergo a liver biopsy, but that as of January 13, 2014, the liver biopsy had not been performed. (*Id.*; see also Doc. # 1, p 4) (stating that the Utilization Review Committee had approved Villarreal for a liver biopsy).

Villarreal claims that by failing and/or refusing to administer the requested drug therapy to him, the USP-McCreary medical staff and Dr. Vazquez-Velazquez were deliberately indifferent to his serious medical needs, in violation of his rights guaranteed by the Eighth Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. Villarreal alleges that because he was denied proper medical treatment, he suffered physical complications and mental anguish. Villarreal demands both injunctive and monetary relief, specifically, an order directing the USP-McCreary medical staff to provide him with the interferon and ribavirin drug therapy, and

unspecified monetary and punitive damages to compensate him for his pain and suffering. [*Id.*, at p. 8]

On June 30, 2014, the Court screened Villarreal's complaint as required by 28 U.S.C. § 1915(e), and entered a Memorandum Opinion and Order, which (1) dismissed as moot Villarreal's claims seeking injunctive relief (specific medical treatment), based on the fact that he had since been transferred to another facility; (2) dismissed his *Bivens* claims against USP-McCreary Warden J.C. Holland and USP-McCreary Health Services Administrator "B." Barron in their individual capacities, finding that Villarreal had not alleged that Holland or Barron, both prison administrators, were personally involved in the complained-of medical decisions; (3) dismissed Villarreal's Eighth Amendment *Bivens* claims against Holland, Barron, and Dr. Vazquez-Velazquez in their *official* capacities, because under established case law a *Bivens* claim can be asserted only against federal officials sued in their *individual* capacities; and (4) ordered Dr. Vazquez-Velazquez to respond to Villarreal's Eighth Amendment *Bivens* claims asserted against him in his individual capacity. (Doc. # 5, pp. 3-6).

2. Motion to Dismiss, or in the Alternative, Motion for Summary Judgment

On September 4, 2015, Dr. Vazquez-Velazquez filed, through counsel, his "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment" (Doc. # 17; Doc. # 19; filed under seal at Doc. # 23). In support of his motion, Dr. Vazquez-Velazquez attached his sworn Declaration (Doc. # 17-2; Doc. # 19-2; filed under sealed at Doc. # 23-2), as well as the sworn Declaration of Carlos J. Martinez, Supervisory Attorney at the BOP's Consolidated Legal Center in Lexington, Kentucky (Doc. # 17-1;

Doc. # 19-1; filed under seal at Doc. # 23-1).² Dr. Vazquez-Velazquez summarized the medical treatment which Villarreal received between November 2012 and January 2014, while he was confined in the USP-McCreary. See Doc. # 23-2, pp. 2-6, ¶ 3. A summary of that treatment is outlined below:

November 20, 2012: USP-McCreary medical staff conducted a Health Screening of Villarreal, in which they noted that in 2005, Villarreal had been diagnosed with the Hepatitis C Virus. Villarreal's Hepatitis C was marked for follow-up. (*Id.*, p. 2).

November 21, 2012: A medication reconciliation encounter was performed at USP-McCreary's Health Services. Villarreal's non-formulary medications were substituted with equivalent formulary medications, and it was noted that Villarreal arrived at USP-McCreary with no medication for his Hepatitis C. (*Id.*)

November 28, 2012: A Chronic Care encounter was performed at USP-McCreary's Health Services, at which time a history of Hepatitis C infection was noted with complaints of fatigue and muscle aches. Villarreal's viral load was noted to be at the medium range of 2,052,286; laboratories were requested; and Villarreal was placed in the Chronic Care Clinic for infectious disease. Dr. Vazquez-Velazquez reviewed and co-signed the request for evaluation for interferon therapy and a liver biopsy (surgical procedure). (*Id.*)

December 5, 2012: A clinical laboratory report concluded that Hepatitis C RNA was not detected. Villarreal's viral load was noted to be at the medium-high range of 6,790,000. Dr. Vazquez-Velazquez reviewed and co-signed the laboratory results on

² In his capacity as the BOP's Supervisory Attorney, Martinez has access to all of Villarreal's prison records, including but not limited to his inmate Personal Data, Administrative Remedies, Disciplinary history, housing assignments, sentencing calculations. (*Id.*, ¶ 2).

December 11, 2012. (*Id.*, pp. 2-3).

