APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jason A. Czekalski

v. Civil No. 17-cv-557-JL

William Wrenn, New Hampshire Department of Corrections Commissioner; Christopher Kench; Paula Mattis; and Jon Fouts

ORDER

Plaintiff, Jason Czekalski, an inmate at the New Hampshire State Prison ("NHSP"), has filed a lawsuit for damages and injunctive relief under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), naming the New Hampshire Department of Corrections ("NHDOC") Commissioner Helen Hanks, in her official capacity, as a defendant and, as defendants in their individual capacities, NHDOC Director of Security Christopher Kench, NHDOC Director of Medical and Forensic Services Paula Mattis, NHSP Director of Security Jon Fouts, and former NHDOC Commissioner William Wrenn. Before the court are plaintiff's motion for partial summary judgment (Doc. No. 112) and defendants' cross-motion for summary judgment (Doc. No. 122) on all claims. Both motions have been fully briefed. See Doc. Nos. 112, 122, 123, 125, 128-1.[1]

After considering the parties' briefs and the record before the court in the light most favorable to the nonmovant, the court concludes that, as to Claims 1, 2, 3, and 4, there is insufficient evidence to support a reasonable finding of defendants' deliberate indifference, and

[1] On March 18, 2021, the Magistrate Judge issued an Order granting two of plaintiff's motions (Doc. Nos. 128, 129), by striking ¶¶ 1, 2, and D from Document No. 125 and adding Document No. 128-1 to the evidentiary record. The stricken paragraphs in Doc. No. 125 had expressed an intent to forego all claims for injunctive relief as well as the claims numbered here as Claims 3(c), 3(g), and 5.

that, as to Claim 5, there is insufficient evidence of defendants' imposition of a substantial burden on plaintiff's daily morning prayers. Therefore, the court grants defendants' motion for summary judgment (Doc. No. 122) and denies plaintiff's cross-motion (Doc. No. 112).

Background

I. Claims

Plaintiff is 59 years old and suffers from chronic pain, asthma, depression, and PTSD. He challenges the prison's delays in providing, or failure to provide, a thicker ("less injurious") mattress, faster prescription refills, free replacement eyeglasses, a different type of asthma inhaler, access to higher doses of ibuprofen and acetaminophen, a cystoscopy ordered by a urologist, and a medication distribution schedule for his daily prescribed dose of Prozac that avoids any interference with his daily morning prayers. The court previously summarized and numbered the claims at issue as follows:

> 1. Defendants Christopher Kench, Paula Mattis, Jon Fouts, and NHDOC Commissioner William Wrenn violated Mr. Czekalski's Eighth Amendment right to adequate medical care by blocking Mr. Czekalski's access to a thicker mattress, giving rise to their liability under 42 U.S.C. § 1983.
>
> 2. Defendants violated Mr. Czekalski's Eighth Amendment right to adequate medical care by causing the prison's prescription refill process to be implemented in a way that delayed his receipt of medications due to delays in filling prescriptions and delivering medication, giving rise to defendants' liability under 42 U.S.C. § 1983.
>
> 3. Defendants violated Mr. Czekalski's Eighth Amendment right to adequate medical care, giving rise to their liability under 42 U.S.C. § 1983, in that:
>
> > a. NHDOC policies adopted by defendants caused Mr. Czekalski, prior to April 24, 2017, to be denied access to 800 mg of ibuprofen three times a day, which was the dosage he was prescribed to treat his arthritis prior to his incarceration;
> >
> > b. NHDOC policies adopted by defendants caused Mr. Czekalski, prior to May 2, 2017, to be denied access to the same type of inhaler that had been prescribed to treat his asthma prior to his incarceration;

c. NHDOC policies implemented in 2017 resulted in a change in the timing of Mr. Czekalski's receipt of a daily morning dose of anti-depressants, in contravention of the dosing schedule ordered by Dr. Graves;

. . .

e. NHDOC policies adopted by defendants denied Mr. Czekalski access to the daily dosage of acetaminophen his NHSP treating physician, Dr. Rodd, recommended he take to treat his arthritis;

. . .

g. The NHDOC has failed to replace Mr. Czekalski's broken eyeglasses free of charge, without which he is legally blind.

4. Defendants violated Mr. Czekalski's Eighth Amendment rights by failing to supervise their (former) subordinate employee, NHDOC Nurse Judy Baker, resulting in a delay in scheduling Mr. Czekalski for a follow-up appointment for a cystoscopy between June 2015 and January 2016, giving rise to the supervisory defendants' liability for inadequate medical care under 42 U.S.C. § 1983.

5. The change in the scheduled distribution of Mr. Czekalski's morning dose of anti-depressants, beginning in 2017, has substantially burdened his religious exercise of daily morning prayers, in violation of RLUIPA.

II. Health History, Pain, and Mattress Issues

Mr. Czekalski has a pre-incarceration history of asthma, osteoarthritis affecting his shoulder and hip, a knee problem (chondromalacia patella), chronic back pain, PTSD, depression, as well as risk factors for cancer and a heart attack. See Pl.'s Personal Decl., Apr. 28, 2020 ("Czekalski Decl. I") ¶ 5 (Doc. No. 112-1); Jt. Stip. of Undisputed Facts ¶¶ 3, 6 ("Jt. Stip.") (Doc. No. 98); Pl.'s Aff., Aug. 9, 2020 ("Czekalski Decl. II") ¶ 4 (Doc. No. 125-1). Mr. Czekalski would testify that his pain was well-managed immediately prior to his incarceration, "through a combination of medication and an appropriate (and very expensive) mattress." Pl.'s Offer of Proof ¶ 9(i) (Doc. No. 113, at 9).

Mr. Czekalski has claimed in this case that his arthritis pain has worsened since his incarceration. He has been evaluated and treated at the NHSP by the NHDOC Chief Medical

Director Dr. Thomas A. Groblewski; by Dr. Groblewski's predecessor Dr. Jeffrey Fetter, M.D.; and by (former) NHSP Pain Clinic Director Dr. Carey Rodd, M.D. See Aff. of Jeffrey C. Fetter, M.D., May 14, 2018 ("Fetter Decl. I") ¶ 1 (Doc. No. 23-1); Decl. of Jeffrey C. Fetter, M.D., July 10, 2018 ("Fetter Decl. II") ¶¶ 3-7 (Doc. No. 25-3); Jt. Stip. ¶ 10 (Doc. No. 98); Decl. of Thomas A. Groblewski, D.O., July 3, 2020 ("Groblewski Decl.") ¶ 2 (Doc. No. 122-8).

While incarcerated at the NSHP, Mr. Czekalski has been prescribed glucosamine and non-steroidal anti-inflammatory drugs ("NSAIDs") to treat his arthritis and chronic pain. See First Am. Compl. ¶¶ 9-10 (Doc. No. 5); Jt. Stip. ¶ 4 (Doc. No. 98). The prescribed NSAIDs have included Naproxen, which plaintiff refused to take because of its side-effects, as well as ibuprofen, which he takes at high doses exceeding his prison doctors' advice. See Fetter Decl. I ¶¶ 4-5 (Doc. No. 23-1); Fetter Decl. II ¶¶ 4-7 (Doc. No. 25-3); Groblewski Decl. ¶ 2 (Doc. No. 122-8); Jt. Stip. ¶ 4 (Doc. No. 98). In addition, his NHSP doctors have recommended he take, as needed, acetaminophen (available for purchase through the canteen) to supplement his prescribed doses of NSAIDs. See Doc. No. 29-4, at 5; First Am. Compl. ¶ 65(A) (Doc. No. 5).

Since Mr. Czekalski filed this lawsuit in December 2017, he has received three new mattresses, including one on or about December 2018, one in June 2019, and one in November 2020. See Jt. Stip. ¶ 7 (Doc. No. 98); Pl.'s Supp. Decl., Dec. 6, 2020 ("Czekalski Decl. III") ¶ 3 (Doc. No. 128-1); Pl.'s Offer of Proof – Exs. ¶ 5(b) (Doc. No. 113, at 11-12). When Mr. Czekalski filed a motion complaining in this case that his mattress had "collapsed" in December 2019, Major Fouts ordered corrections officers to take photos of that mattress and decided not to replace it, as it looked to be in "good shape." Decl. of Maj. Jon H. Fouts, Jan. 8, 2020 ("Fouts Decl.") (Doc. No. 91-8).

Mr. Czekalski has averred that the mattresses he has used in his cell have not been sufficiently thick or supportive over time to allow him to manage his pain without resorting to

higher doses of NSAIDs than his providers have recommended or prescribed. See First Am. Compl. ¶ 24 (Doc. No. 5). After approximately six to eight weeks of use, he avers, the mattresses compress so much when he lies down, that he feels the concrete pad beneath, his sleep is disrupted by the pain he feels, and he is unable to find a position during the day that alleviates his severe pain. See Czekalski Decl. I ¶¶ 4-13 (Doc. No. 112-1). He reports that he has had better sleep, lower levels of pain, an increased range of motion, improved blood pressure readings, no need for his anti-depressant, and an ability to manage his pain while taking a lower daily dose of NSAIDs: (1) when he has been issued a new mattress, in the first six to eight weeks of use; (2) when he has slept on two mattresses stacked together in his cell[2]; and (3) when he has slept on the mattresses available to patients in the NHSP Health Services Center. See Czekalski Decl. I ¶¶ 4-9 (Doc. No. 112-1); Czekalski Decl. III ¶¶ 8-12 (Doc. No. 128-1).

A written set of practice guidelines adopted by the Director of Medical and Forensic Services proscribes the issuance of medical passes for extra mattresses. See Medical Restriction Pass Guidelines, Doc. No. 38-3, at 3; see also Aff. of Bernadette M. Campbell, Deputy Director of Medical Services, Jan. 2, 2019 (Doc. No. 38-2). Mr. Czekalski's own declaration and other evidence in the record indicate that Dr. Rodd and/or Dr. Groblewski told him that NHSP health care providers cannot order mattresses for inmates. Personal Decl., Jan. 23, 2020 ("Czekalski Decl. IV") ¶ 10 (Doc. No. 93-1), at 3; see also Doc. No. 29-4, at 5.

