

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3567
Summary Calendar

ALBERT CHUI CLARK,

Plaintiff-Appellant,

versus

KENNETH PEREGO, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana
(CA-91-603-A-M1)

(October 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Louisiana State Penitentiary inmate Albert Chui Clark (Clark) appeals the district court's grant of summary judgment in defendants' favor in his action under 42 U.S.C. § 1983 against prison officials. We affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Clark filed this section 1983 action against certain prison officials at the Louisiana State Penitentiary (LSP), alleging a violation of his Eighth Amendment rights.¹ Clark claims that these officials terminated his previously prescribed vegetarian diet with deliberate indifference to his serious medical needs. Clark asserts that he is unable to eat meat or food prepared with meat extracts without becoming ill.

On May 7, 1990, defendant LSP staff physician Dr. Bankston examined Clark and, at his request, placed him on a vegetarian diet even though his medical condition did not require one. In April 1991, pursuant to a new prison policy curtailing special diets, defendant Dr. Perego, LSP's medical director, terminated Clark's vegetarian diet. On May 1, 1991, defendant Dr. Barnes, another LSP staff physician, placed Clark on a low-fat meat diet.² After examining Clark on May 8, 1991, Dr. Bankston refused to resume Clark's vegetarian diet, specifically finding that Clark had no medical condition requiring a non-meat diet.

After Clark's complaints of vomiting associated with the low-fat diet, Dr. Barnes again examined Clark on June 3, 1991 and switched him to a general diet. On June 17, 1991, Dr. Barnes again examined Clark for continued complaints of vomiting associated with

¹ Clark's complaint named Dr. Kenneth Perego, Dr. Susan Bankston, Dr. Robert Barnes, and several other prison officials as defendants.

² Clark alleges that he never requested a low-fat diet and that the prescription of the low-fat diet was part of an elaborate scheme to circumvent this litigation.

the consumption of meat and described his condition as stable. On July 15, 1991, Dr. Ducote (not a party to this suit) examined Clark for complaints of stomach pains from the consumption of meat and prescribed Maalox. Finally, Dr. Bankston further examined Clark on August 7, 1991 and found no medical reason to prescribe the vegetarian diet requested by Clark.

After unsuccessfully pursuing his administrative remedies, Clark filed this section 1983 action in the district court below requesting monetary damages, restoration of his vegetarian diet, and the stocking of vegetarian foods in the prison canteen. The case was assigned to a magistrate judge, who recommended granting defendants' motion for summary judgment. The magistrate judge found "no evidence in the record that the decision to discontinue the plaintiff's vegetarian diet was done without first considering [his] medical need for the diet. The medical consensus [Drs. Perego, Bankston, and Barnes] is that the plaintiff is not now, nor was he ever in medical need of a vegetarian diet." The district court adopted the magistrate judge's report, granted defendants' motion for summary judgment, and dismissed the action. Clark appeals.

Discussion

We review an order granting summary judgment *de novo*. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1219 (1994). Summary judgment is appropriate where the record discloses that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Summary

judgment against a party is proper if the summary judgment evidence before the court would not suffice to sustain a finding in favor of that party on a necessary element of his case as to which he would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986).

To prevail in a section 1983 claim for deprivation of medical care, a prisoner must prove that care was denied and that this denial constituted "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 97 S.Ct. 285, 291 (1976); see *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). This Court has held that "deliberate indifference may be shown when prison officials deny an inmate recommended treatment by medical professionals." *Payne v. Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988). The facts underlying an inmate's deliberate indifference claim "must clearly evince the medical need in question and the alleged official dereliction." *Johnson*, 759 F.2d at 1238 (emphasis in original). We have held that a disagreement between an inmate and a prison physician as to whether medical care is appropriate does not amount to deliberate indifference to serious medical needs and therefore does not give rise to a federal constitutional claim. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

Our review of Clark's prison medical records supports the district court's conclusion that the summary judgment record does not suffice to support a finding that any defendant was deliberately indifferent to Clark's serious medical needs, a matter on which Clark would have the burden of proof at trial. After LSP officials terminated his vegetarian diet, LSP physicians examined

Clark on five separate occasions pursuant to Clark's complaints of digestive problems related to his meat consumption.³ Despite Clark's protestations concerning his diet, none of these physicians found a medical need for a vegetarian diet. Moreover, Dr. Perego's affidavit states that the only reason Dr. Bankston placed Clark on a vegetarian diet in May 1990 was because Clark requested it.

Clark has not presented any evidence that defendants' conduct constituted deliberate indifference to a serious medical need. At most, Clark has established that he and the prison physicians disagreed about whether he had a serious medical need for a vegetarian diet. Whether the prison officials were right or wrong (and there is no medical evidence they were wrong), there is in any event no evidence they (or any of the other defendants) were deliberately indifferent. Indeed, the record demonstrates they were not. Accordingly, the district court properly granted defendants' motion for summary judgment. See *Varnado*, 920 F.2d at 321.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

³ Dr. Barnes examined Clark on June 3 and June 17, 1991, Dr. Bankston examined Clark on May 8 and August 7, 1991, and Dr. Ducote examined Clark on July 15, 1991. Clark's medical records further indicate that one week after the change in the special diet program, Dr. Barnes examined Clark for corns on his toes.