January 1, 2013: Villarreal filed an inmate request to staff alleging that he was feeling very sick with chest pain, coughing, and throat pain. (*Id.*, p. 3). Villarreal alleged that he was spitting blood, having headaches and nose bleeds, and that he was waiting for his alanine aminotransferase (ATL)³ test in order to obtain treatment for his Hepatitis C.

January 2, 2013: Villarreal complained of throat pain and alleged to be spitting blood and having nose bleeds. Villarreal reiterated his pending request for Hepatitis C treatment. (*Id.*)

January 3, 2013: Villarreal was informed that his symptoms were not related to his Chronic Care Condition Hepatitis C, but that he had been referred to psychology and surgery, pending the Utilization Review Committee's ("URC") approval for Hepatitis C treatment. (*Id.*, p. 3).

March 27, 2013: Villarreal was seen at psychology services for an interferon evaluation. Villarreal was evaluated and the potential side effects of interferon were discussed. Psychology services found no indications that would affect Villarreal's ability to commence interferon treatment. Dr. Vazquez-Velazquez reviewed the psychological evaluation on March 28, 2013. (*Id.*)

April 18, 2013: A Chronic Care Encounter was performed at USP-McCreary's Health Services. Villarreal reported a history of Hepatitis C and that he was awaiting a biopsy. Villarreal denied abdominal pain, dark urine, or nausea/vomiting. Villarreal was examined, his laboratories were reviewed, new laboratories were requested, and the issue of Hepatitis C treatment was discussed. (*Id.*, pp. 3-4). Villarreal was informed that

³ Alanine aminotransferase is typically used to detect liver injury. (*Id.*, n. 5).

he had not been approved for Hepatitis C treatment, and that a packet would be sent to the region for approval or denial. Villarreal insisted on the treatment because he was scheduled to be released in a little over a year, but was told that the prison Health Services Unit had no control over treatment decisions. (*Id.*, p. 4).

May 14, 2013: Villarreal was seen by Dr. Dasen Ritchey, M.D., for a liver biopsy based on a confirmed diagnosis of Hepatitis C. The notes state, "Villarreal presented no history of nausea, vomiting or diarrhea, nor any mental changes, bloody diarrhea, bruising, tremors or abdominal swelling." Villarreal stated that he wanted the Hepatitis C to be treated "now rather than later," and he was examined and assessed for Hepatitis C without a liver biopsy proving hepatic injury. Villarreal was found to be without any external symptoms or signs of extensive disease, but an ACT or US guided core liver biopsy in the near future was requested. Dr. Ritchey's nurse called USP-McCreary requesting a liver biopsy as soon as possible in order to follow up with a gastro-intestinal doctor. On May 15, 2013, Dr. Vazquez-Velazquez reviewed the consultation report. (*Id.*, p. 4).

On May 14, 2013, an administrative note was entered in Villarreal's file concerning a conversation between Dr. Ritchey's office and a USP-McCreary medical provider. Dr. Ritchey's representative stated that a liver biopsy needed to be scheduled as soon as possible, wanting to bypass "7-Corners" (the provider which schedules the prison's outside medical services), and directly schedule the biopsy. The doctor's office was informed that the procedure requires the URC to evaluate the consultation, and that if the URC approves the procedure, it would be re-scheduled. (*Id.*, pp. 4-5). The doctor's office noted the time involved to re-schedule; when asked if the situation was

emergent or urgent, the office replied that it was not an emergency, but that once the patient is diagnosed with Hepatitis C, he needs to see a gastrointestinal (GI) specialist as soon as possible for treatment. (*Id.*, p. 5).

May 16, 2013: A consultation encounter was conducted at USP-McCreary Health Services. The consultation report stated a CT or US guided core liver biopsy was needed in the near future in order to direct therapy. The consultation revealed no external symptoms or signs of extensive disease, but stated that the procedure should be conducted as soon as possible. (*Id.*).

May 22, 2013: The URC approved the referral request for general surgery. (*Id.*)

June 24, 2013: Villarreal was seen at sick call for influenza type symptoms. At that time, Villarreal wanted to discuss his Hepatitis C, threatening to “file” if he did not receive treatment for his condition. Villarreal was advised by the treating APRN that his case was “pending” to determine if he was eligible for Hepatitis C treatment. (*Id.*).