Mr. Czekalski's grievance records submitted to prison officials before he filed this case complained about the mattresses causing him pain and his "getting a run-around between medical and security" when he asked for a thicker mattress. Doc. No. 29-1, at 2. Warden Michael Zenk's response to the June 2017 grievance in this court's record states the following:

> Based on my review of your complaint I am providing you with the following information: 1) The NHDOC purchases and provides residents with a

[2] It is undisputed that stacking mattresses is not generally allowed.

> correctional style mattress that is 4 inches thick, which is very similar to mattresses used in the [Federal] Bureau of Prisons; 2) residents in general population are provided the same style of mattress and worn or damaged mattresses are replaced as necessary; and 3) the Medical Dept. is treating your pain issue but no special mattress is ordered by the Medical Staff. Based on the preceding information, it is clear you are being treated fairly and in accordance with our policy. . . .

Doc. No. 29-1, at 2. Defendant Christopher Kench, on behalf of the Commissioner's Office, stated in response to Mr. Czekalski's grievance appeal that he "supported Major Fouts' and Warden Zenk's responses" regarding the mattress issue. Doc. No. 29-1, at 2.

An unsworn statement signed by Dr. Rodd in November 2019, produced to defendants as Mr. Czekalski's expert disclosure in this case, states, among other things, that "disrupted sleep definitely affects pain perception in most people," and that "[c]hronic pain may adversely affect many medical conditions" including insomnia and depression. Dr. Rodd's report further states the following regarding his experience with treating Mr. Czekalski and other inmates with chronic pain in his former capacity as the NHSP Pain Clinic Director:

- . . . . The mattresses were a major issue for most inmates. I cannot attest to whether continued use of the mattresses will lead to harm. Better mattresses may improve sleep for many of the inmates.

  . . . .

- [The NHSP] Pain Clinic was very limited in what could be used for chronic pain. NSAIDs, glucosamine and Tylenol were the mainstay of our therapy. . . . I cannot confirm that bad mattresses contributed directly to Mr. Czekalski's chronic pain.

  . . . .

- In a correctional environment, the practice of medicine is a challenge, although every effort is made to keep to the community standard. Often there are circumstances that prioritize the safety of the staff and inmates over measures that might contribute to conditions more like those outside of prison. This makes it difficult to intervene in the realm of mattresses, pillows, shoes or clothing since these are considered Corrections issues over which medical has no control.

Doc. No. 125-7, at 3.

Mr. Czekalski testified in his deposition in this case that the causes of his sleep problems include his mental health issues, his loud snoring, and anger at his conviction, in addition to his chronic pain. Jt. Stip. ¶ 11 (Doc. No. 98). His deposition testimony recites, in part, as follows:

> Mr. Edelman: What have been your symptoms of PTSD over the years?
>
> Mr. Czekalski: Over the years, nightmares, inability to sleep. . . .
>
> Mr. Edelman: And these conditions continue to this day?
>
> Mr. Czekalski: Yes, they do.
>
> . . . .
>
> Mr. Edelman: Has [your depression] resulted in sleeplessness from time to time?
>
> Mr. Czekalski: It may have contributed. I can't tell when the sleeplessness is from that and when it's from the PTSD. I know the clinician here said those two tend to go hand in hand, especially when you're dealing with chronic pain, so –
>
> Mr. Edelman: Now, you also complained of concerns that you had sleep apnea; do you recall that?
>
> Mr. Czekalski: Yes. I snore to the point where I wake myself up. I cannot sleep laying on my back at all.
>
> . . . .
>
> Mr. Edelman: Does the idea of your having been, to your mind, falsely accused of a heinous crime contribute to your sleeplessness from time to time?
>
> Mr. Czekalski: Significantly. I still carry around a lot of anger and a lot of rage.

Dep. of Jason Czekalski, June 24, 2019 ("Czekalski Dep.") at 18-21 (Doc. No. 122-2, at 3-6).

III. Prescriptions Refills

Mr. Czekalski has claimed that from the time of his arrival at the NHSP in December 2013, there have been delays in filling or delivering his prescriptions. He has specifically averred that although the refill form given to inmates stated that inmates should allow four days for refills to be processed, prescriptions for some of his medications including ibuprofen could

take ten to fifteen days to arrive after his supply had run out. First Am. Compl. ¶ 49 (Doc. No. 5). His First Amended Complaint states that the failure to deliver his prescriptions on time "results in debilitating pain (ibuprofen), bloody urine (proscar), and respiratory distress (asthma inhalers), all problems defendants have been repeatedly made aware of." First Am. Compl. ¶ 57 (Doc. No. 5).

Mr. Czekalski filed Level II and Level III grievances as exhibits in this case, which he had submitted to prison officials in 2016 and 2017, concerning prescription refill and delivery delays. See Doc. No. 29-1, at 2-5. His July 2016 Level II grievance to the Warden's Office complained generally about delays in filling almost all of his refill requests since his arrival at the NHSP, including his most recent requests, which took six and eight days, instead of the four-day time period indicated on the prison's refill form. Medical Services Deputy Director Campbell responded in August 2016, stating that Mr. Czekalski could go to sick call to receive any medications he lacked due to delays in prescription refills, as there would be no charge for such sick call visits. See Doc. No. 29-1, at 2. Ms. Campbell also answered Mr. Czekalski's grievance appeal that he had addressed to the NHDOC Commissioner's Office, dated September 2016, in which she stated that the NHDOC was reviewing the refill process to make future improvements. See Doc. No. 29-1, at 2.

In his April 2017 Level II grievance, Mr. Czekalski reported that his problems with refill delays had continued, affecting the timing of his ibuprofen refill. Medical and Forensic Services Director Mattis responded that the prescriptions were refilled on time, so that she believed the problem was a "delivery" and not a "refill" issue, which she addressed by sending Mr. Czekalski's grievance to the Warden's Office. Doc. No. 29-1, at 4. Czekalski then appealed Ms. Mattis's grievance response to the DOC Commissioner. Defendant Kench denied that grievance

appeal, stating in May 2017 that the Commissioner's Office was "aware of the problem" and was "seeking a remedy." Doc. No. 29-1, at 5.

Mr. Czekalski has stated that his experience with the prescription refill problem led him to file complaints in January 2018 with the N.H. Board of Pharmacy and the U.S. Drug Enforcement Agency. Doc. No. 125-10. Although Mr. Czekalski does not know whether any action was taken by those agencies on his complaints, but "[w]ithin weeks . . . the prescription refill problem was suddenly solved." Czekalski Decl. II ¶¶ 8-9 (Doc. No. 125-1).

IV. Prozac

Mr. Czekalski is prescribed a single dose of Prozac per day to be taken in the morning. That medication was previously made available to him in "B Call," the mid-morning medication distribution. At some point in 2017, B Call medications were shifted to "A Call" (early morning) distribution, a time period Mr. Czekalski has characterized as inappropriate. First Am. Compl. ¶ 65(c) (Doc. No. 5).

Prozac is also distributed on weekday mornings during sick call. Sick call occurs in the mid to late morning, after Mr. Czekalski has finished his morning routine in his cell and is otherwise attending classes on a variety of commercial topics, in lieu of working at a prison job. Czekalski Dep. at 28, 31-32 (Doc. No. 122-2).

"A Call" medication distribution starts each day after inmates' cell doors are first opened. In his First Amended Complaint, which was filed in January 2018, Mr. Czekalski averred that his cell door had been opened anytime from about 6:00 a.m. until 7:00 a.m. First Am. Compl. ¶ 65(c) (Doc. No. 5). At his deposition in June 2019, Mr. Czekalski testified that, in the several months leading up to the deposition, his cell door had been generally opened anytime from about 5:30 a.m. on early days (on average three to five days per week) until as late as 5:45 a.m. or 6:00

a.m. on other days, which typically coincided with weekends, when the unit was short-staffed. Czekalski Dep. at 30 (Doc. No. 122-2).

That variability in the timing of A Call medication distribution is at the root of Mr. Czekalski's Prozac claims in this case, as his early morning schedule also includes practicing his Jewish faith by putting on his tefillin,[3] and saying his morning prayers, which takes him about an hour to complete. See First Am. Compl. ¶ 65(c) (Doc. No. 5). Mr. Czekalski is able to fit his prayer routine into his schedule by starting his prayers at 5:35 a.m., so that he can complete all of his prayers before he eats and goes to his classes at 7:10 a.m. during the week. Czekalski Dep. at 30 (Doc. No. 122-2). When Mr. Czekalski's cell door is not opened in time for him to take the medication before he starts his prayers, he generally skips the dose of Prozac at A Call, as the distribution of medications in that time period will have ended before he is finished praying. Czekalski Dep. at 30 (Doc. No. 122-2).

Mr. Czekalski testified in his June 2019 deposition that his mental health provider, Dr. Graves, mindful of Mr. Czekalski's morning schedule, had recently increased Mr. Czekalski's dosage of Prozac from 40 mg to 60 mg per dose. The increased dosage was intended to keep more of the medication in his system longer. Czekalski Dep. at 31 (Doc. No. 122-2).

V. Eyeglasses

Inmates are allowed to keep two pairs of eyeglasses in their cells, and, at Mr. Czekalski's age, they can receive new prescription glasses every two years, without charge. See Czekalski Dep. at 100 (Doc. No. 122-2). In 2016, Mr. Czekalski, who is legally blind without glasses, broke a pair of glasses several months after the NHDOC issued them to him. Id. at 97. He was

[3] "The Tefillin, also called phylacteries, are a set of boxes containing sacred texts inscribed on parchment that Jews may strap to their body as part of morning prayer." Bader v. Wrenn, 675 F.3d 95, 96 (1st Cir. 2012).

told he could pay approximately $23 to receive a replacement pair at that time. Id. at 100 (Doc. No. 122-2). Since Mr. Czekalski had kept an outdated pair of eyeglasses in his cell, he chose to continue using those glasses, even though his prescription had changed, to avoid the fee. Id. (Doc. No. 122-2). He received a new pair of eyeglasses in November 2018, the next time he became eligible for free glasses. Id. (Doc. No. 122-2).

