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United States District Court,
S.D. New York.

Frank GRAHAM, Plaintiff,
v.
Lester N. WRIGHT, etc., et al., Defendants.

No. 01 Civ. 9613(NRB). | Aug. 10, 2004.

Attorneys and Law Firms

Frank Graham, Bare Hill Correctional Facility, Malone, New York, Plaintiff, pro se.

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MEMORANDUM AND ORDER

BUCHWALD, J.

***1** Plaintiff Frank Graham ("plaintiff" or "Graham"), an inmate currently incarcerated at Bare Hill Correctional Facility in Malone, New York, was diagnosed with hepatitis C on March 12, 2001. Following that diagnosis, plaintiff brought suit pro se pursuant to 42 U.S.C. § 1983 against the Department of Correctional Services ("DOCS") and various prison administrators and physicians in their official and individual capacities claiming that the defendants failed to diagnose and treat his condition in a timely manner. We affirmed in the main the Report and Recommendation of Magistrate Judge Pitman on September 12, 2003, thereby dismissing plaintiff's claims for various injunctive relief and certain monetary damages against prison administrators and physicians in their official capacities for failure to state a claim. [1] *See* *Graham v. Wright*, No. 01 Civ. 9613(NRB), 2003 WL 22126764 (S.D.N.Y. Sept. 12, 2003). Additionally, Magistrate Judge Pitman's recommendation to deny defendants' motion to dismiss plaintiff's claim for monetary damages against Drs. Graceffo, Matthews, Milicevic, Lancellotti, and Makram in their individual capacities was adopted. *Seeid.* These five defendant physicians now move for summary judgment, arguing that the plaintiff has failed to establish a basis upon which they could be found to have been deliberately indifferent to the plaintiff's medical needs.

BACKGROUND

The following facts are not in dispute, except where noted. [2]

A. *Hepatitis C*

Hepatitis C is a liver disease caused by the hepatitis C virus. *See* Lebovics Decl. ¶ 5. [3] Eighty-five percent of people infected with the hepatitis C virus develop chronic hepatitis C, which slowly damages the liver and can cause cirrhosis of the liver, end-stage liver disease, and liver cancer. *Seeid.* The virus was first identified in 1988, [4] *seeid.* at ¶ 28, and the FDA approved the first test to detect it in 1990. *See* Graceffo Decl. ¶ 10. At least six genotypes of the hepatitis C virus have been identified. Genotype 1 is the most common in the United States. *See* Lebovics Decl. ¶ 13.

Treatment of hepatitis C has evolved since the early nineties as doctors have come to understand better the risk that hepatitis C can cause serious liver damage and have developed more successful medications. *See* Lebovics Decl. ¶ 28. The first hepatitis C treatment, called interferon, was approved by the federal Food and Drug Administration in 1992. *See* Graceffo Decl. ¶ 12; Lebovics Decl. ¶ 15. Physicians began treating hepatitis C with a combination of interferon and ribavirin in 1998, and in 2002 the FDA approved a new form of interferon called pegylated interferon that remains in a patient's body longer than ordinary interferon. *See* Whalen Decl. ¶ 9. Pegylated interferon is now used in combination with ribavirin to treat hepatitis C. *Seeid.*

The chance of success with any hepatitis C treatment depends on the genotype of the virus infecting the patient and the patient's viral load. In patients with both genotype 1 and a high viral load, treatment with interferon alone, used between 1992 and 1998, was successful only five percent of the time. *See* Lebovics Decl. ¶ 14. The development of pegylated interferon used in combination with ribavirin has increased the success rate to roughly 30 percent. *Seeid.* at ¶ 15.

B. *Plaintiff's Illness*

***2** When hepatitis Cdamages liver cells, abnormally large amounts of enzymes, known as SGOT [5] and SGPT, [6] are released from those cells into the blood stream. *See* Graceffo Decl. ¶¶ 21–23. The first record of elevated levels of SGOT or SGPT in plaintiff's blood appears in a report from February

1983. *See* Pl.'s Objection to Mot. for Summ. J., Ex. A. Blood tests in September and November 1990 also revealed high levels of these enzymes. *See* Pl .'s Objection to Mot. for Summ. J., Ex. C; Decl. in Supp. of Summ. J., Ex. F, 00279. In 1990 Graham was under the care of defendants Graceffo and Matthews. Three subsequent tests performed between January and August 1991 continued to show that plaintiff's levels of these enzymes were approximately one and a half to two times normal levels. *See* Decl. in Supp. of Summ. J., Ex. F, 00283, 00286–87. At that time, physicians did not typically test for hepatitis C or other liver diseases unless enzyme levels were consistently four times the normal range. *See* Graceffo Decl. ¶ 30.