July 1, 2013: Dr. Vazquez-Velazquez reviewed laboratory reports which revealed that Villarreal’s viral load was found to be at the medium-high range of 5,820,000 and that Hepatitis C RNA was not detected. (*Id.*).

July 29, 2013: A Chronic Care Encounter was performed at USP-McCreary Health Services. Villarreal was evaluated and examined and his Hepatitis C condition was discussed. Villarreal was informed that under BOP policy, he did not qualify for Hepatitis C medication because his projected release date was in July 2014. Villarreal became upset when he was so advised. (*Id.*, pp. 5-6). New laboratories were requested and the consultation request for a liver biopsy was canceled. (*Id.*, p. 6).

August 19, 2013: New laboratories were requested. (*Id.*).

September 3, 2013: Villarreal's white cell count was found to be stable since July 2013. (*Id.*).

October 10, 2013: Laboratory reports were reviewed. (*Id.*).

January 10, 2014: A Chronic Care Encounter was performed at USP-McCreary's Health Services. No new viral load was taken because Villarreal was close to his projected release date and was not eligible for treatment. (*Id.*).

Based on the medical treatment summarizes above, Dr. Vazquez-Velazquez argues that dismissal and/or the entry of summary judgment are appropriate because no genuine issue of material fact exists. First, Dr. Vazquez-Velazquez contends that the prison medical staff's alleged failure to provide Villarreal with a specific drug therapy does not rise to the level of deliberate indifference under the Eighth Amendment of the U.S. Constitution. Dr. Vazquez-Velazquez acknowledges that Villarreal demanded, but did not receive, a different type of medical treatment or a more aggressive drug therapy, over and above what was prescribed. However, Dr. Vazquez-Velazquez asserts that the denial of that request does not establish that he and the prison medical staff were deliberately indifferent to Villarreal's serious medical condition.

In his Declaration, Dr. Vazquez-Velazquez explains that the BOP's Clinical Practice has published *Guidelines for the Evaluation and Treatment of Hepatitis C and Cirrhosis*. (Doc. # 19-2; R. 23-2, p. 6, ¶ 4] These Guidelines provide recommendations for the medical management of federal inmates who have been diagnosed with Hepatitis C, and those Guidelines consist of a 10-step, systematic approach for

detecting, evaluating, and treating Chronic Hepatitis C.⁴ (*Id.*, pp. 6-7).

Dr. Vazquez-Velazquez explains that pursuant to the *Guidelines for the Evaluation and Treatment of Hepatitis C and Cirrhosis*, inmates are first screened for Hepatitis C, and if they are positive for it, they are provided with initial medical follow-up. Initial medical follow-up consists of a baseline evaluation including a physical examination, laboratory tests, patient education, and preventative health measures. (*Id.*, p. 7). After a positive inmate has been examined and evaluated, it is determined whether Hepatitis C treatment is recommended or not recommended. Hepatitis C treatment is not recommended if: 1) contraindications to peginterferon are present; 2) the inmate will be incarcerated for an insufficient period of time to complete treatment; 3) the inmate has an unstable medical or mental health condition which precludes antiviral therapy; and 4) the inmate refuses treatment. If any of these conditions are present, the treatment related work-up is to halt. (*Id.*, citing “Guidelines for the Evaluation and Treatment of Hepatitis C and Cirrhosis”, Appendix 2, Step 3a).

Dr. Vazquez-Velazquez asserts that at reaching Step 3a, the BOP did not recommend further treatment of Villarreal’s hepatitis condition, and the evaluation of Villarreal’s condition ended at Step 3b. (*Id.*, p. 7, n. 9). Despite that decision, Dr. Vazquez-Velazquez claims that between November 20, 2014 and January 14, 2014, the

⁴ The ten steps in the *Guidelines for the Evaluation and Treatment of Hepatitis C and Cirrhosis* are: Step 1: Appropriately screen inmates for Hepatitis; Step 2: Provide initial follow-up for anti-Hepatitis C positive inmates; Step 3a: Determine if Hepatitis C treatment is not recommended; Step 3b: Monitor Hepatitis C -infected inmates who are not on treatment. For inmates who may be eligible for Hepatitis C treatment, proceed as follows: Step 4: Obtain Hepatitis C RNA assay and Hepatitis C genotype; Step 5: Assess liver fibrosis and need for a liver biopsy; Step 6: Determine if treatment should be initiated; Step 7: Conduct a pre-treatment evaluation; Step 8: Determine appropriate treatment and obtain informed consent; Step 9: Manage side effects and monitor treatment response; Step 10: Assess for sustained viral response (SVR).

