NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 21, 2017*
Decided December 29, 2017

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3939

MARIO HOWARD LLOYD,
Plaintiff-Appellant,

v.

SCOTT MOATS and TED WALL,
Defendants-Appellees.

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

No. 13-1291

James E. Shadid,
Chief Judge.

ORDER

Mario Lloyd, a prisoner at the Federal Correctional Institution in Pekin, Illinois, brought an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming that a prison doctor and nurse were deliberately indifferent to his foot pain in violation of the Eighth Amendment. He asserts that Dr. Scott Moats and Nurse Ted Wall misdiagnosed the cause of his foot pain, unreasonably

* 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. See FED. R. APP. P. 34(a)(2)(C).

APPENDIX A United States Court of Appeals decision

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delayed diagnostic testing, and inadequately treated him. The district court entered summary judgment for both defendants, and Lloyd appeals. We affirm the judgment.

We review the facts, taken here from the summary-judgment record, in the light most favorable to Lloyd. *Estate of Perry v. Wenzel*, 872 F.3d 439, 452 (7th Cir. 2017). While incarcerated, on October 10, 2011, Lloyd participated in a flag football game and badly injured his right foot. Afterwards his foot was bruised and he iced it all night. He attempted to go to sick call the next day, but he was not seen until October 13. That day, Lloyd says, he complained to Nurse Wall of pain in his right foot; Wall told him the discomfort was caused by a bunion. Lloyd said that his next visit was later in October. At that time he asked Wall to schedule an x-ray for his foot, but Wall did not do so, citing his lack of authority. Lloyd swears that he first asked Wall for an x-ray within a week of the October 13 appointment and then again in early November. Yet the October visits are not recorded in Lloyd's medical records (which, Wall attested, cannot be deleted), and Wall stated in his affidavit that neither alleged October visit took place.

The first medical visit documented in the record was on November 15, 2011, when Wall diagnosed Lloyd with a bunion. Wall advised Lloyd "to obtain a wider or size larger issue boot" because he did not meet the "criteria for a medical shoe." A month later, Lloyd saw Dr. Moats and complained of pain over his right, first, metatarsophalangeal joint (the joint that connects the big toe to the base of the foot). Dr. Moats also diagnosed a bunion and took an x-ray, which revealed an "old fracture in midfoot" that had healed itself. Dr. Moats's notes state that Lloyd reported that he had hurt that portion of his foot "playing football" but that the area was "no longer bothersome." (Lloyd disputes that he said this, but the difference in account does not matter to the outcome of his appeal.) Dr. Moats did not recommend any treatment for the fracture, but he was concerned about the "moth eaten" appearance in the area immediately below the base of Lloyd's big toe, and suspected an "inflammatory process." Dr. Moats prescribed aspirin and ordered blood tests, which did not reveal anything unusual. A radiologist also reviewed Lloyd's x-ray and reached the same conclusions: any bony trauma Lloyd had suffered had healed, and the source of his pain was the bunion and "degeneration."

Lloyd made several more complaints of foot pain to Dr. Moats and Wall, and the doctor ordered another x-ray on March 15, 2013. A radiologist reviewed this x-ray too, interpreting the results to be "[n]egative except for moderate degenerative joint disease." Wall told Lloyd about these results but documented that Lloyd was "unwilling to accept findings ... wants to be evaluated again." The following week, after Lloyd continued to complain of foot pain, another prison doctor ordered an MRI.

It was completed almost five months later, on August 28, and revealed "mild degenerative changes" with no abnormality of the midfoot.

Before the MRI, Lloyd went to sick call on August 19 and complained that over-the-counter pain medication was not easing his foot pain. But Wall countered that he reviewed Lloyd's many commissary purchases since October 2011, and Lloyd had never purchased any pain relievers. The defendants submitted Lloyd's commissary report and an affidavit from the facilities trust fund supervisor, who confirmed that Lloyd did not buy pain relievers from September 9, 2011 to September 4, 2014 (essentially, within three years after the injury). Lloyd disputes this, but the receipts for pain relievers that he submitted were from after September 4, 2014.