VI. Cystoscopy

In June 2015, while incarcerated at the Northern New Hampshire Correctional Facility ("NCF") in Berlin, New Hampshire, Mr. Czekalski was sent to a hospital emergency room to address his complaints of urinary retention and blood in his urine. A CT scan performed several months later revealed an indistinct mass in his bladder and a "bone island" in his pelvis. The urologist, Dr. Scott Fabozzi, who reviewed that CT scan, recommended a follow up cystoscopy to rule out the possibility of cancer, which was completed in January 2016. See Nov. 18, 2019 Dr. Fabozzi Ltr. (Doc. No. 122-3). The cystoscopy showed that Mr. Czekalski had an enlarged prostate, a benign condition. Id. (Doc. No. 122-3). During the seven-month delay between the emergency room procedure and follow-up cystoscopy, Mr. Czekalski was concerned that he could have cancer, and he suffered pain and discomfort due to blood clots in his urine at least twice per week, for which he sought care at the NCF on several occasions but did not otherwise generally report to the prison's health services department. Mr. Czekalski has averred that medicine prescribed by the urologist, after the cystoscopy, stopped the bleeding and clotting in less than a week.

Mr. Czekalski's First Amended Complaint claimed that the delay in scheduling follow-up diagnostic procedures for what ended up being benign prostate issues resulted from dereliction by Nurse Baker, whom he alleges defendants had not adequately supervised. This court allowed that claim to proceed against the named supervisory defendants, based on allegations regarding

what defendants knew regarding Nurse Baker's job performance and Mr. Czekalski's condition. Mr. Czekalski's objection to defendants' motion for summary judgment states that records he has obtained through discovery have revealed that Nurse Baker was not responsible for the delay, which he now claims resulted from "decisions made by [non-medical] personnel," who had "prioritize[d] administrative transports over medical transports," and who, he alleges, were not properly supervised by the named defendants. Doc. No. 125, at 1-2. Mr. Czekalski has not moved for leave to amend the complaint to alter his claim regarding the causes of the delayed diagnostic exam to identify any person he believes the defendants failed to properly supervise.

Summary Judgment Standard

Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute is "'one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant, would permit a rational factfinder to resolve the issue in favor of either party.'" Baum-Holland v. Hilton El Con Mgmt., LLC, 964 F.3d 77, 87 (1st Cir. 2020) (citation omitted). "'Facts are material when they have the potential to affect the outcome of the suit under the applicable law.'" Id. (citation omitted).

"The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists." Feliciano-Muñoz v. Rebarber-Ocasio, 970 F.3d 53, 62 (1st Cir. 2020). Then, "'[the nonmoving party] must respond to a properly supported motion with sufficient evidence to allow a reasonable jury to find in its favor with respect to each issue on which [it] has the burden of proof.'" Id. (citation omitted). In doing so, the non-movant "cannot rely on 'conclusory allegations, improbable inferences, acrimonious invective, or rank speculation.'" Theidon v. Harvard Univ., 948 F.3d 477, 494 (1st Cir. 2020) (citation omitted). In ruling on such motions, the district court must "construe] the record in the light most

favorable to the nonmoving party and resolv[e] all reasonable inferences in that party's favor." Pierce v. Cotuit Fire Dist., 741 F.3d 295, 301 (1st Cir. 2014). "The plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish . . . an element essential to that party's case" on which "that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

"Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment per se." Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996). "Cross motions simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Id. The court thus views each party's respective motions for summary judgment through this prism. See Estate of Hevia v. Portrio Corp., 602 F.3d 34, 40 (1st Cir. 2010).

Discussion

I. Eighth Amendment Claims

Almost all of Mr. Czekalski's claims seek relief under section 1983 for alleged violations of the Eighth Amendment's Cruel and Unusual Punishment Clause. The court addresses those Eighth Amendment claims first, before turning to the remaining claim of a violation of Mr. Czekalski's rights under RLUIPA.

A. Eighth Amendment Requirements

The Eighth Amendment requires prison officials to provide humane conditions of confinement, including adequate shelter and medical care. See Farmer v. Brennan, 511 U.S. 825, 832 (1994).

> Although the Eighth Amendment "does not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337, 349 (1981), it does not "permit inhumane ones" either, Farmer[, 511 U.S. at 832]. Accordingly, "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to

> scrutiny under the Eighth Amendment." Id. (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).

Abernathy v. Anderson, 984 F.3d 1, 6 (1st Cir. 2020).

An Eighth Amendment claim challenging the conditions of an inmate's confinement, including claims challenging sleeping accommodations and inmate health care services, has both an objective and a subjective component. See Wilson v. Seiter, 501 U.S. 294, 298 (1991). "[T]he deprivation alleged must be, objectively, 'sufficiently serious.'" Farmer, 511 U.S. at 834 (citations omitted). Where an alleged failure to treat a medical condition forms the basis of an inmate's claim, the objective component may be established by evidence of a medical need "'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.'" Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 74 (1st Cir. 2016) (citation omitted).

> "The 'seriousness' of an inmate's needs may also be determined by reference to the effect of the delay of treatment." The serious medical need inquiry is fact-specific and must be tailored to the specific circumstances of the case.

Abernathy, 984 F.3d at 6 (citations omitted).

To prevail on an Eighth Amendment claim, a plaintiff must also present evidence of the defendant's sufficiently culpable state of mind, a showing that requires evidence that defendant's conduct was purposeful and not inadvertent or merely negligent. See id.; Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014). A showing of deliberate indifference to a substantial risk of serious harm satisfies the subjective prong of an Eighth Amendment claim. See Farmer, 511 U.S. at 834. To establish deliberate indifference, an inmate must demonstrate that defendants were aware of facts that gave rise to an inference that a substantial risk of serious harm existed; that defendants drew the inference that such a risk existed; and that defendants, by act or omission, did not take reasonable steps to ameliorate the risk. See id. at 828-29; Leite v. Bergeron, 911 F.3d 47, 52–53 (1st Cir. 2018). Deliberate indifference may also be manifested

by "'wanton disregard to a prisoner's needs . . . akin to criminal recklessness, requiring consciousness of impending harm, easily preventable." Abernathy, 984 F.3d at 6 (citation omitted).

A showing of a defendant's negligence is insufficient to satisfy the subjective component of an Eighth Amendment claim. Ruiz–Rosa v. Rullan, 485 F.3d 150, 156 (1st Cir. 2007) ("substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment are all insufficient to prove a constitutional violation" (internal citations and quotation marks omitted)). "'Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.'" Kosilek, 774 F.3d at 83 (citation omitted).

B. Section 1983 and Supervisory Liability

Mr. Czekalski's Eighth Amendment claims seek relief under 42 U.S.C. § 1983. Common law tort principles of causation and proximate cause apply to claims under 42 U.S.C. § 1983. See Burke v. McDonald, 572 F.3d 51, 60 (1st Cir. 2009) . The elements of a claim under section 1983 include a showing "that the defendants' conduct worked a denial of rights secured by the Constitution or by federal law" and "was the cause in fact of the alleged deprivation." Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997).

"Generally, a supervisor cannot be held liable under § 1983 on a respondeat superior theory," Justiniano v. Walker, 986 F.3d 11, 20 (1st Cir. 2021), and "§ 1983 liability cannot rest solely on a defendant's position of authority." Ramírez-Lluveras v. Rivera-Merced, 759 F.3d 10, 19 (1st Cir. 2014). The liability of a supervisor "'must be premised on his or her own acts or omissions' and does not attach automatically even if a subordinate is found liable." Justiniano, 986 F.3d at 20 (internal citations and brackets omitted).

> To connect the liability dots successfully between supervisor and subordinate, a plaintiff must show "that one of the supervisor's subordinates abridged the

> plaintiff's constitutional rights" and that the supervisor's (in)action "was affirmatively linked to that behavior in the sense that it could be characterized as . . . gross negligence amounting to deliberate indifference." . . .
>
> Deliberate indifference requires a plaintiff to demonstrate or allege "(1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk."

Id. (internal citations and brackets omitted).

Causation is also an essential element of a supervisory liability claim under section 1983. Id. "The showing of causation must be a strong one, as that requirement contemplates proof that the supervisor's conduct led inexorably to the constitutional violation." Ramírez-Lluveras, 759 F.3d at 19 (emphasis in original) (citation and internal quotation marks omitted). "In other words, a supervisor's deliberate indifference must lead in a straight line to the putative constitutional violation." Parker v. Landry, 935 F.3d 9, 15 (1st Cir. 2019).

C. Mattress Claim (Claim 1)

Plaintiff and defendants have filed cross motions for summary judgment on Claim 1, plaintiff's Eighth Amendment claim that the failure to provide him a better (thicker) mattress has caused him to suffer severe pain and injuries that disrupt his sleep, and that without a better mattress the level of pain he suffers cannot be managed without his taking dangerously high doses of NSAIDs. Plaintiff has characterized Claim 1 as:

- "[a claim] that the mattresses defendants provided inflicted pain, suffering, and injury"; and
- "a claim against the general conditions of confinement, not a claim regarding the denial of physician-ordered care, or the refusal of a physician to provide care."

Pl.'s Obj. to Defs.' Mot. for Summ. J. (Doc. No. 125), at 1;

Pl.'s Reply to Defs.' Obj. to Prelim. Inj. (Doc. No. 93), at 3.

The evidence offered in support of plaintiff's motion for summary judgment on Claim 1 includes his sworn statement that when he has slept on newer or double-stacked mattresses, and

on the mattresses used in the NHSP Health Services Department, he has needed to take lower doses of NSAIDs to manage his pain; he has witnessed his blood pressure readings improve; and he has needed no anti-depressant, experienced less pain, slept better, and felt his ability to move and exercise become unrestricted. Such evidence, if credited, could provide a foundation for finding a link between his perception of mattress quality, sleep patterns, and health status, consistent with Dr. Rodd's expert report.

