

In 1995, plaintiff fractured his left heel. In 1997, while plaintiff was incarcerated in state custody, surgery was performed on plaintiff's left ankle. In November and December 1998, plaintiff, while still in state custody, again reported pain in his left ankle after spraining the ankle.

On April 5, 2001, plaintiff became incarcerated at USPL, which continues to the present. Plaintiff first reported left ankle pain to USPL medical staff on June 4, 2001, for which he was prescribed Motrin pain reliever. On June 18, 2001, plaintiff's left ankle was x-rayed, and he was again prescribed medication. Subsequently, plaintiff was evaluated and treated over sixteen times for pain associated with his left ankle. Plaintiff also has been treated by means of three orthopedic consultations by an outside contract physician and two pain-management specialist evaluations. Additionally, four x-rays have been performed, and plaintiff has been transported to The Headache & Pain Center in Leawood, Kansas (the "Center") for an MRI, and an EMG nerve study; none of which revealed an abnormality in plaintiff's ankle. Plaintiff's pain has been treated with various forms of pain, anti-inflammatory, and muscle-relaxant medication throughout his incarceration at USPL.

Plaintiff asserts that, when he was sent to the Center for his MRI and EMG nerve study, the treating physician recommended that he "follow-up with Pain Management as scheduled" and that he "made [sic] need an evaluation by an orthopedic foot specialist such as Dr. Horton or Dr. Bonner or Dr. Badway." Pl. Mtn. Summ. J., Attach. A. Nevertheless, plaintiff contends, Dr. McCollum has not permitted the recommended follow up.

Plaintiff also asserts that he suffered an umbilical hernia as a result of his need to continually use crutches or a cane to aid his mobility. Defendants contend that an umbilical hernia is a congenital (present at

birth) weakness, and that general daily activity can bring about their development. In April 2003, plaintiff was taken to a local hospital for surgery to repair his hernia injury.

II. Legal Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

When the court, in its discretion, determines that it must consider matters outside the pleadings, then the court will convert a motion to dismiss into a motion for summary judgment. *See* Fed. R. Civ. P. 12(b); *Lybrook v. Members of the Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1341 (10th Cir. 2000). Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that it is “entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is

“material” if, under the applicable substantive law, it is “essential to the proper disposition of the claim.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is “genuine” if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must “set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Adler*, 144 F.3d at 671. “To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Id.*

Finally, the court notes that summary judgment is not a “disfavored procedural shortcut,” rather, it is an important procedure “designed to secure the just, speedy and inexpensive determination of every action.” *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In this case, the court recognizes that plaintiff appears pro se, and the court therefore construes plaintiff's complaint liberally and judges it against a less stringent standard than that used for pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). As the Tenth Circuit has concluded:

We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.

Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (footnote omitted).

III. Analysis

A. Plaintiff's Motion for Summary Judgment

Plaintiff requests an order of summary judgment on his behalf because, he asserts, defendants did not answer his complaint within twenty days from being served.

Plaintiff, in actuality, is requesting a judgment by default, pursuant to Federal Rule of Civil Procedure 55. However, because defendants are officers of the United States, they are permitted sixty days to answer from the date of service on the United States attorney, if defendants are sued in their official capacities, or sixty days to answer from the date of personal service or service on the United States attorney if sued in their individual capacities. Fed. R. Civ. P. 12(a)(3).

Defendants were served on August 25, 2003. Thereafter, defendants requested an extension of time on October 14, 2003, and again on November 21, 2003, both of which the court granted, before filing the present motion to dismiss or for summary judgment. That is, defendants responded to plaintiff's complaint within time permitted by Rule 12.

Plaintiff's motion for summary judgment (or default judgment) is, therefore, denied.

B. Defendants' Motion for Summary Judgment¹

1. Eighth Amendment

"A prison official's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment." *Sealock v. Colo.*, 218 F.3d 1205, 1209 (10th Cir. 2000) (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Prison officials act with deliberate indifference to an inmate's health if they know that he faces a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994). Indifference may be proven by showing that prison officials intentionally denied, delayed access to, or interfered with an inmate's necessary medical care. *Estelle*, 429 U.S. at 104-05. Therefore, a plaintiff inmate must show more than negligent or inadvertent failure to provide adequate medical care. *Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993). Further, a prisoner's difference of opinion regarding the medical treatment he has received will not support a claim of cruel and unusual punishment. *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993).