In 1991, there was a tuberculosis outbreak at Auburn Correctional Facility, where plaintiff was incarcerated at the time. Since plaintiff had tested positive for exposure to tuberculosis in 1987, Graceffo prescribed isoniazid for him as a precautionary measure. Plaintiff's medical file indicates he began receiving isoniazid in August 1991. *See* Decl. in Supp. of Summ. J., Ex. F, 00340. Isoniazid was known to cause liver damage, and if a patient's liver enzyme levels increased to four to five times normal levels, treatment with isoniazid was stopped. See Graceffo Decl. ¶¶ 17–20. Three further blood tests in November and December 1991 and April 1992, respectively, revealed that plaintiff's liver enzymes were one and a half to three times as high as normal levels. *See* Decl. in Supp. of Summ. J., Ex. F, 00386, 00413–14. Graham stopped taking isoniazid in November 1992. *Seeid.* at 00340; Graceffo Decl. ¶ 27. Plaintiff was never tested for hepatitis C while he resided at Auburn in the care of Graceffo and Matthews.

Plaintiff was transferred to Eastern Correctional Facility in October 1993. *See* Decl. in Supp. of Summ. J., Ex. C. During his time there, defendant Dr. Milicevic was in charge of his care. Only one blood test was performed on him in the nearly five years he spent at Eastern. This test, in February 1998, showed the plaintiff's SGOT level to be 69, above the normal range of 0–40. *See* Decl. in Supp. of Summ. J., Ex. F, p. 00161. He was not tested for hepatitis C while at Eastern.

In September 1998 plaintiff was transferred to Woodbourne Correctional Facility, *see* Decl. in Supp. of Summ. J., Ex. C, and another blood test was taken in July 2000. This test showed his levels of both SGOT and SGPT to be nearly twice as high as normal. *See* Decl. in Supp. of Summ. J., Ex. F, p. 00172. Citing the plaintiff's high SGPT level, defendant Lancellotti ordered a hepatitis C test for plaintiff on December 28, 2000. *See* Decl. in Supp. of Summ. J., Ex. F, p. 00477.

***3** After the test, plaintiff was diagnosed with hepatitis C on March 12, 2001. He is afflicted with genotype 1 of the virus and has a high viral load. *See* Lebovics Decl. ¶ 23. Plaintiff contends that defendant Makram initially chose not to treat him because, in her opinion, he was in no present danger from the disease and the side effects would be too severe. Pl.'s Compl. ¶ 16. The plaintiff's medical records show, however, that it was the plaintiff who decided not to pursue treatment after Makram explained to him the potential risks and benefits of the medications then available. *See* Makram Decl. ¶ 13; Decl. in Supp. of Summ. J., Ex. F, 00479.

Plaintiff's medical records further indicate that on July 30, 2001 he changed his mind and informed Dr. Makram that he wished to be considered for treatment. *See* Makram Decl. ¶ 15; Decl. in Supp. of Summ. J., Ex. F, 00486–87. Subsequently, Makram ordered additional tests and an evaluation of plaintiff's medical file to determine if he was a suitable candidate for medication. *See* Makram Decl. ¶ 16. On September 17, 2001, Dr. Makram referred plaintiff to a specialist in infectious diseases and gastroenterology who confirmed the hepatitis C diagnosis and recommended a liver biopsy to determine the extent of damage to plaintiff's liver. *Seeid.* at ¶¶ 17–18.A biopsy is necessary before hepatitis C treatment can begin. *Seeid.* at ¶ 23.The biopsy was performed on December 27, 2001, but the plaintiff was transferred out of Woodbourne Correctional Facility, and out of Dr. Makram's care, on January 3, 2002, *see* Decl. in Supp. of Summ. J., Ex. C, before Dr. Makram had an opportunity to review the biopsy. *See* Makram Decl. ¶¶ 20–24.

For reasons only partially explained in the record but unrelated to the defendants, *see* Whalen Decl. ¶¶ 7–12, after the plaintiff's transfer his treatment with pegylated interferon and ribavirin did not begin until February 26, 2003. *Seeid.* at ¶ 13.These medications were administered until August 7, 2003, at which point they were stopped because the plaintiff's disease was not responding to them and he was complaining about fatigue. *Seeid.* at ¶ 17.