Such evidence does not permit this court to grant plaintiff's motion for summary judgment on Claim 1. Plaintiff's treating physician Dr. Groblewski has expressed an opinion that Mr. Czekalski, in July 2020, had no medical need for a different mattress:

> In my opinion, there does not exist a medical need that Mr. Czekalski sleep on an alternative mattress. . . . Were I to find, contrary to my disclosed opinion, that Mr. Czekalski's existing mattress will lead to medical harm, including but not limited to the advancement of his disease, I am aware of no Department of Corrections/New Hampshire State Prison prohibition against prescribing one.

Groblewski Decl. ¶ 6 (Doc. No. 122-8), at 2 (emphasis in original). It is undisputed that no medical provider has ever concluded that Czekalski's mattresses have caused or will cause or contribute to medical harm, or that a special mattress is medically necessary for him.

A jury lacking expert testimony corroborating that the signs observed by Mr. Czekalski manifest a medical condition caused by his mattress; crediting Mr. Czekalski's observations regarding the factors other than pain affecting the quality of his sleep; crediting equally Dr. Rodd's opinions that disrupted sleep affects pain perception and that chronic pain causes sleeping disturbance; and crediting Dr. Groblewski's opinion that the mattress does not cause medical harm, could reasonably conclude that using the mattresses does not expose Mr. Czekalski to a substantial risk of serious harm. Moreover, as to whether the use of the mattresses causes him to take dangerously high levels of NSAIDs, Mr. Czekalski's voluntary act in taking

high doses, contrary to the advice of his NHDOC health providers, could be found to be a superseding intervening cause.

The evidence of the dispute between Mr. Czekalski and Dr. Groblewski brings this case in line with the cases in which inmates disagree with their prison health providers as to whether a particular form of treatment is medically appropriate or necessary. See Kosilek, 774 F.3d at 82 ("'[A]llegations [that] simply reflect a disagreement on the appropriate course of treatment . . . fall[] short of alleging a constitutional violation'" (quoting Ferranti v. Moran, 618 F.2d 888, 891 (1st 1980))). The existence of such a disagreement is not sufficient to show that the provider has been deliberately indifferent to a substantial risk of serious harm. And without evidence of his medical provider's deliberate indifference in failing to order that Mr. Czekalski be issued an alternative mattress, Mr. Czekalski has not presented evidence sufficient to demonstrate that any named supervisory defendant's conduct inexorably led to a violation of his Eighth Amendment rights.

There is evidence that plaintiff complained about the quality of his mattress to Major Fouts at some point in 2017, before grieving issues to the Warden and Commissioner, but there is no evidence from which a reasonable factfinder could conclude that Major Fouts blew off that complaint or failed to respond in a manner given rise to a reasonable inference of deliberate indifference, as the substance of his complaints to Major Fouts in 2017 and Major Fouts's response are not in the record before the court. When confronted with information in December 2019 suggesting that the mattress plaintiff used had collapsed, Major Fouts responded by having his corrections officers look at and photograph the mattress. Although plaintiff points out that the guards did not try to bend the mattress or place weight on it to assess its supportiveness, without some showing of Major Fouts's subjective awareness of his need for a supportive

mattress, the fact that the mattress was not subjected to a more rigorous or appropriate test fails to demonstrate a subjective awareness on Major Fouts's part to a substantial risk of serious harm.

As to the issue of the remaining defendants' knowledge of Mr. Czekalski's complaints about his mattress, the evidence consists of Mr. Czekalski's grievance records submitted to prison officials in 2017,[4] as well as his pleadings in this lawsuit. Warden Michael Zenk's response to the 2017 grievances, endorsed by the Commissioner's Office, responds to the issues raised and includes the observation that the medical providers treating Mr. Czekalski for his "pain issues" had not prescribed a special mattress. Such evidence of prison officials' deference to medical decisionmaking regarding issues affecting the underlying complaints of pain caused by a condition of confinement meaningfully distinguishes this case from cases where the inmate's complaints of harm have been disregarded. See, e.g., McClure v. Haste, 820 F. App'x 125, 129 (3d Cir. July 8, 2020) (deputy warden who "blew . . . off" inmate's complaint that depriving him of mattress exacerbated his back problem could be found deliberately indifferent). Cf. Paiva v. Blanchette, No. CA 13-252 S, 2015 WL 5719576, at *6 (D.R.I. Sept. 29, 2015) (warden's deference to doctors' medical expertise as to treatment for inmate's pain, notwithstanding plaintiff's testimony that treatment was not working, did not amount to deliberate indifference); cf. Brown v. Englander, No. 10–cv–257–SM, 2012 DNH 095, 2012 WL 1986518, at *3–4, 2012 U.S. Dist. LEXIS 76176, at *10-12 (D.N.H. June 1, 2012) (inmate claiming prison officials were deliberately indifferent to his complaints of pain in failing to provide him with what he considered to be medically necessary treatment could not prevail

[4] Mr. Czekalski has filed a notice in this court stating that he submitted two sets of Level II and Level III grievances regarding his mattress issues. The responses of the NHSP Warden and NHDOC Commissioner's Office to grievances, dated June 12, 2017 and July 20, 2017, were filed as Attachment A (Doc. No. 29-1, at 2-3) to "Plaintiff's Submission of Proof of Exhaustion of Administrative Remedies." Plaintiff has not filed, in this case, a second set of grievances regarding mattress issues. The second set of grievances are described in "Plaintiff's Submission" (Doc. No. 29, at 1) as post-dating his filing of this case.

without expert medical testimony where treatment provided was not so obviously outrageous that lay trier of fact could reasonably conclude it violated Eighth Amendment); Murphy v. Magnusson, No. 98–439, 1999 WL 615895, at *3–4, 1999 U.S. Dist. LEXIS 12598 *14–15 (D. Me. July 27, 1999) (prison medical providers' refusal to provide prisoner with pain medication, extra mattresses, and a new pair of shoes "even if proven, would not rise to the level of deliberate indifference").

The evidence in the record is insufficient to support a reasonable finding that any named defendant disregarded a known risk of harm, from the denial of a thicker mattress, in a manner that demonstrates that such defendant was deliberately indifferent to that risk. Accordingly, the court denies Mr. Czekalski's motion for summary judgment and grants defendants' cross-motion for summary judgment on Claim 1.

D. Prescription Refills (Claim 2)

Defendants move for summary judgment on Claim 2, in which Mr. Czekalski seeks damages to address problems with the prescription refill system that he alleged existed until several weeks after he sent letters to state and federal agencies about the problem in January 2018. They point to steps they took to address the problems raised in Mr. Czekalski's complaints.

Prison officials who are aware of a serious risk of harm "may not be considered indifferent if 'they responded reasonably to the risk.'" Norton v. Rodrigues, 955 F.3d 176, 185 (1st Cir. 2020) (citation omitted). "[D]eliberate indifference requires knowledge of a substantial risk of serious harm and an unreasonable response to the same." Id.

The record indicates that medical staff and officials notified of Mr. Czekalski's grievances about the refill problem directed him to go to sick call whenever he lacked access to medications due to refill delays. Mr. Czekalski offers no evidence suggesting that sick call failed

to meet his medical needs for medications. Absent such evidence, or undue speculation regarding the lack of capacity of sick call, a reasonable factfinder could not infer that sick call was an unreasonable response to the immediate risk of harm presented by the refill and delivery problems.

Moreover, the record includes the Declaration of Samuel Fiore, R.Ph., which details reasons, including pharmacy staff vacancies at the NHSP and medication administration issues, that contributed to the prescription refill delays when he was hired as a pharmacist at the NHDOC in 2017. See Decl. of Samuel Fiore, R.Ph., July 4, 2020 ("Fiore Decl.") (Doc. No. 122-14). Mr. Fiore's declaration describes the steps taken by the NHSP pharmacy beginning in 2017 to resolve the staffing issues and other administrative inefficiencies, including hiring a staffing agency to fill positions in the event of future vacancies, adding a new pharmacist position, engaging a contractor to assist in eliminating the prescription backlog, and updating the software system. Id. ¶ 2 (Doc. No. 122-14). The facility handled ongoing problems by allowing inmates to receive medications during sick call if their refills were not timely and keeping open purchase orders at area pharmacies. Id. ¶ 3 (Doc. No. 122-14). The facility further addressed the issues relating to having correctional staff without medical training dispense medications, which had delayed the delivery and refilling of some medications, by shifting medications to a "more comprehensive nurse-administered" system. Id. ¶ 4 (Doc. No. 122-14). Mr. Czekalski has acknowledged that the prescription refill problems had ended by early 2018. A factfinder, aware of the detailed description of steps taken by the NHSP Pharmacy and the facility in 2017 and 2018 to address the prescription refill delays in response to complaints, and Mr. Czekalski's acknowledgement that the problems went away in 2018, could not find the prison officials failed to take reasonable steps in response to the risk of harm. Accordingly, defendants' motion for summary judgment on Claim 2 is granted.

E. NSAIDs, Tylenol, Inhalers (Claims 3(a), 3(b), 3(e))

In Claims 3(a), 3(b), and 3(e), Mr. Czekalski challenges the dosage and type of medication he received at the NHSP to treat his diagnosed conditions of arthritis, chronic pain, and asthma. Mr. Czekalski highlights evidence that his health care providers in the past, prior to his incarceration, had prescribed high doses of ibuprofen and a different type of asthma medication for him, and he argues that the failure to provide the same types of medications, as well as access to high doses of acetaminophen without having to purchase that medication through the canteen, violated his Eighth Amendment rights.

Mr. Czekalski claimed in his First Amended Complaint that he was unable to obtain the amount of acetaminophen recommended for him by Dr. Rodd, his former NHSP treating physician, as there was a cap on how much acetaminophen he could purchase through the canteen, and Dr. Rodd's recommendation exceeded that amount. Mr. Czekalski has offered no evidence, however, that any named defendant was subjectively aware that the cap on acetaminophen available for purchase prevented Mr. Czekalski from taking the dosage of that medication recommended by Dr. Rodd. Absent such evidence, there is no triable issue of deliberate indifference.

