IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3268

ROGER DEAL YATES,

Plaintiff-Appellant,

v.

BRUCE N. LYNN ET. AL.,
Secretary, Department of Corrections,
State of Louisiana

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-91-0866-B)

(February 15, 1995)

Before KING, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:*

This case centers on the proceedings surrounding Roger Deal Yates's Eighth Amendment claims against officials in the Louisiana Department of Corrections. Yates, an inmate at Louisiana State Penitentiary in Angola, proceeding pro se and in forma pauperis, appeals the district court's grant of the defendants' motion for summary judgment and the district court's

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*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

denial of his own motion for preliminary injunctive relief. We affirm.

I. BACKGROUND

Roger Deal Yates suffers from a congenital joint laxity in both of his knees. The disease decreases the stability of Yates's knees, and although this condition cannot be cured, the progression of the disease can be slowed with physical therapy and medication.

In 1984, while Yates was imprisoned in the Louisiana State Penitentiary, the district court entered a stipulation and order as an ancillary matter to other pending litigation involving Yates and the Louisiana Department of Public Safety and Corrections ("LDPSC"). The LDPSC and Yates stipulated, inter alia, to Yates's knee problems and noted that in June of 1984 Yates received "arthroscopic partial medical meniscectomy on his right knee." Additionally, Yates and the LDPSC stipulated that, pursuant to the recommendations of an LDPSC orthopedic surgeon, Yates receive a special duty classification. Specifically, the stipulation provided that Yates be given the duty status of:

> "Limited Duty (permanent by Court order), diagnosis: unstable right knee.
>
> LIMITATIONS: No deep stooping or deep kneebends, no climbing, no heavy lifting and no prolonged standing. (Prolonged Standing means no standing for over two consecutive hours without a 10 minute rest period)."

Moreover, the stipulation provided that "[t]he limitations of this duty status may not be modified except upon written

recommendation of a Board Certified Orthopedic Surgeon after proper examination." The district court entered an order on January 17, 1985, recognizing the stipulation and decreeing that "the [LDPSC] . . . place Roger Yates in the duty status stipulated to by the parties."

After the Yates's classification status was resolved he was returned to the main prison. The next year, Yates's problems in his left knee worsened, and he was placed on no duty status and was given a knee brace for his left leg. Later, in an effort to improve his condition, Yates was provided with crutches and a brace for his other knee. Additionally, while living in the main prison unit, Yates traveled to the prison hospital each day in order to receive physical therapy.

Apparently, as the result of a civil action instituted when his condition deteriorated, Yates was transferred back to the hospital ward of the prison in November of 1988. While in the hospital ward, Yates received physical therapy including various leg strengthening exercises and hot water treatments to alleviate stiffness and cramping. The treatments were so beneficial to Yates that he only needed his braces for limited purposes. Additionally, other characteristics of the hospital were helpful to Yates's condition. Specifically, Yates was not required to walk very far to receive meals or medication, and he was not required to climb any steps. During this time Yates did not have a job assignment, and was classified with a "no duty" status.

Yates, however, recounted that he sometimes helped "elderly inmates on the wards and in the therapy room."

In April of 1991, Yates was transferred out of the hospital and back into the general dormitory. Prior to his transfer, Yates explained, he attempted to inform a prison physician, Dr. Perego, about his need to be in the hospital. The entreaties fell on deaf ears, according to Yates, and he was transferred back to the dormitories. Dr. Perego later testified that he did not recall the specifics of his conversation with Yates, but Dr. Perego did recollect that he recommended Yates's transfer "based on the fact that we felt like, at that time, that his condition was stable and that hospitalization was no longer required." Dr. Perego described that he reviewed Yates's chart in conjunction with his duty status, and Dr. Perego concluded that Yates "is able to work, no prolonged standing or walking more than two hours. Should have a 10-minute break every two hours. [Yates] is not to do any goose-picking, no ladder climbing. Can go up and down stairs, can mop and sweep." Dr. Perego, however, made these determinations, based only on Yates's "chart" and without any examination of Yates's knees.