DISCUSSION

I. *Summary Judgment Standard*

Summary judgment is properly granted "if 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 material fact and that the moving party

is entitled to judgment as a matter of law."Federal Rule of Civil Procedure 56(c). The Federal Rules of Civil Procedure mandate the entry of summary judgment "against a party who 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 Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

In reviewing the record, we must assess the evidence "in the light most favorable to the non-movant and ... draw all reasonable inferences in his favor."*Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir.1990). Because the plaintiff is pro se, we will construe his pleadings liberally. We emphasize that where reasonable, we have drawn inferences and resolved ambiguities in the manner most favorable to plaintiff. The mere existence, however, of an alleged factual dispute between the parties will not defeat a motion for summary judgment. Rather, the non-moving party must affirmatively set forth facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc .*, 477 U.S. 242, 256 (1986). An issue is "genuine ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."*Id.* at 248 (internal quotation omitted).

II. *Plaintiff's Deliberate Indifference Claims*

***4** Plaintiff seeks monetary damages under 42 U.S.C. § 1983 for the defendants' alleged deliberate indifference to his medical needs in violation of the Eighth Amendment. To establish an Eighth Amendment violation for deliberate indifference, plaintiff must satisfy both an objective and a subjective element. *See**Smith v. Carpenter*, 316 F.3d 178, 183 (2d Cir.2002). Objectively, the plaintiff's injury must be sufficiently serious to implicate the Eighth Amendment. *Seeid.* at 184 (holding that " '[b]ecause society does not expect that prisoners will have unqualified access to health care,' a prisoner must first make this threshold showing of serious illness or injury in order to state an Eighth Amendment claim for denial of medical care.") (quoting *Hudson v. McMillan*, 503 U.S. 1, 9 (1992)).

The inquiry into whether the objective element of a deliberate indifference claim is satisfied "must be tailored to the specific circumstances of each case."*Id.* at 185.In considering this element, courts focus on the risk of harm to the prisoner resulting from a lack of medical care. *Id.* at 186.*SeealsoEstelle*, 429 U.S. at 106 (stating that "[i]n order to state a cognizable claim, a prisoner must allege *acts or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs.") (emphasis added). Where an inmate alleges that prison officials refused to address his medical condition, the objective element is satisfied if the underlying condition is sufficiently serious. *Seeid.* at 185–186.

Where, however, an inmate only alleges that prison officials delayed in adequately treating his serious medical condition, "it is appropriate to focus on the challenged *delay* or *interruption* in treatment rather than the prisoner's *underlying medical condition* alone in analyzing whether the alleged deprivation is, in 'objective terms, sufficiently serious' to support an Eighth Amendment claim."*Smith*, 316 F.3d at 186 (quoting *Chance*, 143 F.3d at 702). A defendant's delay in treating an ordinarily insignificant medical condition can become a constitutional violation if the condition worsens and creates a "substantial risk of injury." *Id.* Conversely, delay in treating a life-threatening condition may not violate the Eighth Amendment if the lapse does not cause any further harm beyond that which would occur even with complete medical attention. *See id.*

The subjective requirement is met if the plaintiff demonstrates that the defendant had a sufficiently culpable state of mind to establish Eighth Amendment liability. A showing of negligence by the defendants is not enough for a deliberate indifference claim. *See**Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (stating that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner"). A deliberately indifferent official "knows of and disregards an excessive risk to inmate health or safety."*Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

A. *The Objective Element of Plaintiff's Claims*

***5** Defendants contend that their delay in testing plaintiff for hepatitis C did not harm him because his body's failure to respond to treatment in 2003 indicates that he would not have benefitted from earlier treatment, either. [7] Only thirty percent of patients, like Graham, who are afflicted with genotype 1 of the virus and high viral load respond to the most updated treatment protocol of pegylated interferon and ribavirin. Graham, unfortunately, was not within the thirty percent. For hepatitis C patients treated with interferon alone, there was only a five percent response rate. Defendants reason that a patient who did not respond to the treatment with a thirty percent success rate would have had virtually no chance of responding to the medication with a five percent rate of success. Accordingly, they argue, plaintiff cannot

show that he was harmed by any delay in treatment. *See* Lebovics Decl. ¶¶ 25, 30 (declaring "with a high degree of medical confidence that the fact that plaintiff did not respond to therapy in 2003 demonstrates that he would not have responded to interferon therapy in 1992 nor interferon and ribavirin therapy in 1998.").