USP-McCreary medical staff thoroughly and consistently examined, monitored, and evaluated Villarreal's medical condition, and concluded that it was stable, with no significant problems. (*Id.*, p. 9, ¶ 5). Dr. Vazquez-Velazquez also notes that the antiviral treatment for Hepatitis C "has some limitations in terms of both efficacy and toxicity," that the laboratory tests revealed that Villarreal's blood platelets and liver enzymes were within the normal range, that his viral loads were within a satisfactory range, and that Villarreal showed no signs of inflammation or cirrhosis. (*Id.*, ¶ 6, pp. 9-10). Given those findings, Dr. Vazquez-Velazquez asserts that it was unnecessary to administer interferon and ribavirin treatments to Villarreal. (*Id.*)

Dr. Vazquez-Velazquez further explains that the final decision not to provide Villarreal with the anti-viral drug therapy he demanded was reached in compliance with the BOP's policy guidelines. (*Id.*, p. 10, ¶ 7). Dr. Vazquez-Velazquez asserts that the complex anti-viral Hepatitis C treatment requested by Villarreal requires time, not only to effectively administer, but also to properly follow-up with testing; therefore, the recommended standard duration of Hepatitis C treatment with interferon and ribavirin is 24-48 weeks, depending on the test results obtained after treatment is administered. (*Id.*) Because Villarreal was so close to his anticipated release date by the time his medical request was processed and reviewed, the BOP would not have had time to complete the administration and necessary follow-up of the drug therapy. Thus, Dr. Vazquez-Velazquez claims that given these circumstances, Villarreal was not a candidate for the anti-viral drug treatment he requested. (*Id.*) Dr. Vazquez-Velazquez explains that if the anti-viral drug therapy begins but is interrupted (*i.e.*, because the prisoner is released from the BOP's custody), serious adverse consequences could

result. (*Id.*) Additionally, Dr. Vazquez-Velazquez claims that when a Hepatitis C prisoner is close to his release date, the BOP will not authorize the treatment. (*Id.*)⁵ Dr. Vazquez-Velazquez also identified possible adverse consequences of interferon treatment, including death and/or serious psychiatric events, which can cause or worsen depression and mood changes. (*Id.*, ¶ 3, p. 2, n. 4).

Furthermore, Dr. Vazquez-Velazquez alleges that he was not personally involved in the specific medical decisions about which Villarreal complains, that he was not Villarreal's primary care health provider and had merely reviewed Villarreal's medical encounters on six specific dates,⁶ that he had no direct contact with Villarreal, and did not conduct any on-site evaluations or examinations of him. (*Id.*, p. 11; ¶ 8). Dr. Vazquez-Velazquez states that a Primary Care Provider Team ("PCPT") provided direct medical care to Villarreal during his confinement in USP-McCreary. (*Id.*) Dr. Vazquez-Velazquez explains that the PCPT consisted of "EMT's, registered nurses, physician assistants, and clinical doctors," who are responsible for providing "direct patient care." (*Id.*) Under the PCPT model, each inmate is assigned to a medical team of health care providers and support staff who are responsible for managing the inmate's health care needs. Dr. Vazquez-Velazquez states that once Villarreal arrived at USP-McCreary, he assessed and followed Villarreal's medical condition, along with the PCPT and outside

⁵ Dr. Vazquez-Velazquez explains that inmates who are infected with Hepatitis C, but for whom treatment is *not* recommended are monitored through the Chronic Care Clinics and are periodically evaluated to determine if Hepatitis C treatment should be reconsidered. Monitoring considerations consist of: 1) a follow-up plan, 2) baseline laboratory evaluations, 3) follow-up laboratories, and 4) repeat liver biopsies. (*Id.* Step 3b). Periodic liver ultrasound or CT examinations are not to be performed unless cirrhosis is present or other definitive indications are found. (*Id.*, p. 8, ¶ 4).