On June 25, 2014, Lloyd was sent to an outside podiatrist. He told her that he had a history of pain on the top of his right foot and the joint of his big toe. She noted that he had a decreased range of motion in both areas, but the remainder of the physical exam was normal. The podiatrist reviewed Lloyd's MRI results, which were positive for osteoarthritis in two of his joints. She discussed diabetic and osteoarthritis foot care with him and recommended a pair of "Dr. Comfort" diabetic shoes. The prison's utilization review committee, however, denied Lloyd's request for these shoes, determining that, based on Dr. Moats's recommendation that osteoarthritis did not require specialized footwear, Lloyd could safely wear the prison-issued boots. (The committee does not appear to have considered whether the podiatrist recommended the "diabetic" shoes to alleviate any symptoms caused by Lloyd's diabetes.)

After Lloyd exhausted his administrative remedies, he filed this suit in June 2013 (before the MRI and his visit to the podiatrist). The district judge screened the complaint, see 28 U.S.C. § 1915A, and allowed Lloyd to proceed on his claim that Dr. Moats and Wall were deliberately indifferent for failing to investigate the cause of Lloyd's foot pain, waiting two months to x-ray his foot, and not immediately ordering an MRI. Lloyd's theory was that he broke his foot in his October 2011 fall, that this break was the cause of his pain, and that he continued to suffer because of the defendants' inattention to the fracture. Lloyd asked the court three times for recruited counsel but the court denied each request.

During discovery Lloyd served on the defendants requests to produce his medical records and interrogatories. The defendants turned over more than 900 pages of records and answered most of his interrogatories with only a few objections. Lloyd made two motions—one to compel the defendants to provide more discovery and one to require them to answer his interrogatories fully; he also accused the defendants of supplying "false information" about his treatment. The district judge denied both

requests, noting that Lloyd did "not state, with specificity, which of Defendants [*sic*] objections he believes to be unsupported" and that the defendants had adequately responded to his interrogatories. Lloyd also requested discovery sanctions because, he alleged, the defendants' attorneys tampered with the disc containing images of his x-rays. The judge also denied this motion because he found no evidence of tampering and Lloyd had been able to review the information on the disc at one point.

Eventually Lloyd and the defendants filed cross-motions for summary judgment. The judge granted the defendants' motion and denied Lloyd's. He offered two reasons for those rulings: first, that "the bunion and arthritic pain" did not represent "a serious medical condition"; and second, that the defendants were not deliberately indifferent in their treatment of Lloyd's foot pain because they "undertook an extensive work-up of Plaintiff's foot pain and recommended appropriate over-the-counter pain medication."

On appeal Lloyd argues that factual disputes preclude a conclusion that there was no deliberate indifference as a matter of law. Prison officials violate the Eighth Amendment when they are deliberately indifferent to the serious medical needs of prisoners. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To establish a deliberate-indifference claim, a prisoner must demonstrate both that his medical condition is "objectively" serious and that the officials acted with a "sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834–35 (1994). "[A] prison official cannot be found liable under the Eighth Amendment ... unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837.

The parties dispute whether Lloyd's foot pain was an objectively serious medical condition. But we need not reach this issue because, even assuming that it was, there is insufficient evidence from which a reasonable jury could conclude that the defendants acted with deliberate indifference.

Lloyd maintains that the delay in Nurse Wall and Dr. Moats's treatment of his fracture, including the delay in ordering x-rays and an MRI, was unlawful. Even assuming that Lloyd fractured his foot in October 2011 (although it is impossible to tell *when* the fracture occurred), nothing in this record supports the conclusion that the delay before the x-rays and MRI were taken was an "inexplicable delay in treatment which serves no penological interest" or that it "exacerbated the injury or unnecessarily prolonged pain." *Petties v. Carter*, 836 F.3d 722, 731 (7th Cir. 2016) (en banc). It was up to Lloyd to "place verifying medical evidence in the record to establish" that it was, and he did not do so. *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996). Moreover, a delay in ordering tests must be evaluated in light of the entire record to determine if it evinces deliberate indifference: "[T]he question whether an X-ray or additional

diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment." *Estelle*, 429 U.S. at 107; see *Pyles v. Fahim*, 771 F.3d 403, 411 (7th Cir. 2014).

