

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2755
(Summary Calendar)

CHARLES EARL BAKER,

Plaintiff-Appellant,

versus

S. YOUNG, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(CA-H-90-1809)

(July 16, 1993)

Before JOLLY, WIENER and E. M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Charles Earl Baker, a prison inmate in Texas, filed a 42 U.S.C. § 1983 civil rights complaint, alleging that prison officials failed to provide him with medical care for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a number of ailments and compelled him to perform work assignments that aggravated his medical condition. The district court ordered the plaintiff to file a more definite statement of the facts involved in the action, and Baker filed additional pleadings. The court next ordered a Spears¹ hearing to determine the viability of Baker's claim under 28 U.S.C. § 1915(d). Following the Spears hearing, Baker filed an amended complaint, adding claims that prison officials retaliated against him because he filed suit, and that he was strip-searched in the presence of female guards.

The district court dismissed Baker's claims that he was denied medical care and forced to perform work assignments that aggravated his conditions. The court also dismissed Baker's claim of retaliation without prejudice and advised Baker that he could make the allegations in a new complaint. Finally, the district court dismissed as duplicative, with prejudice, Baker's claim that he was strip-searched in the presence of female guards because that claim was raised in another pending case, Aranda v. Lynaugh, No. H-89-277. Id. at 60, 63.

Baker argues that the district court erred in dismissing his claims that the defendants' failure to treat his medical ailments violated his constitutional rights. Baker also argues that his work classification was changed by a defendant prison official without affording Baker a medical examination, and that he was compelled to perform work that aggravated his medical condition. Baker states further that the magistrate judge who conducted the

¹ Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

Spears hearing did not permit him to introduce his medical records, to call witnesses, or to cross-examine the prison doctor. And Baker argues that he was placed in administrative segregation with violent inmates in retaliation for filing his lawsuit; and that he was then strip-searched in the presence of female guards every time he left the cell.

A prisoner's IFP complaint may be dismissed as frivolous if it has no arguable basis in law or in fact. Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992). A dismissal of a complaint as frivolous, pursuant to 28 U.S.C. § 1915(d), is reviewed for abuse of discretion. Id. at 1734.

Deliberate indifference to a prisoner's serious medical need constitutes an Eighth Amendment violation. Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993). In order to maintain a claim for delayed medical treatment, the plaintiff must allege that the delay was caused by deliberate indifference and resulted in substantial harm. Id. The assignment of a prisoner to a work detail that exacerbates a serious physical ailment may constitute deliberate indifference. Id. at 194.

"[A] court may dismiss a claim as factually frivolous only if the facts alleged are clearly baseless, a category encompassing allegations that are 'fanciful,' 'fantastic' and 'delusional'." Moore v. Mabus, 976 F.2d 268, 270 (5th Cir. 1992) (internal quotations and citations omitted). To support a finding of frivolousness, the facts alleged must rise to the level of the irrational or the wholly incredible and may not be dismissed simply

because the court finds the allegations to be unlikely. Id.

In determining whether the district court has abused its discretion, we may consider whether that court inappropriately resolved genuine issues of disputed fact, reached erroneous legal conclusions, failed to develop adequately the record for appellate review, and failed to provide an adequate statement of reasons for the dismissal. Id. at 270-71.

The purpose of a Spears hearing is "to flesh out the substance of a prisoner's claims." Wesson v. Oglesby, 910 F.2d 278, 281 (5th Cir. 1990). Credibility assessments at a Spears hearing are limited to assessing "the inherent plausibility of a prisoner's allegations based on objective factors." Id. at 282. If a prisoner's version of the facts, as contained in his complaint and elaborated upon at the Spears hearing, "is inherently plausible and internally consistent, a court may not for purposes of a § 1915(d) dismissal simply choose to believe conflicting material facts alleged by the defendants." Id.