While there could be exceptions to Dr. Lebovics' conclusion, any failure by the defendants to diagnose Graham's disease earlier and thus begin his treatment sooner deprived him of no more than a five percent chance of response. Because there was no more than a five percent chance that plaintiff or any other patient would have responded to interferon alone, he cannot establish by a preponderance of the evidence that he would have benefitted from interferon treatment if it was provided at an earlier date. Thus, no rational jury could find that it is more likely than not that an event with a five percent chance of occurring would have happened in this instance. Consequently, the plaintiff cannot establish that he suffered the objective harm needed for a deliberate indifference claim.

Having concluded that Graham cannot show that he suffered the objective harm necessary for an Eighth Amendment claim, we need not reach the defendants' claims that plaintiff cannot satisfy the subjective element, either. In the alternative, however, this Court finds that the plaintiff has not produced sufficient evidence of the defendants' culpability from which a reasonable jury could find them guilty of deliberate indifference.

B. ***The Subjective Element of Plaintiff's Claims: Drs. Graceffo and Matthews***

Graham claims that Graceffo's and Matthews' decisions not to order a hepatitis C test between 1990 and 1992, when blood tests consistently showed he had elevated levels of two liver enzymes, SGOT and SGPT, demonstrate their indifference to his health. Dr. Graceffo does not deny that blood tests indicated that plaintiff's liver enzymes were above the normal range during this time period, but he avers that Graham's enzyme levels did not rise to the point at which patients were typically tested for hepatitis C. *See* Graceffo Decl. ¶ 30. Plaintiff's SGOT and SGPT levels were never greater than three times normal, *Id.* at ¶ 31; Decl. in Supp. of Summ. J., Ex. F, 00286–87, 00386, 00413–14, and Graceffo's statement that the standard of care was to test for hepatitis C only if a patient's enzyme levels rose to four times normal levels is undisputed. Accordingly, as the plaintiff cannot show that Graceffo's and Matthews' decisions deviated from prevailing medical standards, there would be no basis for a jury to find that their failures to order a hepatitis C test support a claim of deliberate indifference.

C. ***The Subjective Element of Plaintiff's Claims: Dr. Milicevic***

***6** Following plaintiff's transfer to Eastern Correctional Facility in 1993, his health was monitored by Dr. Milicevic. One blood test was conducted on the plaintiff during his stay at Eastern, from October 1993 through September 1998. This test, in February 1998, showed the plaintiff's SGOT level to be 69, above the normal range of 0–40. *See* Decl. in Supp. of Summ. J., Ex. F, p. 00161.

Plaintiff asserts that Dr. Milicevic's failure to test his blood more than once in nearly five years despite his prior history of elevated liver enzyme levels and her failure to order a hepatitis C test after his February 1998 blood test show that she was deliberately indifferent to his health. Plaintiff's blood tests, however, never showed that his enzyme levels rose to four times the normal range. Accordingly, we do not find that Milicevic knew of and disregarded an excessive risk to the plaintiff by failing to order a hepatitis C test. Even if we were to assume, arguendo, that Dr. Milicevic should have tested plaintiff's blood more frequently or ordered a hepatitis C test, we would find, for the reasons explained above, that plaintiff did not suffer any injury that could support an Eighth Amendment claim.

D. ***The Subjective Element of Plaintiff's Claims: Dr. Lancellotti***

The fourth defendant, Dr. Lancellotti, ultimately ordered a hepatitis C test for Graham in December 2000 after reviewing plaintiff's medical records. Lancellotti Decl. ¶ 9. Plaintiff contends that Lancellotti could not have known to order a hepatitis C test unless he had been previously aware that plaintiff had hepatitis C. However, Dr. Lancellotti's notes from December 28, 2000 indicate that he ordered the test based on the plaintiff's high SGPT reading. *See* Decl. in Supp. of Summ. J., Ex. F, 00477. That July, a blood test had shown Graham's levels of both SGPT and SGOT to be above normal. *See* Decl. in Supp. of Summ. J., Ex. F, 00172. Plaintiff's allegation against Lancellotti lacks factual support, and if credited would essentially punish Dr. Lancellotti for ordering a hepatitis C test.