The record of treatment that Lloyd received forecloses a finding of deliberate indifference. See *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997) (emphasizing the "detailed account of the treatment he received" in rejecting deliberate indifference finding). Wall and Dr. Moats examined Lloyd multiple times, took x-rays that an outside radiologist interpreted, and referred Lloyd to an outside podiatrist. The outside specialist confirmed that degeneration and osteoarthritis caused Lloyd's pain. Neither defendant disregarded Lloyd's complaints of foot pain or made outrageous treatment (or non-treatment) decisions; the record reflects a level of continuous care that is not consistent with a malicious state of mind. A prisoner "is entitled to reasonable measures" to prevent a serious risk of harm, but he "is not entitled to the best care possible." *Arnett v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011). On this record, a jury could not reasonably conclude that the defendants did not provide adequate care.

Finally, neither Lloyd's disagreement with his doctors nor any disagreement among the doctors, establishes deliberate indifference in this case. Plainly Lloyd disagrees with the course of action that Dr. Moats and Nurse Wall took in treating his foot pain, and also with their diagnosis of its cause; he says the fracture caused his ongoing pain, and he thinks he should have been given stronger pain medication and special footwear. But Lloyd's disagreement is irrelevant. He is not competent to diagnose himself, and he has no right to choose his own treatment. See *Holloway v. Delaware Cty. Sheriff*, 700 F.3d 1063, 1073 (7th Cir. 2012). Further, the fact that Dr. Moats disagreed with the podiatrist's recommendation for special shoes is not material here because the shoes were not prescribed, only recommended pending "prison medical department" approval. While a genuine issue of material fact may arise when a prison physician ignores a specialist-prescribed treatment, *Gil v. Reed*, 381 F.3d 649, 663 (7th Cir. 2004), a prison physician's decision to reject another doctor's treatment recommendation in favor of his own "does not amount to deliberate indifference where both recommendations are made by qualified medical professionals" and the prison doctor's decision is made for a medical reason. *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 797 (7th Cir. 2014); see *Perez v. Fenoglio*, 792 F.3d 768, 778 (7th Cir. 2015). As long as Dr. Moats used medical judgment—and there is no evidence he did not—he was free to devise his own treatment plan. See *Holloway*, 700 F.3d at 1073.

Lloyd also argues on appeal that the district judge abused his discretion by denying Lloyd's motions for recruitment of counsel, but we disagree. When an indigent plaintiff requests recruitment of counsel the district judge must ask whether the plaintiff made reasonable attempts to independently obtain counsel (or was prevented from doing so), and whether it appears that he is competent to litigate the case. See *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc). We will reverse only if Lloyd demonstrates prejudice. See *id.* at 659.

The district judge denied Lloyd's first motion as premature, his second because he had not demonstrated reasonable efforts to retain counsel, and his third because he was competent to litigate the case himself. In denying the third motion, the judge noted that Lloyd "had strenuously prosecuted this case, and has filed a variety of motions, including motions to compel." Lloyd's extensive summary-judgment filings also demonstrated that he could litigate the case himself. See *Pruitt*, 503 F.3d at 654–56. This decision was well within the bounds of the judge's discretion. Lloyd believes that he suffered prejudice because, without an attorney, he could not obtain an expert medical witness, but he has not persuaded us that an expert would have made a difference. He already had the benefit of an outside podiatrist's review of his medical records and her recommendation to provide Lloyd with special shoes. Further, to be useful an expert would have to opine that Dr. Moats and Wall strayed so far from the standard of care that their actions surpassed malpractice and instead approached intentional wrongdoing, see *Arnett*, 658 F.3d at 751. The nature and extent of the treatment in this case would make finding such an expert unlikely, at best.

