

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40817
Summary Calendar

ERIC DEAN COLEMAN,

Plaintiff-Appellant,

versus

BILLY LAYTON, Health
Admin., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(6:93-CV-809)

(January 3, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant Eric Dean Coleman (Coleman), proceeding pro se and *in forma pauperis*, appeals an order of the district court dismissing with prejudice his claims against defendants-appellees Billy Layton et al. (collectively, Defendants) 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

deliberate indifference to his medical needs. We affirm.

Facts and Proceedings Below

Coleman is a prisoner at the Coffield Unit of the Texas Department of Criminal Justice (TDCJ). His lower right leg has been amputated below the knee. Although he wears a prothesis, he must remove it to shower. For this reason, he requires a "handicap shower," that is, a shower that has no steps, a seat, and railings. Medical personnel at TDCJ issued Coleman a handicap shower pass, which he presented after being transferred to the Coffield Unit. However, soon thereafter he was transferred to administrative segregation, where there are no shower facilities to accommodate his needs. Prison officials did arrange for Coleman to shower at times other than those normally allotted for prisoner showers.

On August 20, 1993, Coleman slipped and fell in the shower. He was seen immediately by a doctor, who diagnosed a slight back strain and prescribed Motrin. A subsequent general exam confirmed this diagnosis. When Coleman continued to complain of back pain, as well as rubbing of the prosthetic limb, a doctor diagnosed subjective back pain and referred Coleman to the brace and limb clinic, where he was fitted with a new prosthesis. Also, arrangements were made beginning September 3, 1993, for Coleman to use a properly equipped shower elsewhere in the Unit.

Coleman subsequently brought this action under 42 U.S.C. § 1983 alleging that Defendants¹ were deliberately indifferent to his

¹ Coleman brought suit against Billy Layton, Health Administrator of the Coffield Unit; Drs. Larson, Ford, and Meyers, physicians at the Coffield Unit who treated Coleman on various occasions; Major M.W. Brock and Captain Dennis Blevins,

medical needs by failing to provide him with appropriate shower facilities.² The magistrate judge held a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), to ascertain the legal basis of Coleman's claims. *Id.* at 180-81. Coleman, Dr. Ford, and a TDCJ warden testified, and Coleman's medical records were introduced into evidence. Although Coleman initially contended that the shower facilities he currently uses are inadequate to his needs, under questioning from the magistrate judge, he admitted that the shower has those features that distinguish a handicap shower: no steps, a seat, and railings. The essence of his claim, the magistrate therefore determined, was that Defendants should have provided him with these special facilities when he first was transferred to administrative segregation, thereby preventing the accident that caused his back injury. Coleman testified that he did not know whether Defendants intentionally denied him access to the handicap shower for the purpose of causing him harm.

The magistrate judge determined that Coleman's complaint at most amounted to an allegation of negligence against Defendants,

officials in the administrative segregation unit; and B. Fuller, an official at TDCJ's Classification Unit.

² Coleman's original complaint also raised other allegations, specifically that Captain Blevins refused to allow Coleman to use his crutches during recreation times while in administrative segregation and that prison officials subjected him to cruel and unusual punishment by providing insufficient clothing to stay warm during the winter months. The magistrate judge considered these matters during the *Spears* hearing, but Coleman has not raised them in this appeal. They are therefore waived. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1163 (5th Cir. 1992).

which cannot support a claim of medical indifference, and therefore recommended that his claim be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). The district court adopted the magistrate judge's recommendation and dismissed Coleman's claims with prejudice.³ Coleman appeals that order.

Discussion

The district court may dismiss an *in forma pauperis* complaint *sua sponte* if it determines that the complaint is frivolous. 28 U.S.C. § 1915(d). A complaint is frivolous when "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 109 S.Ct. 1827, 1831-32 (1989). A claim is legally frivolous when it is "based on an indisputably meritless legal theory." *Id.* at 1833. We review the dismissal of a petition under section 1915(d) for abuse of discretion. *Denton v. Hernandez*, 112 S.Ct. 1728, 1734 (1992).

For a denial of medical care to rise to the level of a constitutional violation, a prisoner must show both that medical treatment was denied or delayed and that the denial or delay constituted deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 97 S.Ct. 285, 291 (1976). "Mere negligence, neglect or medical malpractice" does not give rise to a cause of action for deliberate indifference under section 1983, *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (citation omitted); the

³ Although section 1915(d) dismissals are typically without prejudice, a dismissal with prejudice is proper if the allegations of the complaint are legally insufficient and cannot be cured by amendment. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993).

defendant's actions must have been wanton, that is, they must evince "a reckless disregard for the rights of others." *Walker v. Butler*, 967 F.2d 176, 178 (5th Cir. 1992).

Clearly, Coleman's amputation is a serious medical need. However, we agree with the district court that on these facts, Coleman cannot meet the deliberate indifference standard. Coleman is currently provided with a shower that meets all the criteria he himself stated were necessary⁴; that this facility may not be all that Coleman could wish for does not create a cause of action under section 1983.⁵ His allegations regarding Defendants' actions prior to his slip and fall accident at most demonstrate negligence, but a mere mistake in judgment is not actionable. *Varnado*, 920 F.2d at 321. The district court did not abuse its discretion in dismissing with prejudice; given the facts presented, amendment of Coleman's complaint would not cure the fundamental defect in his cause of action. See *Graves*, 1 F.3d at 319.

Conclusion

The judgment of the district court dismissing this action with prejudice is therefore

⁴ In his brief to this Court, Coleman alleges that, following the district court's dismissal of his action, he has been denied access to the handicap shower and is again required to shower in the regular facilities other prisoners in administrative segregation use. We cannot consider these allegations. "[A]dditional incidents regarding [Coleman's] medical treatment that occurred after his *Spears* hearing that were not presented to the district court . . . are factual issues that may not be raised for the first time on appeal." *Varnado*, 920 F.2d at 321.

⁵ At his *Spears* hearing, Coleman testified that the shower "[is] not what I require. . . . [T]he shower doesn't function like a regular shower. . . . [I]t is old." Clearly, this is not a constitutional violation.

AFFIRMED.