Dr. Groblewski, Mr. Czekalski's current treating physician, has reviewed Mr. Czekalski's medical records and has expressed his opinion that Mr. Czekalski's chronic pain, arthritis, and asthma have been properly diagnosed and treated at the NHSP. Dr. Groblewski filed a declaration stating that he would testify that the different medications and dosages prescribed for Mr. Czekalski's pain over time, including glucosamines and NSAIDs, reflected individual medical provider judgments for treating his reports of pain, considering the risks to his health posed by the high dosages of NSAIDs he demanded. See Groblewski Decl. ¶ 1 (Doc. No. 122-8); Attach. 1 to Groblewski Decl. (Doc. No. 122-9) ¶ 5. Similarly, Dr. Groblewski has opined

that Mr. Czekalski's asthma has been treated throughout his incarceration by a complement of metered dose inhalers and anti-allergy medication, and that the variation in prescriptions he has had for his asthma has reflected different clinical judgments within the range of prudent professional standards. See Groblewski Decl. ¶ 1 (Doc. No. 122-8); Attach. 1 to Groblewski Decl. (Doc. No. 122-9) ¶ 5.

Mr. Czekalski has offered no contrary expert opinion with respect to his claims challenging the types and dosages of medications he has received. Mr. Czekalski's arguments, claims, and evidence about the quality of care he received before he filed this case, and the type and dosages of medication prescribed for his arthritis pain and asthma, essentially amount to disputes regarding the proper course of treatment for those conditions, and whether the care he received has been malpractice. Such disputes do not provide grounds for a reasonable jury to conclude that Mr. Czekalski has suffered an Eighth Amendment violation. See Roman-Montañez v. Torres-Mendez, 284 F. Supp. 3d 134, 140 (D.P.R. 2018) ("Courts do not dictate prescriptions to medical professionals, and have held that the refusal to provide pain medication on demand is insufficient to support an Eighth Amendment cause of action." (citing cases)); see also Ruiz–Rosa, 485 F.3d at 156; Kosilek, 774 F.3d at 82.

The record does not support a reasonable inference that any of the named defendant prison officials have been deliberately indifferent to a substantial risk of serious harm to Mr. Czekalski, relating to the issues raised in Claims 3(a), 3(b), and 3(e). Judgment as a matter of law is properly entered in defendants' favor on those claims. Accordingly, defendants' motion for summary judgment on Claims 3(a), 3(b), and 3(e) is granted.

F. Eyeglasses (Claim 3(g))

Defendants have moved for summary judgment on Claim 3(g), which asserts an Eighth Amendment violation arising out of the time it took the NHSP to provide him with free

replacement prescription eyeglasses after his broke in early 2017 -- approximately 22 months -- when he opted not to pay the $23 replacement fee to receive a pair sooner. Mr. Czekalski's deposition transcript recites the following:

> Mr. Edelman: What did you do to get around without . . . glasses?
>
> Mr. Czekalski: I still had my old ones. . . . They may not be perfect, but it works. There wasn't much of a difference in my scripts. . . . They change a little bit year to year, but an old prescription is still usable.

Czekalski Dep. at 100 (Doc. No. 122-2).

Imposing a fee for medical services is not per se unconstitutional. See Reynolds v. Wagner, 128 F.3d 166, 174 (3d Cir. 1997) ("there is nothing unconstitutional about a program that 'requires that inmates with adequate resources pay a small portion of their medical care'"; "[i]f a prisoner is able to pay for medical care, requiring such payment is not 'deliberate indifference to serious medical needs'" (citations omitted)). "[S]uch a requirement simply represents an insistence that the prisoner bear a personal expense that he or she can meet and would be required to meet in the outside world." Id. The record before this court does not suggest that Mr. Czekalski could not afford to pay the fee for replacing his broken glasses sooner.

Moreover, the record provides no evidentiary basis for a jury to find that requiring him to a pay a fee for replacements, leading him to use his old eyeglasses for a period of time until he received a new pair in November 2018, presented any substantial risk of serious harm to him. See Wagner v. City of St. Louis Dep't of Pub. Safety, No. 4:12CV01901 AGF, 2014 U.S. Dist. LEXIS 96467, at *24, 2014 WL 3529678, at *8 (E.D. Mo. July 16, 2014) ("Courts . . . have concluded as a matter of law that the denial of eyeglasses and eye medication or headaches and blurry vision resulting from an incorrect eyeglass prescription are insufficient to establish an objectively serious medical need." (citing cases)). Although Mr. Czekalski's testimony is that he

started to notice blurriness and felt pain and discomfort, there is no evidence suggesting that any named defendant was subjectively aware of or deliberately indifferent to such complaints, or that those conditions presented any risk of serious harm to him. Accordingly, the motion for summary judgment on Claim 3(g) is properly granted in defendants' favor.

G. Cystoscopy Claim (Claim 4)

In the First Amended Complaint, Mr. Czekalski alleged that Nurse Baker's dereliction, and defendants' failure to supervise her, were the causes of the delay in scheduling the cystoscopy that ruled out the possibility of bladder cancer and led to his receiving proper treatment for the blood in his urine. Defendants have moved for summary judgment on Claim 4, relating to the delayed scheduling of that procedure.

In objecting to defendants' motion for summary judgment, Mr. Czekalski has abandoned his claim that Nurse Baker's poor job performance and defendants' failure to supervise her caused the delay. Instead, "hav[ing] learned through the discovery process" that "Nurse Baker . . . seems to have had only a minor part in those delays," Czekalski Decl. II ¶ 2(A)-(C) (Doc. No. 125-1), Mr. Czekalski puts forth a new theory at this time, that "non-medical NHDOC personnel," otherwise unidentified by Mr. Czekalski, caused the delay by placing his medical transport at a lower priority than "routine" transports, and defendants' alleged failure to properly supervise those individuals violated his Eighth Amendment rights. Pl.'s Obj. (Doc. No. 125), at 12. He specifically avers in his objection to the summary judgment motion that there are "open questions" relating to his new theory of liability that would "require examination of witnesses at trial" to discover the answers, including the "reasons for the overall delay" in diagnosing and treating the problem of blood in his urine. Czekalski Decl. II ¶ 2(A)-(C) (Doc. No. 125-1).

An objection to a motion for summary judgment is not a proper vehicle for amending a complaint. See Cass v. Airgas USA, LLC, No. 17-cv-313-JD, 2018 DNH 157, 2018 U.S. Dist.

LEXIS 129558, at *20 n.8, 2018 WL 3682491, at *8 n.8 (D.N.H. Aug. 2, 2018); Logiodice v. Trs. of Me. Cent. Inst., 170 F. Supp. 2d 16, 30 n.12 (D. Me. 2001), aff'd, 296 F.3d 22 (1st Cir. 2002). Plaintiff cannot use his response to the summary judgment motion -- filed after the deadlines for pleading amendments, discovery, and dispositive motions have all passed[5] -- to inject a new set of allegations into this case and present a new theory of defendants' liability, potentially requiring further investigation regarding causation, the nature of the risk (supervision of a different set of non-medical staff members), as well as information regarding any defendants' subjective awareness of and deliberate indifference to that risk, to establish or defend that amended claim on the merits.

Though a plaintiff may respond to a motion for summary judgment by showing that he or she lacks sufficient information to present facts essential to justify an objection, see Fed. R. Civ. P. 56(d), Mr. Czekalski has not provided that type of response to defendants' motion for summary judgment on Claim 4. Rather, he has effectively abandoned the cystoscopy claim as he had pleaded it. The pertinent allegations in the First Amended Complaint stated, as follows:

> 79. [D]espite repeated inquiries by petitioner, as well as numerous visits to medical for continued bleeding, the cystoscopy was not performed until January 7, 2016, some seven months after petitioner first went to medical with the problem.
>
> . . . .
>
> 83. During the period from June, 2015 to January, 2016, NHDOC nurse [Baker] was repeatedly disciplined . . . .
>
> 84. It was nurse Baker who was responsible for following up on petitioner's care, and it was she who kept cancelling appointments and losing petitioner's paperwork.

[5] Mr. Czekalski was a practicing attorney and a member of this court's Bar prior to his felony conviction. He has demonstrated a capacity for complying with deadlines in the pretrial schedule, and seeking an extension of such deadlines, when he has deemed such extensions to be necessary or appropriate. He filed no request for such an extension with respect to Claim 4.

> 85. Defendants Wrenn, Kench, and Mattis are directly responsible for the continued employment of . . . nurse Baker, and hence are directly responsible for petitioner not receiving proper diagnosis and treatment in a timely manner.

First Am. Compl. ¶¶ 79-85 (Doc. No. 5), at 18.

In light of Mr. Czekalski's August 9, 2020 declaration repudiating the First Amended Complaint's statements regarding Nurse Baker's connection to the delay at issue, the record lacks evidence to support a reasonable finding of defendants' liability as to the Eighth Amendment claim of their failure to supervise her. Accordingly, the defendants are entitled to judgment as a matter of law on that claim, and the defendants' motion for summary judgment is granted as to Claim 4.

H. Eighth Amendment - Prozac Distribution (Claim 3(c))

Defendants have moved for summary judgment on Claim 3(c) and Claim 5, challenging -- as a violation of his Eighth Amendment rights and his rights under RLUIPA -- the early morning distribution of Mr. Czekalski's daily Prozac dose during "A Call," a medication dosing schedule that Mr. Czekalski claims creates an "unresolvable conflict with [his] morning prayers . . . forcing him to choose between his right to receive proper medical care and his right to practice his religion." First Am. Compl. ¶ 65(C) (Doc. No. 5, at 12). The court first considers the Eighth Amendment aspect of the Prozac claims (Claim 3(c)), finding merit in defendants' contention that there is no evidence that the timing of Prozac distribution has presented a substantial risk of serious harm to Mr. Czekalski; and no evidence of deliberate indifference on the part of any named defendant.