Lloyd also says that the district court erred in denying his discovery motions. But "[t]rial courts retain broad discretion to limit and manage discovery under Rule 26 of the civil rules." *Geiger v. Aetna Life Ins. Co.*, 845 F.3d 357, 365 (7th Cir. 2017) (internal alterations omitted). They also have broad discretion to impose discovery sanctions, and may impose them only "where a party displays willfulness, bad faith, or fault." *Scott v. Chuhak & Tecson, P.C.*, 725 F.3d 772, 778 (7th Cir. 2013). In the district judge's view, the defendants complied with Lloyd's discovery requests when they did not have valid objections, and they did not improperly object to or withhold anything. The judge further concluded that Lloyd's assertions that the defendants acted in bad faith, provided "false information," and tampered with the discs containing Lloyd's x-rays were baseless. We too see no evidence of censurable conduct, and we will not second-guess the district judge's ruling without good reason. See *Chatham v. Davis*, 839 F.3d 679, 687 (7th Cir. 2016).

We AFFIRM the judgment of the district court.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 23, 2018

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 16-3939

MARIO H. LLOYD,
Plaintiff-Appellant,
v.

SCOTT MOATS and TED WALL,
Defendants-Appellees.

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

No. 13-1291

James E. Shadid,
Chief Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing en banc on January 23, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B The petition for a rehearing was DENIED

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

MARIO HOWARD LLOYD,	)	
	)	
Plaintiff,	)	
v.	)	**No.: 13-cv-1291-JES**
	)	
SCOTT MOATS and TED WALL,	)	
	)	
Defendants.	)	

ORDER ON SUMMARY JUDGMENT

Plaintiff, an inmate at the Federal Correctional Institution in Pekin, Illinois ("FCI- Pekin"), has brought an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against FCI-Pekin employees, Dr. Scott Moats and Nurse Ted Wall. Plaintiff alleges that Defendants were deliberately indifferent to his serious medical needs in failing to diagnose and treat his right foot condition. Plaintiff filed a Motion for Summary Judgment [ECF 40] to which Defendant responded [ECF 46] and Plaintiff replied [ECF 53]. Defendants subsequently filed a Cross Motion for Summary Judgment [ECF 47] and Statement of Undisputed Material Facts [ECF 50]: Plaintiff replied, [ECF 54] and [ECF 55], and Defendant responded [ECF 57].

For the reasons indicated herein, Plaintiff's Motion for Summary Judgment, [ECF 40] is DENIED. Defendants' Cross Motion for Summary Judgment, [ECF 47], is GRANTED.

MATERIAL FACTS

On October 10, 2011, Plaintiff was participating in a flag football game when his right foot allegedly was caught in a hole in the dirt, causing him to fall. Plaintiff felt immediate pain

APPENDIX C United States District Court's order on Summary Judgment

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and discontinued playing. When he returned to his cell, he applied ice to his right foot. The next day, Plaintiff's foot was markedly bruised. He attempted to go to sick call that day but allegedly was not seen until two days later, on October 13, 2011. Defendants dispute this, indicating that the medical records reveal that Plaintiff was first seen for complaints of foot pain on November 15, 2011.

Plaintiff claims that he was seen by Defendant Nurse wall on October 13, 2011. He alleges that Defendant Wall told him the discomfort was caused by a hallux valgus bunion and there was nothing to be done.[1] Defendant allegedly returned his identification to him, apparently not charging a co-pay for the visit. Plaintiff believes that this is the reason that there is no medical records of the visit, or, alternatively, that defendants deleted all record of the visit. Defendants respond they are obligated to make a record of all medical visits and that the electronic medical record program does not allow a record to be deleted. They advance the records as proof that Plaintiff did not voice complaints of foot pain until November 15, 2011.