⁶ Dr. Vazquez-Velazquez states the he reviewed the notes from Villarreal's medical encounters on November 28, 2012; December 5, 2012; March 28, 2013; May 15, 2013; June 11, 2013; and July 1, 2013, but that he did not "...provide any on site evaluations or examinations to Plaintiff [Villarreal]." (*Id.*, p. 11, ¶ 8).

providers in order to properly address and treat Villarreal's condition. (*Id.*, pp. 11-12, ¶ 8). Nevertheless, Dr. Vazquez-Velazquez contends that the PCPT appropriately diagnosed, tested, monitored, maintained, and addressed all of Villarreal's medical needs during his period of confinement at the prison. (*Id.*, p. 12; ¶¶ 10-11).

Dr. Vazquez-Velazquez specifically refutes Villarreal's claim that the interferon and ribavirin drug therapy was necessary and asserts that he was not deliberately indifferent to Villarreal's medical needs. Dr. Vazquez-Velazquez contends that even though he had no direct involvement in Villarreal's daily medical treatment, he followed the BOP's guidelines and policies regarding the treatment of Villarreal's Hepatitis C, which established that Villarreal was not a candidate for the type of medical treatment he demanded. (*Id.*, pp. 11-12). Dr. Vazquez-Velazquez further contends that Villarreal has not alleged facts substantiating his broad and conclusory allegations that Dr. Vazquez-Velazquez personally and deliberately denied Villarreal necessary medical treatment in violation the Eighth Amendment; rather, at best, Villarreal alleges dissatisfaction and disagreement with the medical treatment provided at USP-McCreary. Dr. Vazquez-Velazquez argues such assertions are inadequate to support an Eighth Amendment deliberate indifference allegation.

Finally, Dr. Vazquez-Velazquez advances two additional reasons why Villarreal's claims should fail. First, Dr. Vazquez-Velazquez alleges that Villarreal's complaints consist of mere mental anguish, and that Villarreal suffered no actual, physical injury as a result of the alleged conduct by USP-McCreary medical staff. And second, Dr. Vazquez-Velazquez asserts that he is entitled to qualified immunity, because he was not aware of any clearly-established law or constitutional right mandating him to provide

Villarreal with the medical treatment which he specifically demanded.

3. Villarreal's Response to the Motion to Dismiss, or in the Alternative, Motion for Summary Judgment

In response to the motion filed by Dr. Vazquez-Velazquez, Villarreal has submitted a one-page letter (Doc. # 24) in which he states that he relies on the allegations which he set forth in his Complaint. Villarreal claims that he "...wanted treatment for my liver then and I still want the same. I went threw [sic] all the stress to get my treatment but the system fell [sic] other wise." (*Id.*) Villarreal concludes his Response by stating: "The Judge has all I send all I want is for His Best Judgment and what is right. I leave the matter in the Judge Hands and respect What is Right." (*Id.*).

II. DISCUSSION

1. Standard of Review

Because Dr. Vazquez-Velazquez has submitted sworn declarations and other materials outside of the pleadings, the Court will treat his arguments as a motion for summary judgment under Federal Rule of Civil Procedure 56. See *Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993); see also *Smith v. The Cheesecake Factory Restaurants, Inc.*, No. 3:06-00829, 2010 WL 441562, at * 3–4 (M.D. Tenn. Feb. 4, 2010).

Summary judgment is appropriate where "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 the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail on a motion for summary judgment, the non-moving party must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 341–42 (6th

Cir. 1990). Drawing all reasonable inferences in favor of the non-moving party, the Court must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

Although Villarreal filed a one-page letter in response to Dr. Vazquez-Velazquez’s motion to dismiss/motion for summary judgment, his letter was devoid of any factual content, legal arguments, case law, or medical proof which contravene either Dr. Vazquez-Velazquez’s motion or the evidence which supports his motion. Therefore, for all practical purposes, Villarreal did not file a response to Dr. Vazquez-Velazquez’s motion for summary judgment. However, when faced with an unopposed motion for summary judgment, a district court cannot grant a motion for summary judgment without first considering the supporting evidence and determining whether the movant has met their burden. *Delphi Auto. Sys., LLC v. United Plastics, Inc.*, 418 F. App’x 374, 380-81 (6th Cir. 2011) *quoting* *Carver v. Bunch*, 946 F.2d 451, 454–55 (6th Cir. 1991) (“a district court cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The court is required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden.”). Accordingly, the Court will examine the record to determine if Dr. Vazquez-Velazquez has carried his burden.

