

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

LEVI DAVIS,
Plaintiff

v.

SHANNON MARCOUX, ET AL
Defendants

Docket No. 10-1-16 Cncv

RULING ON PENDING MOTIONS

On January 6, 2016, plaintiff Levi Davis filed with this court a Complaint for Review of Governmental Action under V.R.C.P. Rule 75. Plaintiff, who suffers from Hepatitis C and is an inmate in the care and custody of the Vermont Department of Corrections (“DOC”), seeks an order from this court requiring the Vermont Commissioner of Corrections and the other Defendants, all of whom are DOC officials, to provide Plaintiff with treatment for his Hepatitis C. Defendants acknowledge that the Plaintiff has Hepatitis C, but they oppose his request for relief on the grounds that he is not a candidate for treatment, other than periodic monitoring, at this time, and that he has failed to exhaust his administrative remedies.

Presently before the court are Defendants’ Motion to Dismiss for Failure to Exhaust Administrative Remedies (filed on February 12, 2016), Defendants’ Motion for Summary Judgment (filed on July 22, 2016), and Plaintiff’s “Motion to Request Court to Grant Evidence, Rule in Favor of Plaintiff for Relief, Make the Department of Corrections Pay for My Treatment for Hepatitis C” (filed September 19, 2016).¹ The Defendants are represented by Stephen J. Soule, Esq. and Pamela L. P. Eaton, Esq. Plaintiff is representing himself. The following facts are undisputed.²

¹ The court is treating Plaintiff’s “Motion to Request Court to Grant Evidence, Rule in Favor of Plaintiff for Relief, Make the Department of Corrections Pay for My Treatment for Hepatitis C” as a cross-motion for summary judgment.

² These facts are taken from the following sources: Plaintiff’s Complaint; lab reports and medical records dating from August 2008 to January 2009 that Plaintiff attached to his “Motion in Response to Summary Judgment;” Defendants’ “Statement of Undisputed Material Facts;” the Affidavit of Steven J. Fisher, M.D that Defendants submitted with their motion for summary judgment; and the Affidavits of David Turner that Defendants submitted with their motion to dismiss. In his response to the Defendants’ motion for summary judgment, Petitioner did not come forward with any depositions, documents, affidavits or other materials refuting the factual assertions set forth in Defendants’ statement of undisputed material facts. Therefore, those factual assertions are deemed to be undisputed for purposes of the summary judgment motion pursuant to V.R.C.P. Rule 56(e)(2).

UNDISPUTED MATERIAL FACTS

Plaintiff Levi Davis suffers from chronic Hepatitis C and is an inmate in the care and custody of the Vermont Department of Corrections. He is presently incarcerated at Northern State Correctional Facility in Newport, Vermont.

In his Complaint, Plaintiff alleges that in the past, while he was still living in the community, his medical condition was “severe enough” that he received Interferon treatment for his Hepatitis C, but that the treatment had to be “postponed” “due to medical issues or allergic reactions” (Complaint, ¶ 4). After his incarceration, Plaintiff alleges that he “made it known” to Defendants that he wanted “to participate in treatment before this progressive disease continues to attack my body and further complicate my health and positive chance of putting this chronic condition in remission” (Id.). Plaintiff further alleges that the Defendants’ responses to his requests for treatment were unsatisfactory, resulting in his filing his Complaint in this case (Id.).

During the period August 2008 to January 2009, while Plaintiff was apparently living in the Rutland, Vermont area, Plaintiff received treatment from David S. Tager, M.D. for his chronic Hepatitis C condition. Based upon elevated liver-function test results, Dr. Tager recommended that Plaintiff undergo three liver biopsies. Based upon the biopsies, which took place on September 25, 2008, Plaintiff was diagnosed with “chronic Hepatitis, mildly to moderately active (Grade 2-3), minimal increase in portal fibrosis (state 0-1)” (“Surgical Pathology Consultation Report” of Ezequiel Lopez Presas, M.D., 9/26/08).³

DOC contracts with Centurion of Vermont, LLC (“Centurion”) to provide medical and mental health care for inmates housed in Vermont; Steven J. Fisher, M.D. is Centurion’s Statewide Medical Director for Vermont (Fisher Affidavit, ¶¶ 2-3).

Inmates with Hepatitis C are monitored by Centurion’s medical team with consultation from the Infectious Disease Department at the University of Vermont Medical Center (Id. ¶ 5). Centurion uses a blood test known as FIB-4 to monitor the stability or progression of Hepatitis C in infected patients (Id., ¶ 6). The FIB-4 test monitors the extent of scarring or fibrosis in the liver through non-invasive blood tests (Id., ¶ 7).