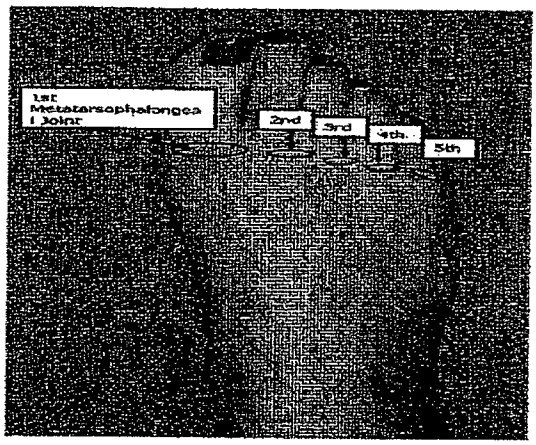
Plaintiff claims that he sought treatment of his right foot on at least one other occasion between October 13, 2011 and November 15, 2011, the first treatment referenced in the record. He claims that on or about October17-20, 2011, he requested that Defendant Wall schedule him for an x-ray to his right to foot. As noted, there is no record of these encounters.

The first relevant recorded visit was that of November 15, 2011. On that date, Plaintiff was seen by Defendant Wall, requesting "medical shoes". The note is not specific as to whether Plaintiff was complaining of pain nor does it identify the location of any pain. The exam of that day revealed a bunion of the hallux (great toe) of the right foot. Plaintiff was advised to obtain a

[1] A bunion, (Hallux Valgus), is a prominent bump on the inside of the foot around the big toe joint. http://www.foot.com/site/tags/hallux-valgus.

wider or larger boot, and told that he did not qualify for a medical shoe.

On December 15, 2011, Plaintiff was seen by Defendant, Dr. Moats for a previously scheduled chronic care clinic appointment related to his diabetes. The medical record reveals that Plaintiff complained of pain over the right first metatarsophalangeal joint. (See identification of first metatarsophalangeal joint at base of the great toe, below).[2]



Dr. Moats diagnosed a mild bunion formation at the site, apparently confirming Defendant Wall's earlier entry. He also ordered x-rays which showed evidence of a fracture at the midfoot.[3] Dr. Moats has submitted an affidavit indicating that the fracture was "old" and was healing on its own. [ECF 50-1].

Plaintiff has filed an Amended Complaint in which he admits that Defendant Wall correctly diagnosed the bunion. He believes, however, that Defendant Wall was deliberately indifferent in not investigating the cause of the bunion. Plaintiff had reviewed a "Mayo medical

[2] https://www.verywell.com/metatarsophalangeal-joint-1337716

[3] The midfoot refers to the bones and joints that make up the arch and connect the forefoot (which includes the bones of the toes) to the hindfoot (which includes the ankle bone and the heel bone). http://www.aofas.org/footcaremd/treatments/Pages/Midfoot-Fusion.aspx.

book" which reveals that a bunion can be caused by an injury. It is his belief that he fractured his midfoot on October 10, 2011, and that the bunion developed as a result of that injury. Plaintiff believes that he should have had an x-ray at the onset to determine the severity of the bunion and the need for additional treatment. He criticizes Defendant Wall for making him wait two months for an x-ray. He implicates Dr. Moats as well, claiming that Moats was aware of his complaints. Plaintiff does not assert, however, that he personally spoke with Defendant Moats prior to December 15, 2011, or otherwise identify why he believes that Defendant Moats was aware of his injury.

The medical records of the December 15, 2011 visit document that Plaintiff told Dr. Moats that the area of the midfoot was no longer bothering him though he continued to have pain at the site of the bunion. It appears, therefore, that Plaintiff's bunion pain, at the base of the big toe, was separate from the healing midfoot fracture at the arch of the foot. Defendant Moats discharged the Plaintiff without recommending any treatment to the midfoot. He was, however, concerned with the "moth-eaten" appearance of the first metatarsal area (the area immediately below the base of the great toe). He suspected an inflammatory process and ordered blood testing, the results of which were negative.

Dr. Moats notes that the over-read of the December 15, 2011 x-ray by the radiologist confirmed the presence of the bunion. The radiologist also noted erosive changes in the first and fifth metatarsal bones, often seen with gout, and two potential areas of old trauma lateral to the base of the great toe and another at the navicular bone toward the back of the foot. Dr. Moats has submitted a verified affidavit attesting that the radiologist's opinion substantiated that any bony trauma which Plaintiff might have suffered, had healed. He believed that the source of Plaintiff's pain was the bunion and "degeneration". [ECF 50-1].