Mr. Czekalski has alleged in the First Amended Complaint that the shift in medication distribution from B Call to A Call, beginning in 2017, violated his Eighth Amendment rights, as it has interfered with his ability to take his daily prescribed Prozac dose in the manner specified by his NHSP mental health provider, Dr. Graves. Mr. Czekalski premises his Eighth

Amendment claim on the fact that his Dr. Graves directed that he receive Prozac once per day in the morning.

Mr. Czekalski must establish that the defendants took action, or failed to act with deliberate indifference to Mr. Czekalski's serious medical need for a daily Prozac dose by shifting the time his medication would be administered from a midmorning hour to an early morning hour. Though he has testified that Dr. Graves had considered Mr. Czekalski's prayer practices in directing that he receive Prozac in B Call when that time frame was available for Prozac distribution, not only to avoid disrupting Mr. Czekalski's sleep problems by avoiding a late day ingestion of the medication, but also to avoid disruption of Mr. Czekalski's morning prayers, no reasonable factfinder could conclude from such evidence, without undue speculation, that Dr. Graves considered Mr. Czekalski to have a medical need for receiving his morning dose at a specific time in the morning, no earlier than the midmorning. And mindful of Mr. Czekalski's practice of missing doses, Dr. Graves has increased the amount of Prozac delivered to him per dose, so that more of the medication will remain in his system between doses. There is no competent evidence before the court suggesting that prison officials' act of shifting Mr. Czekalski's receipt of Prozac from midmorning to early morning, standing alone, exposes him to any substantial risk of serious harm.

There is further undisputed evidence that the prison has taken steps to address the implications of Mr. Czekalski's practice of skipping doses offered at A Call because of his prayer schedule. Mr. Czekalski could choose to receive any dose he misses at A Call on a weekday by going to morning Sick Call, Monday through Friday. The evidence before this court offers no grounds upon which a reasonable factfinder could infer that any named defendant has been deliberate indifferent to a substantial risk of serious harm, relating to the time when Mr. Czekalski's morning dose of Prozac is offered. Defendants are entitled to judgment as a matter

of law on that issue. Accordingly the court grants defendants' motion for summary judgment on Claim 3(c).

I. RLUIPA (Claim 5)

The remaining claim in this case is Mr. Czekalski's claim that the A Call schedule for distributing his morning Prozac dose violates his rights under RLUIPA because A Call frequently starts and ends during his morning prayers. Mr. Czekalski has explained that because of that time conflict, which he has characterized as "unresolvable," he has missed the A Call administration of his daily dose of Prozac two or three times per week, in the months preceding his June 2019 deposition. First Am. Compl. ¶ 65(c) (Doc. No. 5, at 12). He claims a violation of his religious rights under RLUIPA, which bars the NHSP "from substantially burdening an inmate's religious exercise unless the regulation under attack is the least restrictive way to advance a compelling state interest." Kuperman v. Wrenn, 645 F.3d 69, 79 (1st Cir. 2011).

Defendants do not dispute that plaintiff's daily prayers are a "religious exercise," motivated by his sincerely held Jewish faith, to which RLUIPA applies. Rather, defendants contend that plaintiff has failed to put forth evidence to support a reasonable finding that the apparent time conflict substantially burdens his prayer practice. The court agrees.

A substantial burden must be more than an inconvenience; burdens that have the effect of merely decreasing "the spirituality, the fervor, or the satisfaction with which a believer practices his religion" are not deemed to be "substantial" burdens. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008); see also Selby v. Caruso, No. 2:09-cv-152, 2012 WL 7160402, 2012 U.S. Dist. LEXIS 186270, at *17 (W.D. Mich. Aug. 16, 2012) ("RLUIPA was not intended to create a cause of action in response to every decision which serves to inhibit or constrain religious exercise, as such would render meaningless the word 'substantial'" (citation

omitted)), R&R approved, 2013 U.S. Dist. LEXIS 22924, 2013 WL 623046 (W.D. Mich. Feb. 23, 2013), aff'd in part and rev'd in part on other grounds, 734 F.3d 554, 561 (6th Cir. 2013).

A substantial burden on one's exercise of religion exists:

> "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."

Perrier-Bilbo v. United States, 954 F.3d 413, 431 (1st Cir.) (citation omitted), cert. denied, 141 S. Ct. 818 (2020). A prison policy "substantially burdens religious exercise under RLUIPA if it coerces the inmate to modify his religious behavior significantly or to violate his religious beliefs." Farrow v. Stanley, No. 02-567-PB, 2005 DNH 146, 2005 U.S. Dist. LEXIS 24374, at *14, 2005 WL 2671541, at *4 (D.N.H. Oct. 20, 2005).

Mr. Czekalski's testimony is that he starts his prayers using his tefillin each day at 5:35 a.m.; and he needs an hour to complete his prayers. He has further testified that he must finish praying before eating breakfast, and that if he starts praying at 5:35 a.m., he is able to finish in time to eat something and be ready at 7:10 a.m. to go to his classes. Czekalski Dep. at 29 (Doc. No. 122-2).

The record lacks any further evidence regarding the requirements of and manner in which Mr. Czekalski's faith requires him to recite his morning prayers, or the manner in which medication is distributed and the time it takes for him to receive his dose of Prozac after his cell door is opened. He argues that his religious practice would be substantially burdened if he had to begin praying at 4:00 a.m., but he has neither argued nor provided evidence suggesting he cannot start his prayers at 5:00 a.m., so that he could complete them at 6:00 a.m., in time to receive A Call medication. Without further evidence regarding the requirements of his religious exercise and the time and manner in which his medication is distributed each morning, a reasonable factfinder could not conclude that there is an irreconcilable time conflict between the time Mr.

Czekalski must devote to his prayers each morning and the time period when A Call medications are distributed.

But even if there were evidence that waking up thirty minutes earlier would not allow him sufficient time to complete his prayers and then take his medications before his weekday classes, the court would nevertheless grant defendants' motion for summary judgment on Claim 5. Prozac is available at morning sick call on weekdays, after Mr. Czekalski is done praying. Mr. Czekalski has described his classes as "just something to keep [his] mind active." Czekalski Dep. at 28 (Doc. No. 122-2). Though attending sick call on those scattered days could require him to miss his morning classes on occasion, reasonable jurors could not conclude from the summary judgment record that occasionally taking Prozac doses at sick call on weekdays would place any substantial pressure on Mr. Czekalski to change his prayer practices and violate his beliefs. Furthermore, there is no evidence Mr. Czekalski has classes on weekend mornings, potentially allowing him to receive his medications at A Call before starting his prayers, without any interruption on those days. The record does not allow a reasonable factfinder to find in favor of Mr. Czekalski on the question of whether the facility's schedule for distributing his morning dose of Prozac imposes a substantial burden on his religious exercise, an issue on which he bears the burden of proof. Accordingly, the court grants defendants' summary judgment motion on Claim 5.

Conclusion

For the foregoing reasons Mr. Czekalski's motion for summary judgment (Doc. No. 112) is DENIED; and defendants' cross-motion for summary judgment (Doc. No. 122) is GRANTED, as to all claims in this action. The clerk of court is directed to enter judgment and close this case.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: March 31, 2021

cc: Jason A. Czekalski, pro se
Seth Michael Zoracki, Esq.
Francis Charles Fredericks, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Jason A. Czekalski

v.

Case No. 17-cv-557-JL

NH Department of Corrections, Commissioner, et al.

JUDGMENT

Judgement is hereby entered in accordance with the following orders:

(1) Order of Judge Joseph N. Laplante dated March 31, 2021;

(2) Order of Magistrate Judge Andrea K. Johnstone dated October 8, 2019; and

(3) Order of Judge Joseph N. Laplante dated April 10, 2018, approving the Report and Recommendation of Magistrate Judge Andrea K. Johnstone dated March 2, 2018.

The prevailing party may recover costs consistent with Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920.

By the Court:

Tracy A. Uhrin
Chief Deputy Clerk

Date: March 31, 2021

cc: Jason A. Czekalski, pro se
Francis Charles Fredericks, Esq.
Seth Michael Zoracki, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jason A. Czekalski

v.

Civil No. 17-cv-557-JL
Opinion No. 2022 DNH 040

William Wrenn, New Hampshire Department of Corrections Commissioner; Christopher Kench; Paula Mattis; and Jon Fouts

O R D E R

Before the court is the post-judgment motion (Doc. No. 142), filed by Jason A. Czekalski, a prisoner in the custody of the New Hampshire Department of Corrections ("DOC"), asking this court to reopen and vacate the March 31, 2021 judgment and the March 31, 2021 Order (Doc. No. 136) ("March 31 Order") underlying that judgment, to the extent that order granted the defendants' motion for summary judgment. Mr. Czekalski also asks the court to schedule a trial on his Religious Land Use and Institutionalized Persons Act ("RLUIPA") claims, and Eighth Amendment claims concerning his mattress, medication, and prescription refills.

The defendants object, see Doc. No. 143, observing that there is no error in the March 31 Order, and that Mr. Czekalski's motion is based on evidence and arguments he raised before entry of judgment, which the court previously deemed

unavailing, and on information which he could have (and should have) presented then. Substantially for reasons expressed in the defendants' objection, and also because of his post-judgment transfer from the New Hampshire State Prison for Men ("NHSP") to the Northern New Hampshire Correctional Facility ("NCF"), which has mooted his RLIUPA claim for injunctive relief, Mr. Czekalski's post-judgment motion is denied.[1]

Discussion

I. Applicable Standard

A. Which Rule Applies

Mr. Czekalski entitled his post-judgment motion, "Certified Motion for Amended and/or Additional Findings under Rule 52(b)." Doc. No. 142. Rule 52(b) provides, as follows:

> On a party's motion filed no later than 28 days after judgment, the court may amend its findings - or make additional findings - and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Fed. R. Civ. P. 52(b) (citing Fed. R. Civ. P. 59).