A FIB-4 score of less than 1.45 suggests the patient does not have advanced stages of liver scarring or fibrosis (fibrosis stage 0-2); if a patient has a FIB-4 score of less than 1.45, Centurion completes a new FIB-4 test approximately every 6-9 months (Id., ¶¶ 8 and 10).

If a patient has a FIB-4 score between 1.45 to 3.25, Centurion completes a new FIB-4 test approximately every 3 months (Id., ¶ 11).

A FIB-4 score of greater than 3.25 would be more indicative of a patient having liver scarring or fibrosis (fibrosis stage 304); if a patient has a FIB-4 score of greater than 3.25, the patient is referred for additional testing and possible treatment (Id., ¶¶ 9 and 12).

³ The information in this paragraph came from a group of lab reports and medical records that Plaintiff attached to his response to Defendants’ motion for summary judgment.

A patient in the community would have the same FIB-4 testing done, at the same intervals, to monitor his fibrosis stage (Id., ¶ 14).

In the community, Hepatitis C treatment depends on the patient having an advanced fibrosis stage, the patient's commitment to sobriety, and the patient's willingness to be treated (Id., ¶ 15). Centurion's decision as to whether an inmate should be treated for Hepatitis C depends on the inmate having an advanced fibrosis stage, the inmate's commitment to sobriety, the duration of the inmate's remaining incarceration, and the inmate's willingness to be treated (Id., ¶ 13). An advanced fibrosis stage is associated with a FIB score of greater than 3.25 (Id., ¶ 9).

Plaintiff's Hepatitis C is being monitored by Centurion through the use of FIB-4 testing; Plaintiff's FIB-4 scores have been as follows: January 27, 2015 - **1.08**; July 13, 2015 - **1.29**; November 12, 2015 - **1.01** (Id., ¶¶ 16-17).

Based on his FIB-4 scores, Plaintiff should be rechecked approximately every 6-9 months (Id., ¶ 18).

Based on his FIB-4 scores, there is no medical necessity for Plaintiff to be treated for Hepatitis C at this time (Id., ¶ 19).

Based on his FIB-4 scores, Plaintiff would not be receiving Hepatitis C treatment, even if he were receiving care in the community rather than in a correctional facility (Id., ¶ 20).

DOC has established administrative procedures to review the grievances of inmates. This procedure includes an informal grievance, a formal grievance, an appeal to the Corrections Executive and culminates in an appeal to the Commissioner of Corrections. Plaintiff pursued an informal grievance, a formal grievance, and an appeal to the Corrections Executive.

Under DOC's grievance process, the Corrections Executive was afforded twenty business days, from receipt of Plaintiff's appeal, to respond to the appeal and was allowed one twenty-business-day extension. The Corrections Executive received Plaintiff's grievance on December 4, 2015, and on December 23, 2015 the Corrections Executive informed Plaintiff that it would be using its twenty-day extension. Then on January 14, 2016, the Corrections Executive sent Plaintiff a response denying his appeal.

Plaintiff's next step under DOC's grievance process would have been to appeal the Corrections Executive's decision of January 14, 2016, to the Commissioner. Plaintiff did appeal to the Commissioner, but he filed his appeal on December 15, 2015, before the Correction's Executive had yet acted on his earlier appeal. Plaintiff then filed his V.R.C.P. Rule 75 Complaint with this court on January 6, 2016, also before the Correction's Executive had yet issued a decision.

DISCUSSION

Motion to Dismiss for Failure to Exhaust Administrative Remedies

The Vermont Supreme Court has consistently held that “when administrative remedies are established by statute or regulation, a party must pursue, or ‘exhaust,’ all such remedies before turning to the courts for relief.” Rennie v. State, 171 Vt. 584, 585 (2000) (mem.) (citations omitted). “This long settled rule of judicial administration serves the dual purposes of protecting the authority of the administrative agency and promoting judicial efficiency.” Id.

Defendants contend that Plaintiff’s Complaint must be dismissed because he failed to exhaust his administrative remedies. More specifically, Defendant contend that Plaintiff violated DOC’s grievances regulations when he appealed to the Commissioner before the Corrections Executive had acted on his appeal to that body, and that violated those regulations again when he filed his Rule 75 Complaint with this court before the Corrections Executive or Commissioner had had a chance to act on his appeals. Plaintiff denies violating DOC’s grievance regulations and opposes the motion to dismiss.