Graham also asserts that Dr. Lancellotti should have ordered a hepatitis C test immediately upon reviewing his medical file

after Graham arrived at Woodbourne. Because the plaintiff's blood test did not show his enzyme levels reached the level at which the existing standard of care would have signaled defendants to order a hepatitis C test, it cannot be inferred that Dr. Lancellotti was deliberately indifferent to the plaintiff solely because he did not order a test after reviewing plaintiff's medical records.

E. *The Subjective Element of Plaintiff's Claims: Dr. Makram*

Plaintiff also asserts that Dr. Makram delayed in properly diagnosing and treating his hepatitis C. *See* Pl.'s Compl. ¶ 16. He claims that Dr. Makram ought to have realized he should be tested for hepatitis C upon reviewing his medical file containing records of his earlier blood tests following his transfer to Woodbourne. As explained above, however, the results of Graham's earlier blood tests never showed his enzyme levels had reached four times the normal range. Plaintiff offers no other evidence that Dr. Makram ought to have diagnosed his hepatitis C earlier and his claim that she refused to treat him is refuted by his medical records. *See* Decl. in Supp. of Summ. J., Ex. F, p. 00479. It will also be recalled that Dr. Makram referred plaintiff to a specialist who recommended a biopsy (which was done) prior to treatment. Accordingly, there is no basis for finding that Dr. Makram acted with indifference to the plaintiff's serious medical needs. [8]

CONCLUSION

***7** For the foregoing reasons, defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Footnotes

1 We only departed from Magistrate Judge Pitman's recommendations in that we also dismissed plaintiff's claims for monetary damages against defendants Wright and Keane.

2 The following factual background is derived from: Plaintiff's Objections to Motion for Summary Judgment (“Pl.'s Objection to Mot. for Summ. J.”); Declaration of Anthony Graceffo, M.D. (“Graceffo Decl.”); Declaration of Mervat Makram, M.D. (“Makram Decl.”); Frank Graham's inmate transfer history, provided as exhibit C to the Declaration in Support of Defendants' Motion for Summary Judgment (“Decl. in Supp. of Summ. J., Ex. C”); Declaration of Frank Lancellotti, M.D. (“Lancellotti Decl.”); Declaration of Tim Whalen, M.D. (“Whalen Decl.”); the medical records of Frank Graham, provided as exhibit F to the Declaration in Support of Defendants' Motion for Summary Judgment (“Decl. in Supp. of Summ. J ., Ex. F”); and the Declaration of Edward Lebovics, M.D. (“Lebovics Decl.”).

3 Unlike the other physicians whose declarations are cited, Dr. Lebovics is not a defendant in this suit or a DOCS employee. He is the director of the Division of Gastroenterology and Hepatobiliary Diseases at New York Medical College and is presented by the defendants as an expert on liver disease. “Hepatobiliary” is defined by *http:// dictionary.reference.com* as “of, relating to, situated in or near, produced in, or affecting the liver and bile, bile ducts, and gallbladder.”Dr. Lebovics has received numerous grants to study hepatitis C treatments and has also published on various liver diseases including hepatitis C.

4 Plaintiff claims hepatitis C was identified in 1985. Whether the correct date is 1985 or 1988 does not change our analysis.

5 Serum glutamic-oxaloacetic transaminase. *See* Graceffo Decl. ¶ 19.

6 Serum glutamic pyruvic transaminase. *See* Graceffo Decl. ¶ 19.

7 Decisions in this Court have consistently held that hepatitis C is a sufficiently serious medical condition for purposes of a deliberate indifference claim. *See**Pabon v. Wright*, No. 99 Civ. 2196(WHP), 2004 WL 628784, at *5 (S.D.N.Y. March 29, 2004) (“It is well-established that Hepatitis C qualifies as a serious medical condition for purposes of an Eighth Amendment analysis.”); *Johnson v. Wright*, 234 F.Supp.2d 352, 360 (S.D.N.Y.2002). Nevertheless, because the plaintiff suffered from a delay in treatment, rather than a complete lack of treatment, the objective element must be satisfied by harm that resulted from the delay. *See**Smith*, 316 F.3d at 186.

8 Because there is insufficient factual basis for plaintiff's claim that defendants acted with deliberate indifference to his medical needs, we do not need to reach Dr. Lancellotti's claim that he was not personally involved in plaintiff's medical treatment or the defendants' claims that they are entitled to qualified immunity.