2. Analysis

In his Complaint, Villarreal alleges that by failing and/or refusing to administer the interferon and ribavirin drug therapy to him, both the USP-McCreary medical staff and Dr. Vazquez-Velazquez were deliberately indifferent to his serious medical needs, in

violation of his rights guaranteed by the Eighth Amendment of the U.S. Constitution. The Eighth Amendment prohibits prison officials from acting with deliberate indifference to a prisoner's objectively serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A deliberate indifference claim has two components, one objective and the other subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001). Under the objective component of the *Farmer* test, "the plaintiff must allege that the medical need at issue is 'sufficiently serious.'" *Id.* Under the subjective component, "the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk." *Id.*

To determine if a plaintiff has a "sufficiently serious" medical need and satisfies the objective component of the *Farmer* test, courts have taken two nonexclusive paths. A medical need is "sufficiently serious" if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6th Cir. 2004). Alternatively, a medical need is "sufficiently serious" if a plaintiff "place[s] verifying medical evidence in the record ... establish[ing] the detrimental effect of the delay in medical treatment." *Napier v. Madison Cnty.*, 238 F.3d 739, 742 (6th Cir. 2001); *Blackmore*, 390 F.3d at 895 (citing *Napier*) ("*Napier* applies where the plaintiff's 'deliberate indifference' claim is based on the prison's failure to treat a condition adequately, or where the prisoner's affliction is seemingly minor or non-obvious.>").

Hepatitis C can be a serious medical condition mandating certain treatment, but not all cases of Hepatitis C require interferon and ribavirin drug therapy treatment. See *Paulley v. Chandler*, No. 3:99-CV-P549-H, 2000 WL 33975579, *4 (W.D. Ky. April 18, 2000). Where the condition is not obvious, a plaintiff “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, he or she must place “verifying medical evidence” of a detrimental effect of delay into the record. See *Napier*, 238 F.3d at 742.

Villarreal has failed to satisfy the objective component of the *Farmer* test. He has not produced any biopsies, ultrasounds, blood tests, consultation notes, examination notes, or any other medical reports suggesting that he has suffered actual harm due to the denial of the requested drug therapy treatment. The only medical proof introduced into this record was submitted by Dr. Vazquez-Velazquez, who states under oath that shortly before Villarreal was released from BOP custody in January 2014, his liver and other vital functions were normal. Ultimately, Villarreal has not shown that he had a “sufficiently serious” medical need, even though he has been diagnosed with Hepatitis C.

Even assuming that Villarreal’s Hepatitis C condition is an objectively serious one, his Eighth Amendment claims against Dr. Vazquez-Velazquez still fail because Villarreal has not satisfied the subjective prong of the *Farmer* test. The subjective component is satisfied by showing that the prison official was deliberately indifferent to a prisoner’s serious medical needs, such as by “intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle*,

429 U.S. at 104; *Caldwell v. Moore*, 968 F.2d 595, 602 (6th Cir. 1992). That is not the situation in this case.

Dr. Vazquez-Velazquez's Declaration and attached medical documents reveal that neither he nor any member of the USP-McCreary medical staff failed to provide Villarreal with necessary medical treatment for his Hepatitis C condition. Indeed, the USP-McCreary medical staff, with the limited participation of Dr. Vazquez-Velazquez, carefully monitored and evaluated Villarreal on a consistent basis between November 20, 2012, and January 14, 2014. During that time period, Villarreal was examined, tested, and monitored on numerous occasions through the Chronic Care Clinics for his Hepatitis C condition and each of these encounters are set forth in detail in Dr. Vazquez-Velazquez's Declaration and the attached medical records. Such ongoing and responsive medical treatment is the antithesis of deliberate indifference. See *Brooks v. Celeste*, 39 F.3d 125, 128 (6th Cir. 1994); see also *Lara-Portela v. Stine*, No. 07-CV-014-KKC, 2008 WL 45398, at *7-9 (E.D. Ky. Jan. 2, 2008). The overall record reflects that the USP-McCreary medical staff and Dr. Vazquez-Velazquez were highly solicitous of Villarreal's medical needs and made substantial efforts to ensure his well-being. The record provided by Dr. Vazquez-Velazquez reveals that Villarreal's extensive medical care met or exceeded that which he would have received in a non-prison setting.