Yates complained that conditions in the dormitories for treating his leg are insufficient. Although there are weight-lifting and exercise facilities in an adjacent dormitory unit, Yates contends that they are far away from where he is housed, and they do not provide adequate treatment for his knees. Yates did admit that he is able to perform "isometric" exercises

without any special equipment, but these exercised are of limited utility. Additionally, Yates testified that in the regular prison dormitories he is not given proper medication. Moreover, Yates maintains that, to the detriment of his knees, he is required to walk further to get his meals and his medicine in the general dormitory than he was in the hospital unit. Yates also complains that prison officials failed to provided him with knee braces.[1] Specifically, Yates noted that his left knee brace was broken in 1989, but that its disfunction only became a problem when he was transferred out of the hospital and his knees began to weaken. In the general dormitory, just as in the hospital unit, Yates is not required to perform any work duties.

According to Yates, his transfer out of the hospital has had a negative effect on his knees. Yates stated that his knees have regressed to the condition they were in prior to his 1988 transfer to the hospital unit. Finally, while Yates is aware that the prison no longer employs a physical therapist, Yates contends that he could provide adequate treatment to himself if he were allowed access to hospital unit's equipment.

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[1] There is some indication that the braces were repaired in March of 1993. This evidence, however, was not before the district court when it made its summary judgment determination. Thus, we may not consider it in our review of the district court's decision on the motion, for "[a]lthough on summary judgment the record is reviewed de novo, this court, for obvious reasons, will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion." Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 (5th Cir. 1992).

Alleging that his housing transfer constituted deliberate indifference to his medical needs, in September of 1991, after filing an internal complaint, Yates filed a claim under 42 U.S.C. § 1983. Yates also moved for a preliminary injunction. Both parties then moved for summary judgment. After evidentiary hearings on the preliminary injunction (held before the motions for summary judgment were filed), a magistrate judge recommend that Yates's motions be denied and that the defendants' motion be granted. The district court agreed with the magistrate judge's recommendation and denied Yates's motions for preliminary injunctive relief and summary judgment, but granted the defendants' summary judgment motion. Yates appeals.

II. STANDARD OF REVIEW

Initially we note that because Yates is proceeding pro se, we "construe his allegations and briefs more permissively." SEC v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993); see also Hughes v. Rowe, 449 U.S. 5, 9 (1980) ("It is settled law that the allegations of [pro se] complaints, however inartfully pleaded, are held to less stringent standards than formal pleadings drafted by a lawyer." (internal quotations and citation omitted)).

Additionally, in the review of a grant of summary judgment, we conduct our inquiry de novo, applying the same criteria used by the district court in its initial examination of the issue. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994);

Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). Initially, we examine the applicable law to ascertain the material factual issues. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence bearing on those issues, viewing the facts and inferences drawn from that evidence in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); FDIC v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). After this process, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

Additionally, Rule 56(c) of the Federal Rules of Civil Procedure prescribes that the party moving for summary judgment bears the initial burden of informing the district court of the basis for its motion and of identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Norman v. Apache Corp., 19 F.3d 1017, 1023 (5th Cir. 1994). If the moving party meets its burden, the burden then shifts to the nonmoving party who must establish the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585-87 (1986); Norman, 19 F.3d at 1023.

Notably, the non-moving party cannot carry its burden by simply showing that there is some metaphysical doubt as to the material facts. Matsushita, 475 U.S. at 586. If, however, "the evidence is such that a reasonable jury could return a verdict for the non-moving party," summary judgment will not lie. Anderson, 477 U.S. at 248.

Decisions regarding whether to grant a preliminary injunction "rest with the sound discretion of the trial court." Hay v. Waldron, 834 F.2d 481, 484 (5th Cir. 1987). Accordingly, we will not upset the denial of a preliminary injunction absent an abuse of discretion. Id.

