

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11062

D.C. Docket No. 4:15-cv-00188-RH-GRJ

STEVEN A. MCLEOD,

Plaintiff-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
MICHAEL CREWS,
Former Secretary, Florida Department of Corrections,
CORIZON HEALTH INC.,
WARDEN,
ASSISTANT WARDEN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(June 19, 2019)

Before JORDAN, GRANT and HULL, Circuit Judges.

HULL, Circuit Judge:

Steven McLeod appeals from the district court's order revoking his in forma pauperis ("IFP") status and dismissing his 42 U.S.C. § 1983 complaint without prejudice. The district court initially granted McLeod IFP status, despite the fact that he had at least three "strikes" under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g), because he had alleged he was in imminent danger from a lack of treatment for his chronic Hepatitis C.

Subsequently, the defendants moved to revoke McLeod's IFP status on the ground that he was not in imminent danger because of his Hepatitis C. The defendants filed an affidavit from the treating physician at the prison, Dr. Alvia Varona. Dr. Varona attested that "McLeod's medical records indicate that he is not a candidate for treatment at this time and, further, that his condition is stable and he suffers no danger from not receiving treatment at this time." Dr. Varona explained that chronic Hepatitis C is often asymptomatic and generally progresses slowly. Dr. Varona noted that treatment for Hepatitis C "has evolved dramatically" in recent years, but also stated that "[m]anagement and treatment of [Hepatitis C] is a complex, evolving field."

Dr. Varona further explained how Florida inmates with chronic Hepatitis C are treated. Specifically, inmates with chronic Hepatitis C are enrolled in the prison's Chronic Care Clinic, where they receive regular clinical evaluation and laboratory testing to monitor their liver enzymes, which can indicate the presence

of cirrhosis or liver damage. Using those evaluations and test results, inmates are prioritized for treatment based on (1) the advancement of hepatic fibrosis or cirrhosis, (2) whether the patient has had a liver transplant or has HIV co-infection, (3) whether the patient has a comorbid medical condition associated with Hepatitis C, such as certain lymphomas, or (4) if the patient is newly incarcerated and was receiving treatment for Hepatitis C before his incarceration.

Dr. Varona averred that McLeod was being regularly monitored by the Chronic Care Clinic, that all of “[h]is laboratory results, including an ultrasound, testing of his liver enzymes, and platelet counts all reflect within normal limits,” and that nothing in his medical records indicated that he met the criteria for prioritization of treatment. In sum, Dr. Varona opined that “McLeod’s medical records have no indication that his [Hepatitis C] infection has progressed to a stage that treatment is required, or that is life-threatening or poses a serious risk to his health.” Dr. Varona emphasized that McLeod’s Hepatitis C was “being appropriately monitored” and that “not receiving treatment at this time will have no significant effect on inmate McLeod’s [Hepatitis C] infection or his overall condition and health.”

In his own affidavit, McLeod confirmed that he had been diagnosed with Hepatitis C and was currently enrolled in the prison’s Chronic Care Clinic, though he complained that he was not informed of his diagnosis in a timely manner and

that he only received a chronic care appointment after filing a prison grievance. McLeod also confirmed that he does not have HIV and that genotype testing was done to determine what strain of Hepatitis C he has. McLeod stated that he had not received any treatment for his Hepatitis C and that no health care employee at the prison had informed him of when or if he would be provided with such treatment. Notably, however, McLeod did not contend that he was presently suffering from cirrhosis, fibrosis, or other liver issues as a result of his Hepatitis C.

A magistrate judge recommended that the defendants' motion to revoke be granted, and the district court ultimately accepted that recommendation over McLeod's objections. The district court revoked McLeod's IFP status and dismissed McLeod's complaint without prejudice. The district court found that (1) McLeod was being monitored and evaluated for appropriate treatment, and (2) while McLeod disagreed that this was sufficient, "the record at least establishe[d] that he [was] not in imminent danger."

On appeal, McLeod argues: (1) that the district court lacked authority to revoke his IFP status after its initial imminent danger determination; and (2) that, in any event, he was in fact in imminent danger of serious physical harm from his Hepatitis C if left untreated. After review and oral argument, we conclude that the district court did have the authority to revoke the IFP determination. Once a district court has made an initial finding of imminent danger, it retains the

authority to revisit that determination and revoke IFP status when new evidence bearing on the IFP determination comes to light. See Shepherd v. Annucci, 921 F.3d 89, 94-95 (2d Cir. 2019) (stating district courts “may reexamine a provisional determination that a complainant is in ‘imminent danger of physical injury’ when, after being served with the complaint, a defendant challenges that determination”).

Further, based on the particular record before us, we cannot say that the district court committed reversible error in revoking McLeod’s IFP status. There is simply no evidence in this record demonstrating that McLeod was in imminent danger of physical injury from his Hepatitis C when he filed his complaint back in 2015. Dr. Varona’s affidavit made clear that McLeod’s condition was being monitored, that his test results at that time were within normal ranges, that there was no indication he was then suffering from any liver issues as a result of his diagnosis, and that chronic Hepatitis C is a very slow-progressing disease. And nothing in McLeod’s affidavit or other filings refuted Dr. Varona’s affidavit or indicated that he was experiencing any health problems because of his Hepatitis C.

To be sure, Hepatitis C is a serious medical condition, and a lack of treatment for Hepatitis C may, in some cases, provide a basis for an imminent danger finding. See Mitchell v. Nobles, 873 F.3d 869, 873-75 (11th Cir. 2017) (prisoner alleged in district court that he had developed cirrhosis as a result of his Hepatitis C and, by the time of appeal, had also developed liver cancer, from which

he died while his appeal was pending); Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) (prisoner, who had both HIV and Hepatitis C, alleged that he suffered skin and scalp infections, severe eye pain and vision problems, fatigue, and stomach pain due to lack of treatment for his illnesses). In this case, however, absent any evidence that McLeod was suffering, or immediately likely to suffer, physical injury as a result of his Hepatitis C, we cannot say the district court committed reversible error in finding McLeod was not in imminent danger and revoking his IFP status.

Thus, the district court's January 3, 2016 order revoking McLeod's IFP status and dismissing his complaint without prejudice is **AFFIRMED**.¹

¹McLeod has brought to the Court's attention a pending class action against the Florida Department of Corrections where the plaintiff class has been certified as: "all current and future prisoners in the custody of the Florida Department of Corrections who have been diagnosed, or will be diagnosed, with chronic hepatitis C virus (HCV)." See Hoffer v. Sec'y, Dept. of Corrs., No. 4:17-cv-00214 (N.D. Fla.). McLeod has already been diagnosed with chronic Hepatitis C. On April 18, 2019, the district court entered a permanent injunction requiring evaluation and treatment of prisoners diagnosed with chronic Hepatitis C based on their fibrosis scores (F0, F1, F2, F3, etc.) and multiple other factors. The Department of Corrections has filed a notice of appeal.

In this appeal, this Court is narrowly ruling on only the imminent danger issue under the PLRA based on the limited record in this case. Nothing herein should be read or considered as expressing any opinion on the merits of McLeod's claims as to treatment for his Hepatitis C.