"In addressing a post-judgment motion a court is not bound by the label that the movant fastens to it." Vasapolli v.

[1] Mr. Czekalski has not challenged the March 31 Order with respect to his Eighth Amendment claim relating to his broken eyeglasses, identified in the March 31 Order as Claim 3(g). Nothing in the record suggests a reason for the court to reconsider the March 31 Order to the extent it granted defendants' motion for summary judgment on that claim.

Rostoff, 39 F.3d 27, 36 (1st Cir. 1994). In light of the arguments Mr. Czekalski makes and the relief he seeks, this court construes his post-judgment motion as seeking to reopen the judgment and reconsider the March 31 Order under Rule 59(e), as well as under Rule 52(b).

B. Applicable Standard

"The purpose of Rules 52(b) and 59(e) is to allow the court to correct or amend a judgment in the event of any manifest errors of law or newly discovered evidence." Perrier-Bilbo v. United States, 954 F.3d 413, 435-36 (1st Cir.), cert. denied, 141 S. Ct. 818 (2020). In general, successful motions for reconsideration must show an intervening change in the law, a manifest error of law or fact underlying the judgment, newly-discovered evidence that could not have been produced before the entry of judgment, or manifest injustice if reconsideration is denied. See Markel Am. Ins. Co. v. Diaz-Santiago, 674 F.3d 21, 32 (1st Cir. 2012) (citing Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005)).

Post-judgment motions under Rules 52(b) and 59(e) do not provide a place for fielding new squads of theories, arguments, or proof that could have been put in play before entry of judgment. See Perrier-Bilbo, 954 F.3d at 435-36 (citing cases). Courts will not reopen a judgment and reconsider its underlying

factual findings and legal conclusions based on any arguments or evidence that the moving party could have, and should have, raised before the decision issued. See Banister v. Davis, 140 S. Ct. 1698, 1703 (2020) (Rule 59(e)); Astellas Inst. for Regenerative Med. v. ImStem Biotechnology, Inc., No. 17-CV-12239-ADB, 2022 U.S. Dist. LEXIS 42449, at *12, 2022 WL 715578, at *4 (D. Mass. Mar. 10, 2022) (Rule 52(b)); Advanced Fluid Sys., Inc. v. Huber, 381 F. Supp. 3d 362, 382 (M.D. Pa. 2019) ("Neither Rule 52 nor Rule 59 are intended to allow parties the proverbial "'second bite at the apple.'" (citation omitted)), aff'd, 958 F.3d 168 (3d Cir. 2020).

Discussion

I. Eighth Amendment Claims

Mr. Czekalski challenges the March 31 Order for failing to address his Eighth Amendment injunctive relief claims separately from his Eighth Amendment claims for damages. Specifically, he argues, if the court were to find that the DOC mattress policy is "illegal," and if there is no other "reasonable method of controlling [his] pain," the court could still grant relief on his Eighth Amendment claims, even without finding any defendant was deliberately indifferent. Doc. No. 142, at 1-2.

Mr. Czekalski's argument lacks any basis in the law. Irreparable harm and a finding of liability are both necessary

preconditions to granting injunctive relief. Permanent injunctive relief may not be granted in the absence of a showing of actual success on the merits. Largess v. Sup. Jud. Ct. for Mass., 373 F.3d 219, 224 n.2 (1st Cir. 2004); Doe v. N.H. Dep't of Corr. Comm'r, No. 21-cv-604-LM, 2022 DNH 023, 2022 U.S. Dist. LEXIS 39856, at *5, 2022 WL 673251, at *2 (D.N.H. Mar. 7, 2022). To obtain any relief on his Eighth Amendment claims, the plaintiff must establish that at least one defendant was deliberately indifferent to a substantial risk of serious harm, or that at least one defendant acted with wanton disregard, akin to criminal recklessness, of the conditions that Mr. Czekalski alleges deny him the minimal civilized measure of life's necessities. See Abernathy v. Anderson, 984 F.3d 1, 6 (1st Cir. 2020); see also Farmer v. Brennan, 511 U.S. 825, 847 (1994) ("a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"). Evidence of a policy's unreasonableness or illegality, untethered from a showing of any defendant's deliberate indifference, will not suffice to avoid summary judgment on his Eighth Amendment claims. See Farmer, 511 U.S. at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

II. Mattress (Claim 1)

Mr. Czekalski seeks reconsideration of the decision to grant defendants' motion for summary judgment on his Eighth Amendment claim alleging he was denied a mattress as necessary to improve his sleep and reduce his need for medications to treat his chronic pain (Claim 1). To avoid summary judgment on that claim, Mr. Czekalski needed to adduce evidence to allow a reasonable factfinder to conclude that the acts or omissions of at least one defendant amounted to deliberate indifference to a substantial risk of serious harm. Id. at 834. And to the extent that claim challenged the medical care he received, or the alleged failure to treat his medical condition, the test is whether at least one defendant has been deliberately indifferent to his "serious medical needs," either those that have been diagnosed as requiring treatment or those that are so obvious that a layperson could easily recognize the need for medical attention. Doc. No. 136, at 14 (citing cases).

As to the existence of a serious medical need, there is no dispute that Mr. Czekalski suffers from diagnosed conditions of chronic pain. The March 31 Order turns, however, on the absence of evidence that any health care provider has ever expressed the opinion that a different, thicker, or new mattress was medically necessary for Mr. Czekalski. Not even the report prepared by

Mr. Czekalski's NHSP physician Dr. Carey Rodd expresses that opinion, see Doc. No. 125-7, although that report was prepared for purposes of this lawsuit at Mr. Czekalski's request, after Dr. Rodd was no longer employed at the NHSP. Mr. Czekalski points to no new evidence or manifest error of law or fact in that regard.

Mr. Czekalski argues here that people do not need an expert's opinion to understand the connection between better mattresses, better sleep, and better health. Additionally, he reports that his own blood pressure readings and self-reported pain-level indicators (including how well he slept and how many pain relievers he took each day) all improved when he slept on a thicker or newer mattress.

Mr. Czekalski's argument in that regard is both speculative and beside the point. The Eighth Amendment does not require prisons to provide inmates with health-promoting bedding or non-pharmaceutical solutions for better health; it requires prison officials not to be deliberately indifferent to each inmate's serious medical needs, or to any substantial risks of serious harm to them. Mr. Czekalski points to no manifest error of law or fact in the court's conclusion that he needed medical evidence and expert testimony tying his medical needs to the mattress he was using, to avoid summary judgment on Claim 1.

Furthermore, even if Mr. Czekalski could persuade a rational factfinder that he had been subjected to a substantial risk of serious harm by using the mattress he claims was inadequate, the absence of evidence of any defendant's deliberate indifference to that risk is enough to avoid reconsideration of the March 31 Order. Mr. Czekalski rehashes his arguments that only physical manipulation of the mattress would reveal its condition, and that the defendants who responded to his grievances were aware that the standard-issue mattresses compressed quickly over time, causing him pain. The March 31 Order explains why the evidence regarding the manner in which several of the defendants (Major Fouts and Christopher Kench) responded to his grievances and complaints, did not suffice to generate a triable issue of their deliberate indifference, or the deliberate indifference of any other named defendant. Nothing in the motion at issue here warrants reopening the judgment or reconsidering those findings.

III. Prescription Refills (Claim 2)

As to Mr. Czekalski's prescription refill claim (Claim 2), this court granted the motion for summary judgment upon finding the steps outlined in the July 4, 2020 Declaration of Samuel Fiore, R. Ph. (Doc. No. 122-14) ("Fiore Declaration"), to be a reasonable response to the prescription refill delay problem

precluding a finding of deliberate indifference. Those steps included, among other things, recruiting staff and hiring an outside contractor to eliminate the refill backlog that had resulted from staffing shortages, maintaining open purchase orders at local pharmacies to reduce out-of-stock delays, and directing inmates to have prescriptions refilled at sick call, to address their immediate unmet medication needs. See Cox v. Nobles, 15 F.4th 1350, 1360 (11th Cir. 2021) ("the reasonableness of the response is dependent upon the exigence of the specific circumstances"), cert. denied, 142 S. Ct. 1178 (2022); Alcorta v. Warden, FCI Berlin, No. 21-CV-250-PB, 2021 U.S. Dist. LEXIS 167832, at *6, 2021 WL 3934355, at *2 (D.N.H. July 27, 2021) (finding evidence of reasonableness of response to COVID-19 in reduction of number of cases), R&R adopted, 2021 WL 3930741, 2021 U.S. Dist. LEXIS 166824 (D.N.H. Sept. 1, 2021).

In his motion to reconsider, Mr. Czekalski reiterates and expands upon matters asserted in his objection to defendants' summary judgment motion, specifically, that it took four years for the prison to fix the prescription refill problem. In addition, he describes his experience with using sick call to obtain prescription refills as ineffective, as "it still took days after going to sick call to receive an already late prescription." Doc. No. 142, at 6-7.

This court declines to reopen the judgment on the basis of evidence regarding the time it took to address the problem, as such information was previously presented and deemed unavailing in the March 31 Order. Moreover, the court declines to reopen the judgment based on the evidence offered here for the first time, regarding the inadequacy of sick call visits, which Mr. Czekalski could have presented prior to the entry of judgment. See Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997) ("'A party who sits in silence and withholds potentially relevant information . . . does so at his peril.'" (brackets omitted) (citing Vasapolli, 39 F.3d at 36-37)). Mr. Czekalski fails to highlight any manifest error of fact or law in the March 31 Order.

But even if Mr. Czekalski could demonstrate a triable issue regarding the matters described in the Fiore Declaration, he has failed to demonstrate that there is any manifest error of fact or law in granting the supervisory official defendants' motion for summary judgment on Claim 2.

> "[D]eliberate indifference alone does not equate with supervisory liability," but rather "[c]ausation [is also] an essential element, and the causal link between a supervisor's conduct and the constitutional violation must be solid." . . . [T]he causation requirement "contemplates proof that the supervisor's conduct led inexorably to the constitutional violation."