III. DISCUSSION

It is well settled that while "the Constitution does not mandate comfortable prisons, [it] does not permit inhumane ones[,] . . . [and] the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Farmer v. Brennan, 114 S. Ct. 1970, 1976 (1994) (internal quotations and citations omitted). Of course, a prisoner's bare claim of mistreatment will not support an allegation of unconstitutional treatment. Rather, for a prisoner to prevail in a claim that the omissions of a prison official violated the Eighth Amendment's prohibition against cruel and unusual punishment, the prisoner must demonstrate that: (1) the deprivation alleged is sufficiently serious, "resulting in the denial of the minimal civilized

measure of life's necessities," Farmer v. Brennan, 114 S. Ct. at 1977 (quoting Hudson v. McMillan, 112 S. Ct. 995 (1992)); and (2) the prison official acted with "`deliberate indifference to the inmate health or safety.'" Id. (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991)). This is a high standard, and as the Supreme Court recently described:

> [A] prison official cannot be held liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that substantial risk of serious harm exists, and he must also draw the inference.

Id. at 1979.

Moreover, when an inmate seeks injunctive relief for ongoing prison conditions, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct." Helling v. McKinney, 113 S. Ct. 2475, 2483 (1993); accord Farmer, 114 S. Ct. at 1983. Additionally, to survive summary judgment on his request, a prisoner "must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so . . . ." Farmer, 114 S. Ct. at 1983.

Our review of the record in this case indicates that, in addition to LDPSC's admitted knowledge of Yates's history of medical problems in his knees, there is no question of fact about

the seriousness of Yates's knee condition. It has been and continues to be serious. Nevertheless, summary judgment is still proper, because Yates failed to raise a question of material fact regarding the defendants' indifference to or disregard of this medical condition. Dr. Perego testified that he knew of Yates's knee problems, and transferred Yates only after reviewing Yates's medical records. Although he mistakenly noted that plaintiff could climb stairs, Yates was not required to climb stairs in his work assignment or in carrying out his daily affairs. Moreover, an error in a treatment decision, even one that would constitute medical malpractice, is insufficient to sustain a claim for an Eight Amendment violation. See Farmer, 114 S. Ct. at 1978 ("Eight Amendment liability requires more than ordinary lack of due care . . . ." (internal quotation and citation omitted)). Thus, while Dr. Perego knew of Yates's condition, there is nothing to indicate that Dr. Perego was indifferent to or recklessly disregarded the risk of deterioration of Yates's knees. Dr. Perego reviewed Yates's record and determined, albeit possibly incorrectly, that Yates's condition would not deteriorate if Yates were transferred.

Similarly, Yates has not raised a question of material fact regarding the culpability of the LDPSC officials in their treatment of Yates during the period following his transfer and through the summer of 1991. While Yates was unable to attend physical therapy, there is no question that he was afforded access to medication and medical care, including several visits

to physicians at the prison as well as treatment by an orthopedic specialist. Although this treatment may not have been as effective as the daily physical therapy Yates received in the hospital and the treatment may have failed to abate the deterioration of the condition of his knees, the prison officials did not act without concern to Yates's health or safety. They considered the risks to Yates's health and determined that the facilities in the general dormitories were sufficient to meet Yates's needs as those needs had evolved through the summer of 1991. Accordingly, the district court did not err in granting the LDPSC's motion for summary judgment.

Yates also argues that the district court erred in denying his motion for a preliminary injunction. In order to receive a preliminary injunctive relief, a plaintiff must show:

> (1) a substantial likelihood of success on the merits;
> (2) a substantial threat of irreparable injury if the injunction is not granted;
> (3) an evaluation that the threatened injury to the plaintiff outweighs the threatened injury the injunction may cause the defendant; and
> (4) a determination that the injunction does not disserve public interest.

Hay, 834 F.2d at 484 (quoting Lindsay v. City of San Antonio, 821 F.2d 1103, 1107 (5th Cir. 1987)). In the instant case, Yates clearly fails the first prong, and obviously is not entitled to preliminary injunctive relief.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court.