Defendant Moats saw Plaintiff on several subsequent locations for complaints of pain at the first metatarsophalangeal joint. Additional x-rays were done on March 15, 2013. They were reviewed by the radiologist who interpreted the results as "[n]egative except for moderate degenerative joint disease." [4] [ECF 51-7]. On April 2, 2013, Defendant Wall went over the x-ray findings with Plaintiff. He told Plaintiff that he had arthritis in his right foot and documented, "inmate unwilling to accept findings ... wants to be evaluated again."

On April 9, 2013, Plaintiff was seen for complaints of foot pain in the right calcaneus ("heel)." Dr. Moats ordered an MRI to the heel to be done on August 28, 2013. At the time of the exam, Plaintiff complained that the pain was in the midfoot and asked that the MRI be directed to that area rather than the calcaneus. Authorization was given to undertake an MRI of right midfoot, as requested. The MRI report notes that the exam was done due to Plaintiff's complaints of "right forefoot pain" which radiated into the toes. The results revealed mild degenerative changes with no abnormality of the medial midfoot. [ECF 50-8].

On June 25, 2014, Plaintiff was referred to outside podiatrist, Dr. Gretchen Evans. Dr. Evans record a nine month history of pain on the top of Plaintiff's right foot as well as at the joint of the big toe. Plaintiff was noted to have decreased range of motion at the base of the big toe and first metatarsal-cuneiform joint. The remainder of the physical exam was negative. Dr. Evans reviewed the MRI findings, which were positive for osteoarthritis of the first metatarsophalangeal and first metatarsal cuneiform joints. She discussed with Plaintiff diabetic foot care and osteoarthritis care and recommended a pair of "Dr. Comfort" diabetic shoes.

The records contain a July 30, 2014 Utilization Review Committee report denying

[4] Degenerative joint disease is also known as osteoarthritis.
http://www.medicinenet.com/script/main/art.asp?articlekey=2932

authorization for the diabetic shoes. The Committee found, based on Dr. Moats' recommendation that Plaintiff could safely where institution issued steel toed boots and that osteoarthritis did not require specialized footwear . [50-12].

Plaintiff has alleged deliberate indifference in that he was not given pain medication for the symptoms in his right foot. Defendant Wall has provided an affidavit indicating that he advised Plaintiff to treat his right foot pain with over-the-counter pain medication available for purchase in the commissary. On August 19, 2013, he was told by Plaintiff that the pain was not relieved by the over-the-counter medications. Defendant Wall has provided a printout of Plaintiff's commissary purchase receipts from October 2011 to September 2014, however, which indicate that Plaintiff did not purchase any over-the-counter pain medications during this period. [ECF 51-13]. Plaintiff disputes this, claiming that the 47-page commissary printout does not include medications which are purchased on Fridays. [54 p. 2]. Defendants counter with the uncontroverted declaration of Regina Kallis who supervises commissary sales. Ms. Kallis attests that over-the-counter medications are available Monday through Thursday, as well as Fridays. She has reviewed all of Plaintiff's commissary records and avers that he did not purchase any pain medication from September 9, 2011 to September 4, 2014. [57-1].

Defendants assert that it is impossible to know for certain whether Plaintiff broke his midfoot on October 11, 2011. They claim that, even if he did, Plaintiff did not present with complaints of foot pain until November 15, 2011, and had an x-ray 30 days later. Plaintiff, of course, asserts that he was seen by Defendant Wall on October 15, 2011, and on at least one other occasion prior to November 15, 2011. Defendants assert, further, that they were not on notice that Plaintiff had sustained a fracture to his foot until they reviewed the x-ray results on December 15, 2011. As they had no notice of the fracture, they cannot be found deliberately

indifferent in not treating the unknown condition. Defendants state, further, that Plaintiff's complaints of foot pain were caused by the bunion at the base of the great toe and was unrelated to the allegedly late diagnosed midfoot fracture.

LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant if entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 7477 U.S. 317, 322-23 (1986). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 294 (7th Cir. 1997). "[A] party moving for summary judgment can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183(7th Cir. 1993).

Accordingly, the non-movant cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine triable issue; he "'must do more than simply show that there is some metaphysical doubt as to the material fact.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986)(quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 818 (7th Cir. 1999). Finally, a scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a

summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250.

DELIBERATE INDIFFERENCE STANDARD

The Eighth Amendment prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "The Eighth Amendment safeguards the prisoner against a lack of medical care that may result in pain and suffering which no one suggests would serve any penological purpose." *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011)(internal quotations and footnote omitted). "Prison officials violate the Constitution if they are deliberately indifferent to prisoners' serious medical needs." *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 828 (7th Cir. 2009)("Deliberate indifference to serous medical needs of a prisoner constitutes the unnecessary and wanton infliction of pain forbidden by the Constitution.").

"In order to prevail on a deliberate indifference claim, a plaintiff must show (1) that his condition was 'objectively, sufficiently serious' and (2) that the 'prison officials acted with a sufficiently culpable state of mind." *Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008)(quoting *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005)); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008)(same). "A medical condition is serious if it 'has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention.'" *Lee*, 533 F.3d at 509 (quoting *Greeno,* 414 F.3d at 653). "With respect to the culpable state of mind, negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense." *Id.*; *Farmer v. Brennan*, 511 U.S. 825, 836-37

(1994)("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.").

ANALYSIS

Plaintiff's Motion for Summary Judgment and responses to Defendants' Motion is predicated on his firm belief that Defendants attempted to "cover-up" the midfoot fracture. The Court believes it reasonable to infer that Plaintiff did, indeed, sustain the fracture as a result of the fall on October 10, 2011. It does not, however, see evidence of a cover-up. On December 15, 2011, Dr. Moats ordered the x-ray and diagnosed a prior midfoot fracture, which was confirmed by the radiologist. Dr. Moats indicated that the fracture was healing on its own and he did not order any treatment.

The Court does not believe that a two-month interval between the alleged injury, and the x-ray is evidence of deliberate indifference. While the parties dispute whether Plaintiff was seen on October 15, 2011, they agree that he was seen on November 15, 2011. There is nothing in the record to substantiate, nor does Plaintiff claim, that the foot pain on that date was severe. As a result, the Court does not find that there was anything to place Defendants on notice of a potential fracture. This, especially, as Defendants have established that Plaintiff did not purchase any over-the-counter pain medication during this time. *See Hudgins v. DeBruyn*, 922 F. Supp. 144, 150 (S.D. Ind. 1996), citing *Martin v. DeBruyn*, 880 F.Supp. 61, 6150 (N.D.Ind. 1995) ("a prison official violates the Eighth Amendment by refusing to provide prescribed OTC medicine for a serious medical need only if the inmates lacks sufficient resources to pay for the medicine. If the

inmate can afford the medicine but chooses to apply his resources elsewhere, it is the inmate, and not the prison official, who is indifferent to serious medical needs.")

Furthermore, there is no evidence that Plaintiff was damaged by the alleged failure to earlier diagnose the midfoot fracture. When Dr. Moats reviewed Plaintiff's x-ray two months after the injury, it showed that the fracture was healing on its own. Plaintiff asserts in his amended complaint, that he should have been given pain medication and a walking boot. [ECF 55 p. 14]. He offers nothing to support that the failure to provide these treatments caused him further injury. There are no findings of malunion or displacement of the fracture in the subsequent x-rays or MRI findings, nor were any identified by Dr. Evans. While Plaintiff asserts that a delay in treatment has increased the likelihood that his condition will be refractory to treatment, he must provide verifying medical evidence in support. This, he has failed to do. *See Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996) ("an inmate who complains that delay in medical treatment rose to a constitutional violation must place *verifying medical evidence* in the record to establish the detrimental effect of delay in medical treatment to succeed.") (Emphasis in original). *See also Davis v. Samalio*, 286 F. App'x 325, 328 (7th Cir. 2008) (unpublished) (summary judgment warranted where prisoner failed to provide verifying medical evidence that the delay caused some degree of harm).