As Dr. Vazquez-Velazquez explains in his Declaration, each time Villarreal's Hepatitis C condition was examined and diagnosed, the medical staff determined that he was stable and showed no significant symptoms or signs of cirrhosis. The USP-McCreary medical staff regularly monitored Villarreal's condition and was aware of the pending consideration for treatment by the URC and Central Office. See Doc. # 19-2;

Doc. # 23-2, ¶¶ 3; 5; 8-10 (Declaration of Dr. Vazquez-Velazquez).

Whether an Eighth Amendment claim exists in Hepatitis C cases ultimately depends on whether interferon treatment is medically-indicated for the patient's condition. Courts have recognized that Hepatitis C may require interferon or another treatment regimen in some, but not all, situations. There is no uniform rule applicable to all cases. As another federal court in this state has aptly observed, each Hepatitis C case is different:

The constitutionality of each prisoner's treatment must be assessed individually, and a conclusion in one case may not foreclose a different conclusion in another. No inequity results from such different outcomes, because each prisoner is considered as an individual. Medical needs are always peculiar to the patient, and the necessary differences in treatment will not establish conflicting or incompatible standards for the board.

Paulley v. Chandler, 3:99-CV-P549-H, 2000 WL 33975579, *4 (W.D. Ky. Apr. 18, 2000).

In *Paulley*, a state prisoner alleged that prison officials violated his Eighth Amendment rights by denying him interferon treatment for his Hepatitis C condition. In analyzing Paulley's case under the Eighth Amendment, the Western District of Kentucky considered the nature of his disease, its seriousness, the treatment options, the potential effectiveness of interferon treatment, prison officials' awareness of the disease and treatments, and whether they denied Paulley the effective options. *Id.* The court recognized that because each prisoner's condition is different, all of those considerations had to be evaluated to determine whether the prisoner had access to the treatment necessary to address his specific condition. *Id.*

Paulley sufficiently established that prison officials were aware of the seriousness of his condition, but declined to approve the interferon therapy. *Id.* The Western District of Kentucky concluded that Paulley suffered from cirrhosis of the liver and faced a

serious risk of death in a short period of time, and that interferon treatment was the only possible effective treatment for the condition. *Id.* Accordingly, the district court held that denial of the treatment violated Paulley's Eighth Amendment rights, and ordered the prison officials to provide him with the interferon therapy. *Id.*

In contrast, the United States Court of Appeals for the Sixth Circuit has found that under circumstances different from those in *Paulley*, the denial of interferon treatment did not violate the Eighth Amendment. *Johnson v. Million*, 60 F. App'x 548 (6th Cir. 2003) In *Johnson*, a state inmate filed a 42 U.S.C. § 1983 civil rights action against the prison warden and two physicians alleging a violation of his Eighth Amendment rights based on their failure to properly treat his Hepatitis C condition. Johnson was not provided any treatment because his liver enzyme levels had stayed within normal range, and interferon or other treatments were not medically-indicated. *Id.* The district court granted summary judgment to the defendants. On appeal, the Sixth Circuit affirmed, noting that prison officials regularly monitored Johnson's Hepatitis C Condition (every three to four months), that his condition did not meet the clinical guidelines for interferon treatment, and that no interferon treatment was recommended or provided. *Id.*

Similarly, in *Edmonds v. Robbins*, 67 F. App'x 872 (6th Cir. 2003), a state inmate filed an action pursuant to 42 U.S.C. § 1983 alleging that the prison physician's failure to properly treat his Hepatitis C violated his Eighth Amendment rights. The district court dismissed the complaint, and on appeal, the Sixth Circuit affirmed, reiterating that a difference of opinion between a prisoner and a physician over treatment of a condition does not rise to the level of an Eighth Amendment violation. *Id.* at 873; see also *Howze v. Hickey*, No. 10-CV-094-KKC, 2011 WL 673750 (E.D. Ky. Feb. 17, 2011) (granting

summary judgment to the defendant in a *Bivens* action in which the prisoner alleged that the denial of interferon/ribavirin constituted a deliberate indifference to his serious medical needs in violation of the Eighth Amendment).

Applying the facts of Villarreal's situation to the applicable law, the Court determines that Villarreal's situation more closely parallels the *Johnson*, *Edmonds*, and *Howze* cases, as opposed to the *Paulley* decision. In Villarreal's case, the medical staff at USP-McCreary continually monitored Villarreal's condition, but found no evidence of cirrhosis of the liver. In fact, in his Declaration, Dr. Vazquez-Velazquez states that during the fourteen-month period between November 2012 and January 2014, the medical staff consistently found that Villarreal was stable and that his laboratory tests results (of his blood and liver enzymes) were within normal limits.