Justiniano v. Walker, 986 F.3d 11, 20 (1st Cir. 2021) (citations omitted). No such evidence of direct, inexorable causation or deliberate indifference may be found here.

It is undisputed that, in response to his multiple Inmate Request Slips ("IRS"), prison staff members advised Mr. Czekalski to go to sick call for refills, see Doc. Nos. 29-2, at 2 & 125-9, at 3; and Mr. Czekalski has presented no evidence suggesting that any named defendant was subjectively aware that sick call visits did not yield timely refills for him. Moreover, defendants and their subordinates explained in answering Mr. Czekalski's grievances in 2016/2017 that the pharmacy problems were under review, that the facility was seeking a remedy, and that Mr. Czekalski's suggestions were noted. See Doc. No. 29-2, at 3-5. It is further undisputed that the steps set forth in the Fiore Declaration represent a remedy that ultimately worked. See Doc. No. 142, at 6.

No reasonable factfinder presented with the summary judgment record could find any named defendant's conduct to manifest deliberate indifference that directly and inexorably caused Mr. Czekalski to be exposed to a substantial risk of serious harm due to his inability to obtain prescription refills without delays. For those reasons, and as explained in defendants' objection, see Doc. No. 143, at 6-7, the court denies Mr. Czekalski's motion to reconsider its ruling as to

defendants' motion for summary judgment on the prescription refill claim (Claim 2).

IV. Pain Medication and Inhaler

A. Acetaminophen (Claim 3(e))

The court's decision to grant defendants' motion for summary judgment as to Mr. Czekalski's Claim 3(e), regarding his access to high doses of acetaminophen, turned on the absence of evidence from which a reasonable factfinder could infer any named defendant's subjective awareness of a failure to treat his serious medical needs. The grievance documents in the summary judgment record do not include Mr. Czekalski's complaint that he could not buy as much acetaminophen per week as he needed, which he based upon his providers' advice not to exceed up to 4000 mg of acetaminophen per day. Mr. Czekalski points to no other non-speculative evidence demonstrating that any named defendant was aware that he had a serious medical need for high doses of acetaminophen exceeding the amount he could buy from the canteen in the relevant time period. Absent any new evidence or showing of any error of law or fact in that regard, the court denies Mr. Czekalski's motion to reconsider as to Claim 3(e).

B. Ibuprofen and Inhaler (Claims 3(a) and 3(b))

With respect to the court's disposition of his claims regarding ibuprofen and the asthma inhaler, Mr. Czekalski's motion to reconsider is denied. He rehashes the same arguments previously considered and rejected by the court, and he fails to show that there is any new evidence, change in the law, or manifest error in the March 31 Order's conclusion that those claims (Claims 3(a) and 3(b)) reflected only a dispute between plaintiff and his health care providers as to the appropriate course of treatment for his medical needs, which cannot form the basis for relief on his Eighth Amendment claims, as to any of the non-medically-trained prison officials he has named as defendants.

V. Cystoscopy (Claim 4)

For reasons stated in defendants' objection, Doc. No. 143, at 10-11, the motion to reconsider the March 31 Order's disposition of Claim 4 is denied. Plaintiff makes no showing of any manifest error of law or fact underlying the relevant ruling; his assertions here simply resurrect the same arguments he previously made.

VI. Eighth Amendment Prozac Claim (Claim 3(c))

The March 31 Order's pretrial disposition of Mr. Czekalski's Eighth Amendment Prozac claim (Claim 3(c)) hinged on the absence of evidence that he had a serious medical need requiring a dose of Prozac no earlier than mid-morning. The motion to reconsider does not demonstrate any manifest error of law or fact concerning that issue or otherwise show why the judgment on that claim should be reopened. Accordingly, the court denies the motion to reopen to the extent it seeks to revisit the disposition of Claim 3(c).

VII. RLUIPA Prozac Claim (Claim 5)

The March 31 Order's disposition of Mr. Czekalski's RLUIPA claim turned on the lack of evidence to support a reasonable finding that the shift in the timing of the NHSP's morning medication distribution schedule substantially burdened, and did not merely inconvenience, his morning prayer practices. Considering Mr. Czekalski's sworn testimony and statements, the court in that Order had calculated that Mr. Czekalski would need to arise thirty minutes earlier on weekdays to avoid a time-conflict between his prayers and the distribution of medication during "A Call," and that on some or all of those days, he could choose instead to receive medication during sick call.

In his post-judgment motion, Mr. Czekalski has clarified that because he also needs time to wash and dress each morning, see Doc. No. 142, at 10-11, he would need to arise at 4:30 a.m. each week day and weekend when he prays, to avoid the prayer-time/A-Call medication distribution time problem. And he has further expanded on the reasons why he does not avail himself of sick call to receive his morning dose of Prozac, namely, that to do so, he would miss the classes he takes to receive "earned time credits."

Mr. Czekalski could have, and should have offered such evidence sooner. He provides no explanation in his motion to reconsider why he chose not to offer the same sworn statements before judgment entered. That reason alone is grounds to deny his motion for reconsideration.

There is also an independent, alternative jurisdictional ground for denying the motion to reopen the judgment with regard to Claim 5, which the parties have not briefed but this court cannot fail to observe. Mr. Czekalski has been transferred to the NCF since judgment entered in this case.

In general, a prisoner's transfer moots his claims for injunctive relief challenging prison conditions or policies at his place of confinement. See Ford v. Bender, 768 F.3d 15, 29 (1st Cir. 2014). "[T]he newly situated inmate has no further need for such declaratory or injunctive relief, for he is free

of the policy or practice that provoked his lawsuit in the first place." Incumaa v. Ozmint, 507 F.3d 281, 287 (4th Cir. 2007).

All of Mr. Czekalski's claims, including his RLUIPA claim (Claim 5), concern the conditions at his previous place of confinement, the NHSP in Concord, New Hampshire. And the only relief available on Mr. Czekalski's Prozac RLUIPA claim is injunctive relief. See Apr. 10, 2018 Order (Doc. No. 19) (approving Mar. 2, 2018 R&R (Doc. No. 10)).

NCF is a different DOC facility, with a different prison population, a different set of corrections officers under the supervision of a different warden, and different health care providers who can adjust his prescriptions and dosages to meet his current circumstances. The record lacks any evidence that the NHSP morning Prozac distribution procedures that concerned Mr. Czekalski at the NHSP have been applied to him at NCF, and no evidence suggesting that the supervisory defendants named as defendants in this case have ever had an opportunity to address whether the means of distributing medications at NCF could be or should be adjusted because of his morning prayer practices. Under such circumstances, there is no manifest error of fact or law in the court's decision to grant defendants' motion for summary judgment on his RLUIPA claim relating to his morning prayers and the time and manner of morning medication distribution at the NHSP.

Conclusion

For the foregoing reasons Mr. Czekalski's Rule 52(b)/Rule 59(e) motion (Doc. No. 142) is DENIED.

SO ORDERED.

Joseph N. Laplante
United States District Judge

March 29, 2022

cc: Jason A. Czekalski, pro se
Seth Michael Zoracki, Esq.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 22-1328

JASON A. CZEKALSKI,

Plaintiff - Appellant,

v.

WILLIAM L. WRENN, former Commissioner, New Hampshire Department of Corrections, in his individual capacity; HELEN HANKS, Commissioner, NH Department of Corrections, in her individual capacity; CHRISTOPHER H. KENCH, Director of Security, NH Department of Corrections, in both his individual and official capacities; PAULA MATTIS, Director of Forensic Services, NH Department of Corrections, in both her individual and official capacities; JON FOUTS, Director of Security, NH State Prison for Men, in both his individual and official capacities,

Defendants - Appellees.

Before

Montecalvo, Lynch, and Kayatta,
Circuit Judges.

ORDER OF COURT

Entered: October 2, 2025

By judgment entered April 22, 2025, the court summarily affirmed the judgment of the district court. Appellant Jason A. Czekalski then filed a "motion for reconsideration," which the court construed as a petition for panel rehearing and denied by order entered July 14, 2025. Consistent with Federal Rule of Appellate Procedure 41(b), the court proceeded to issue mandate on July 22, 2025. Several weeks after issuance of mandate, appellant filed the current "Petition for En Banc Review Under Rule 40." Per Federal Rule of Appellate Procedure 40(a), "a party seeking both forms of rehearing must file the petitions as a single document." Appellant failed to comply with this provision. Moreover, appellant made the current filing weeks after mandate had issued, despite acknowledging that he received a copy of the court's order denying panel rehearing "on July 18, 2025."

At this juncture, the current filing may be construed, at most, as a motion requesting that the original panel recall the mandate. See Bos. & Maine Corp. v. Town of Hampton, 7 F.3d 281, 282 (1st Cir. 1993) ("Although Rule 40 does grant the appellate courts authority to extend the time for filing a petition for rehearing, a court can do so only while it has jurisdiction over the case. We lack jurisdiction here. The mandate issued in this case on April 20, 1993, and '[i]ssuance of the mandate formally marks the end of appellate jurisdiction.' . . . Mandate having issued in the case before us, [] it is no longer sub judice and we lack authority to consider a petition for rehearing.") (quoting Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 415 (D.C. Cir. 1986)); see also United States v. Fraser, 407 F.3d 9, 10 (1st Cir. 2005) ("Fraser's untimely petition for rehearing from the November 2004 decision is before us. It cannot be granted because mandate has issued. We will treat the untimely petition as a motion to recall mandate, over which we do have jurisdiction.") (citation omitted).

Because appellant has not demonstrated the sort of "extraordinary circumstances" that might warrant recall of mandate, the current motion is **DENIED**. Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 22 (1st Cir. 2010) (standard).

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Jason A. Czekalski
Lynmarie C. Cusack
Francis Charles Fredericks Jr.
Seth Michael Zoracki
Nathan W. Kenison-Marvin
Samuel R. V. Garland

Additional material from this filing is available in the Clerk's Office.