Defendants assert, further, that Plaintiff's foot pain was not related to the midfoot fracture, but to a bunion at the base of the great toe. Plaintiff appears to believe that the fracture in the area of the arch caused the symptoms associated with the bunion. He offers nothing, however, to support a causal connection between these two conditions which arose at different areas of the foot. The lengthy medical records, radiology reports and affidavits establish that Plaintiff's pain symptoms were from the bunion and degenerative arthritis, not the healed midfoot fracture.

The Court finds that Defendants were not deliberately indifferent in their treatment of Plaintiff's foot pain. Defendants undertook an extensive work-up of Plaintiff's foot pain and recommended appropriate over-the-counter pain medication. Even if this were not the case, the Court does not find that the bunion and arthritic pain represented a serious medical condition. This, in light of the testimony that, in a three year period, Plaintiff did not purchase any over-the-counter pain medication though he had made numerous other commissary purchases. *See Guarneri v. Hazzard*, No. 06-985, 2010 U.S. Dist. LEXIS 26966, at *48 (N.D.N.Y. Mar. 22, 2010) (back pain prompting requests for "simple ibuprofen is not a serious medical condition"); *Montes v. Ponce Municipality*, 79 Fed. Appx. 448, 451 (1st Cir. 2003) (a condition warranting only over-the-counter pain killers was not "serious").

Plaintiff objects that it took one and-a-half years for him to undergo an MRI. The MRI, however, merely confirmed the prior findings of the bunion and osteoarthritis and did not trigger any new or additional treatment. Here, again, Plaintiff fails to offer verifying medical evidence that he was injured by any delay in having an MRI.

Plaintiff further claims bad faith on the parts of Defendants, regarding a CD which contained both his x-ray and MRI results. Plaintiff claims that he viewed the contents of the CD in the education department and thereafter sent the disc to his daughter. Plaintiff's daughter was reportedly unable to access the images. It is not clear why Plaintiff puts the onus on Defendants or defense counsel, as it appears that he had possession of the CD and then forwarded it on to his daughter. [ECF 53 p. 5]. Furthermore, the podiatry expert Dr. Evans had been able to open the CD, and relied on the MRI results in forming her opinions, so Plaintiff suffered no prejudice.

Based upon these facts, Plaintiff is unable to establish that the Defendants were deliberately indifferent to his serious medical condition and his Motion for Summary Judgment

[ECF 40], is DENIED. For that same reason, the Defendants' Cross Motion for Summary Judgment [ECF 47], is GRANTED.

IT IS THEREFORE ORDERED:

1) Plaintiff's Motion for Summary Judgment [ECF 40], is DENIED. Defendants' Cross Motion for Summary Judgment [ECF 47] is GRANTED. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiff. This case is terminated, with the parties to bear their own costs. All deadlines, internal settings and pending motions are vacated.

2) If Plaintiff wishes to appeal this judgment, he must file a notice of appeal with this Court within 30 days of the entry of judgment. Fed. R. App. P. 4(a)(4).

3) If Plaintiff wishes to proceed *in forma pauperis* on appeal, his motion for leave to appeal *in forma pauperis* must identify the issues Plaintiff will present on appeal to assist the Court in determining whether the appeal is taken in good faith. *See* Fed. R. App. P. 24(a)(1)(c); *see also Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999) (an appellant should be given an opportunity to submit a statement of his grounds for appealing so that the district judge "can make a responsible assessment of the issue of good faith."); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (providing that a good faith appeal is an appeal that "a reasonable person could suppose . . . has some merit" from a legal perspective). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee regardless of the outcome of the appeal.

ENTERED this 2nd day of November, 2016

s/James E. Shadid
JAMES E. SHADID
UNITED STATES DISTRICT JUDGE