The prison physician, Dr. Nemecek, testified² at the Spears hearing that he did not have Baker's complete medical record but that it appeared that medical restrictions were placed on Baker's activities in 1987. Also unclear from the doctor's testimony is whether the restrictions on Baker's physical activities were enforced. The doctor stated that therapeutic diets are not always

² The magistrate judge's report states that the doctor "testified," but there is nothing in the record that shows that he was sworn. Witnesses at a Spears hearing should be sworn. Wilson v. Barrientos, 926 F.2d 480, 483 (5th Cir. 1991). Baker asserts that Dr. Nemecek was not sworn.

indicated for complaints of hypertension, but did not testify whether a therapeutic diet was ever ordered for Baker. Dr. Nemecek testified that hemorrhoids are a chronic disorder that are not disabling and are not caused by sitting on benches. The doctor also stated that suppositories are routinely given to alleviate the hemorrhoid problem but did not state whether suppositories were administered to Baker.

The magistrate judge told Baker that there was insufficient time for him to call witnesses. The district court stated that it was satisfied that Baker had received adequate examinations and care. Except for Dr. Nemecek's brief reference to a medical record, however, there is no indication that the court was provided with authenticated copies of Baker's medical records or any other evidence establishing his medical history.

Baker alleged in his pleadings that he did not receive his prescribed blood pressure medication between April 3 and April 17, 1990, which deprivation allegedly caused him to experience dizziness, black-outs, nose bleeds, and severe headaches. Baker also alleged that: (1) his prescribed diet card was withdrawn and he was forced to eat salty foods which aggravated his high blood pressure; (2) his legs became swollen and "burst" because he was not provided support stockings and was compelled to work at a job involving prolonged standing; (3) he was required to lift objects with weights in excess of his medical restrictions, which activities severely aggravated his hemorrhoids; (4) he was subjected to disciplinary proceedings because he refused to

continue working; (5) he is uncertain whether the daily rectal bleeding resulted from his hemorrhoids or his liver condition; (6) he contracted tuberculosis while in prison but had not received treatment for the condition in over a year; and (7) treatment was delayed for his infected tongue, arthritis, and liver disease.

Baker's alleged ailments include symptoms of some potentially serious diseases and conditions, such as tuberculosis, colo-rectal disease, vascular disease, and hypertension, each of which requires frequent and ongoing treatment. The failure to treat these conditions could have resulted in substantial harm to Baker. He may also be able to prove deliberate indifference if he can show that he was required to perform work that aggravated his medical condition after a doctor had restricted him from performing that type of work.

The record is devoid of any indication that the district court had access to Baker's complete medical record. The testimony of the prison physician shed little light on Baker's actual condition. As Baker's allegations are inherently plausible and consistent, and were not shown at the Spears hearing to be fanciful, fantastic or delusional, the district court abused its discretion in dismissing the complaint as frivolous.

Additionally, Baker alleged in an amended complaint that he was subjected to retaliation by prison guards and placed in administrative segregation because he filed this lawsuit. Prison officials may not retaliate against an inmate because of the inmate's exercise of his right of access to the courts. Gibbs v.

King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). As the defendants had not been served with the complaint at the time that Baker filed his amendment, it was error for the district court not to consider Baker's amended complaint which alleged the retaliation claim. See Fed. R. Civ. P. 15(a) (a party is entitled to amend a pleading once at any time prior to service of process.); James by James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990) (the district court is required to permit amendments unless the ends of justice require a denial.) On remand, the retaliation claim should be given further consideration by the district court.

Finally, Baker has not challenged the district court's dismissal of his strip-search claim as being duplicative in light of that claim's having been alleged in another suit pending in the court. We do not consider issues that are not briefed on the merits. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). The district court's dismissal of the strip-search issue is therefore affirmed.

In conclusion, the district court's dismissal of Baker's constitutional claims grounded in medical matters and retaliation (other than strip-search) are vacated, and the case is remanded for further proceedings consistent with this opinion. The dismissal of Baker's strip-search claim, however, is affirmed.

AFFIRMED in part; VACATED and REMANDED in part.