The court agrees with the Defendants that Plaintiff did not strictly comply with DOC’s grievance regulations. Plaintiff should have waited until the Corrections Executive had issued a decision before filing his appeal with the Commissioner, and he then should have waited until the Commissioner issued a decision before filing his Rule 75 Complaint with this court. Nevertheless, the court will not dismiss the Complaint for failure to exhaust administrative remedies. Plaintiff substantially complied with the grievance process. Moreover, there is no evidence in this case that the Defendants were in any way prejudiced by Plaintiff’s premature appeal, nor is there any reason to believe that the outcome of the administrative grievance process would have been any different if Plaintiff had strictly complied. In addition, there is no evidence that, upon receipt of Plaintiff’s premature appeal, the Commissioner informed Plaintiff that his appeal could not be accepted because it was premature, or that he had the right to refile his appeal after receiving an adverse decision from the Corrections Executive. Given these circumstances, the court will not dismiss the Complaint for failure to exhaust administrative remedies.

Cross-Motions for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. V.R.C.P. 56(a). The nonmoving party is entitled to “the benefit of all reasonable doubts and inferences.” Campbell v. Stafford, 2011 VT 11, ¶ 10, 189 Vt. 567 (quotation omitted). However, the nonmoving party may not rely on mere allegations but must support each challenged element of its claims with admissible evidence. Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995) (moving party may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party’s case, where moving party does not bear the burden of persuasion at trial); Poplaski v. Lamphere, 152 Vt. 251, 254-55 (1989) (summary judgment is mandated where, after the relevant opportunity for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his case on which he has the burden of proof at trial).

DOC is required by law to “provide health care for inmates in accordance with the prevailing medical standards.” 28 V.S.A. § 801(a). Thus, in order to prevail on the merits in this case, Plaintiff must demonstrate that DOC is failing to provide him with health care for his Hepatitis C in accordance with prevailing medical standards. What the prevailing medical standards are, and whether the Defendants are meeting them, are questions that can only be answered by a qualified medical professional; these issues are not so obvious that a lay person could be expected to understand them. Pontbriand v. Bascomb, 2009 WL 2477608 (Vt. 2009), at *2 (addressing the burden of proof borne by an inmate asserting a medical malpractice claim against the health care contractor retained by DOC). Therefore, in order to meet his burden of proof in this case, Plaintiff must present testimony from a qualified medical professional to the effect that DOC is failing to provide him with health care for his Hepatitis C in accordance with prevailing medical standards.

In response to Defendants’ motion for summary judgment, Plaintiff submitted to the court the group of 2008 lab reports and medical records referred to in footnote 3, above, together with his commentary on what he believes those documents prove. In addition, Plaintiff states in his response “[i]n the past I was treated for Hepatitis C from my doctor David Tager, M.D., from anywhere from 36 weeks to a year” with “Interferon & Ribivirion” but that “[d]ue to complications and the effectiveness of the medication my treatment stopped & my viral load rapidly decreased” (Motion in Response of Summary Judgment,” p. 1). Plaintiff adds, “Plaintiff refuses to believe that he is not able to undergo treatment, due to the lack of fibrosis.... Plaintiff was sick enough in 9-26-08 to receive the most severe treatment available interferon and Ribivioron for 36 weeks.”

Except for the reports and records from 2008, Plaintiff has not come forward with any record, report, affidavit or sworn statement by any medical professional as to what the standard of care is for treating his chronic Hepatitis C condition, or as to whether he is presently receiving the level of care that he is entitled to in the correctional facility. Plaintiff’s concerns about the effects that Hepatitis C may have on his future health are entirely understandable, and Plaintiff is certainly entitled to express his views regarding the treatment he would like to receive, but Plaintiff is not a medical professional, he is a layman, and he cannot meet his burden of proof based solely on his personal opinions and concerns. Defendants are entitled to summary judgment in their favor for this reason alone. Pontbriand.

Moreover, the Defendants have provided the court with the affidavit of Steven J. Fisher, M.D., who is the Statewide Medical Director for DOC’s medical care contractor in Vermont. Dr. Fisher’s affidavit demonstrates that Plaintiff’s Hepatitis C is being monitored in the correctional facility, that based on the results of his periodic blood tests Plaintiff is not presently a candidate for Hepatitis C treatment other than continued periodic monitoring, and that DOC is providing Plaintiff with the same care as he would be receiving if he were in the community instead of a correctional facility. Based on these undisputed facts, Defendants are entitled to judgment in their favor as a matter of law.

ORDER

For all the foregoing reasons, Defendants' motion to dismiss for failure to exhaust administrative remedies is DENIED, Defendants' motion for summary judgment is GRANTED, and Plaintiff's cross-motion for summary judgment is DENIED.

SO ORDERED this 29th day of December, 2016.

Robert A. Mello, Superior Judge