Further, and of great significance, Dr. Vazquez-Velazquez also explains that the BOP's final decision not to provide the requested drug therapy treatment was based on its explicit policy guidelines; specifically, that because Villarreal was so close to his release date by the time his request was considered, the BOP determined that he was ineligible for the requested drug therapy treatment. Because the drug therapy administration, from start to end, is a lengthy process that can take 24-48 months, and adverse consequences (including death and/or severe psychiatric complications) can result from the interruption of the interferon/ribavirin drug therapy, the BOP denies the drug therapy to prisoners who have approaching release dates.

As Dr. Vazquez-Velazquez correctly notes, it is well established that the mere fact that a prisoner suffers from a Hepatitis C infection does not necessarily equate into a finding that the failure to provide a specific course of treatment, such as interferon and

ribavirin drug therapy, violates the Eighth Amendment. See *Hix v. Tennessee Dep't of Corrs.*, 196 F. App'x 350, 2006 WL 2431103, *6 n. 1 (6th Cir. 2006) (recognizing that "Hepatitis C does not require treatment in all cases"); see also *Loukas v. MDOC*, No. 2:07-CV-142; 2008 WL 544639, *2 (W.D. Mich. Feb. 27, 2008) (same); *Haley v. Miller*, No. 3:09-CV-0170, 2010 WL 3069313, *8 (M.D. Tenn. July 14, 2010) (no deliberate indifference where the record showed that the plaintiff was denied interferon therapy because he was asymptomatic and the treatment would have further compromised his immune system).

Finally, to the extent that Villarreal claims that he deserved more aggressive treatment than what he received, he alleges nothing more than a difference of opinion between him and Dr. Vazquez-Velazquez and the prison medical providers. A prisoner's challenge to the sufficiency and extent of medical treatment and/or choices of medication simply do not rise to the level of an Eighth Amendment violation. "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); see also *Clark v. Corrections Corporation of America*, 98 F. App'x 413, 416 (6th Cir. 2004); *Simpson v. Ameji*, 57 F. App'x 238, 239 (6th Cir. 2003). Simply put, federal courts are hesitant to second-guess professional judgments exercised by medical professionals. *Youngberg v. Romeo*, 457 U.S. 307, 321–23 (1982); *Rhinehart v. Scutt*, 509 F.App'x 510, 514 (6th Cir. 2013). The decisions which Dr. Vazquez-Velazquez and the medical providers at USP-McCreary made concerning Villarreal's medical treatment between November 2012 and January 2014 do not rise to

the level of cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution.

Here, Villarreal merely relies on the broad and conclusory Eighth Amendment allegations which he asserted in his Complaint. Those allegations sufficed at the initial screening stage, but faced with Dr. Vazquez-Velazquez's well-supported motion, they are wholly inadequate at the summary judgment stage. Conclusory allegations are not evidence and are not adequate to oppose a motion for summary judgment. *Miller v. Aladdin Temp-Rite, LLC*, 72 F. App'x 378, 380 (6th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Based on the medical history which Dr. Vazquez-Velazquez has provided, the supporting medical records which he filed in the record, and the case law cited above, the Court determines that Villarreal has not established that his medical condition was "sufficiently serious" to warrant the specific drug therapy treatment which he demanded, or that Dr. Vazquez-Velazquez and the prison medical staff were deliberately indifferent to Villarreal's Hepatitis C condition.

As the Court has determined that Villarreal has failed to establish that Dr. Vazquez-Velazquez was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment, it is unnecessary to address Dr. Vazquez-Velazquez's other three arguments: that he was not personally or directly involved in Villarreal's medical treatment; that Villarreal has not demonstrated actual, physical harm as a result of the alleged denial of drug therapy; and that he is entitled to qualified immunity. No genuine issues of material fact exist and Dr. Vazquez-Velazquez's is entitled to summary judgment.

III. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED that Defendant Dr. Jorge Vazquez-Velazquez's Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. # 17, Doc. # 19, filed under seal at Doc. # 23) is **granted**.

IT IS FURTHER ORDERED that the civil action is **dismissed** and **stricken** from the Court's docket.

This 15th day of January, 2016.



Signed By:

David L. Bunning *DB*

United States District Judge

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