For purposes of the present motion, the court will assume that plaintiff's ankle pain constitutes a serious medical condition. The dispositive issue in plaintiff's case, therefore, is whether defendants acted with deliberate indifference to plaintiff's medical needs. By plaintiff's own admission, since first reporting ankle pain on June 4, 2001, plaintiff has been evaluated at least twenty times: the medical staff at USPL has treated him sixteen times; an outside contract physician has conducted three orthopedic consultations; four x-rays have been performed; and he has been transported outside USPL for a visit to the specialized Center

¹ The court exercises its discretion to examine materials beyond the pleadings and will consider defendants' motion as one for summary judgment.

for evaluation and examination by means of an MRI and an EMG nerve study. Plaintiff also has been consistently prescribed numerous medications to address his ankle pain. Certainly, then, plaintiff cannot justifiably complain that defendants have deliberately ignored his ankle pain.

Nevertheless, plaintiff contends that defendant McCollum acted with intentional indifference by refusing to return plaintiff to the Center for a follow-up visit. However, it was McCollum who first referred plaintiff to the Center. Following plaintiff's MRI and EMG nerve study, which revealed nothing abnormal, the treating physicians offered a number of recommendations regarding plaintiff's ankle. Dr. Lisa Hermes "recommended" that plaintiff return to the Center for a follow-up visit. Dr. Richard E. Rattay stated that he would meet with plaintiff to discuss further options, and that plaintiff "made [sic] need an evaluation by an orthopedic foot specialist."

The court concludes that plaintiff has not offered any evidence that defendants intentionally disregarded the medical condition of his ankle, much less any evidence that would rise to the level of a constitutional violation. Defendants, or outside consultant physicians, evaluated plaintiff at least twenty times in the approximately twenty months from the time he first reported ankle pain until the date he filed his complaint. Additionally, defendants transported plaintiff to the Center in Leawood, Kansas, for two specialized tests and examination by several physicians. McCollum's decision to not return plaintiff to the Center for a follow-up came after plaintiff's testing did not reveal any abnormality in his ankle. McCollum, therefore, could not have been aware of any serious risk faced by plaintiff that required a return to the Center, much less intentionally denied plaintiff a medically necessary return visit. Plaintiff may have felt that a return to the Center was warranted, but plaintiff's difference in opinion regarding his desired medical care does not give rise to a constitutional claim. *See Olson*, 9 F.3d at 1477.

Plaintiff also asserts that he suffered an umbilical hernia because he had to constantly use crutches or a cane as a result of his ankle pain. Defendants contest the medical accuracy of plaintiff's theory of how he developed a hernia. Without addressing the medical basis for plaintiff's claim, the court concludes that he has not presented evidence that supports a constitutional violation. Plaintiff asserts that he developed an umbilical hernia because defendants were intentionally indifferent to his ankle pain. The court has already reviewed the medical attention that defendants provided to plaintiff, and the court concludes that no reasonable jury could find that defendants acted with deliberate indifference to plaintiff's medical needs. Even assuming that plaintiff developed a hernia as a result of using crutches and a cane, this unfortunate outcome was not the result of defendants ignoring plaintiff's ankle pain.

The court therefore concludes that defendants' motion for summary judgment is granted.

2. Qualified Immunity

Even if the court had not concluded that plaintiff has failed to present a constitutional violation, defendants would still enjoy qualified immunity from suit. Federal officials may assert a qualified immunity defense in *Bivens* suits. *Johnson v. Fankell*, 520 U.S. 911, 914 (1997). Qualified immunity shields officials performing discretionary functions from liability for civil damages when their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Id.* “For the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point,” and “[t]he contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates the right.” *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002) (quoting *Foote v.*

Spiegel, 118 F.3d 1416, 1424 (10th Cir. 1997)) (quoting *V-1 Oil Co. v. Means*, 94 F.3d 1420, 1423 (10th Cir. 1996)).

An inmate's Eighth Amendment right to adequate medical care is clearly established. However, no reasonable official would understand the contours of the right to require more treatment than defendants provided for plaintiff in this situation. McCollum's decision to not return plaintiff to the Center for a follow-up visit was a discretionary decision he made as a medical doctor. No reasonable official would conclude that his discretionary decision to forego a second visit to the Center, after the first visit revealed no abnormality, constituted a violation of plaintiff's civil rights.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (Doc. 35) is granted.

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment (Doc. 18) is denied, and plaintiff's Order to Show Cause and Temporary Restraining Order (Doc. 33), Plaintiff's Request for TRO Relief (Doc. 45), and plaintiff's Motion to Expedite Decision on Plaintiff's TRO Request (Doc. 46) are denied as moot.

Dated this 16th day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

