UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

DARRELL THURSTON, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 3:17-cv-832-SMY-GCS**
	)	
VIPIN SHAH,	)	
	)	
Defendant.	)	

REPORT & RECOMMENDATION

SISON, Magistrate Judge:

Plaintiff Darrell Thurston, Sr., who is incarcerated within the Illinois Department of Corrections, alleges that Defendant Vipin Shah was deliberately indifferent to his high blood pressure while Thurston was an inmate at Pinckneyville Correctional Center from 2013 through 2015. Now before the Court is Defendant Shah's motion for summary judgment for failure to exhaust administrative remedies (Doc. 40). The matter has been referred to the undersigned by District Judge Staci M. Yandle pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). For the reasons delineated below, it is **RECOMMENDED** that the Court grant Defendant's motion for summary judgment.

FINDINGS OF FACT

At all times relevant to his complaint, Plaintiff Darrell Thurston, Sr. was incarcerated at Pinckneyville Correctional Center. Defendant Vipin Shah, a doctor, treated Thurston's high blood pressure. According to Thurston, Dr. Shah prescribed him Clonidine from approximately April 2013 through early 2016 even though the medication caused Thurston's blood pressure to increase to dangerous levels. Thurston also alleged

that he unsuccessfully tried to pursue the IDOC grievance process but that prison officials did not process or return any of his submitted grievances related to his claims in this action, rendering the grievance process unavailable to him.

Defendant Shah's motion for summary judgment identified several grievances in the files at Pinckneyville and the Administrative Review Board ("ARB") submitted by Thurston, none of which related to his claims about his blood pressure medication. In his response, Thurston points to three grievances filed in 2016 that he argues are related to Dr. Shah's treatment of him. The first, dated March 25, 2016, complains about Wexford staff members and the effect that his medication had on his hypertension. (Doc. 49-1, p. 6-7). According to an affidavit submitted by Thurston, a grievance counselor returned the grievance to him, and he then submitted it to a grievance officer. The grievance officer never responded to the grievance. The copy of the grievance submitted by Thurston does not show a written response from a grievance counselor or any other official at Pinckneyville. It also shows a date of June 25, 2016, that was scratched out and replaced with March 25, 2016. (Doc. 49-1, p. 2, 6-7).

Thurston attached a second grievance dated June 15, 2016, to his response. The grievance also complained about the treatment he received from Wexford representatives at Pinckneyville for his hypertension. He marked the grievance as an emergency, and the Chief Administrative Officer ("CAO") marked the grievance as non-emergent on June 20, 2016. Thurston claims that he then submitted the grievance to his counselor, but his counselor never responded. (Doc. 49-1, p. 2, 9).

On July 29, 2016, Thurston submitted another grievance about the medication he received for his hypertension, among other complaints about staff at Pinckneyville. A grievance counselor responded on August 3, 2016. (Doc. 49-1, p. 12-13). Thurston claims in his affidavit that his counselor told him that she submitted the grievance to a grievance officer for him. (Doc. 49-1, p. 2). Defendants challenge that these grievances related to Thurston's hypertension, as he also complains in them about treatment by other prison and Wexford employees. They also argue that Thurston alleged that Dr. Shah's deliberate indifference ended in 2015 and that he should not be allowed to change course and bring in allegations from 2016.

The Court held an evidentiary hearing on October 10, 2016. At the hearing, Thurston testified about the general unavailability of the grievance process at Pinckneyville. He claims that inmates often submit grievances by placing them in a box, but that they are never returned with answers. He also testified that he would follow up as to the lack of response in writing, but jail officials failed to respond to his follow-up letters, as well. At one point, he also referred to the March 25, 2016 as the original he submitted and also referred to it as a copy of a grievance that was never returned to him.

LEGAL STANDARDS

Summary judgment is "proper if the pleadings, discovery materials, disclosures, and affidavits demonstrate no genuine issue of material fact such that [Defendants are] entitled to judgment as a matter of law." *Wragg v. Village of Thornton*, 604 F.3d 464, 467 (7th Cir. 2010). Lawsuits filed by inmates are governed by the provisions of the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. §1997e(a). That statute states, in pertinent part,

that "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *Id*. (emphasis added).

Generally, the Court's role on summary judgment is not to evaluate the weight of the evidence, to judge witness credibility or to determine the truth of the matter. Instead, the Court is to determine whether a genuine issue of triable fact exists. *See Nat'l Athletic Sportwear Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008). In *Pavey*, however, the Seventh Circuit held that "debatable factual issues relating to the defense of failure to exhaust administrative remedies" are not required to be decided by a jury but are to be determined by the judge. *Pavey v. Conley*, 544 F.3d 739, 740-741 (7th Cir. 2008).

The Seventh Circuit requires strict adherence to the PLRA's exhaustion requirement. *See, e.g., Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006)(noting that "[t]his circuit has taken a strict compliance approach to exhaustion"). Exhaustion must occur before the suit is filed. *See Ford v. Johnson*, 362 F.3d 395, 398 (7th Cir. 2004). Plaintiff cannot file suit and then exhaust his administrative remedies while the suit is pending. *Id.* Moreover, "[t]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison administrative rules require." *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2005). Consequently, if a prisoner fails to use a prison's grievance process properly, "the prison administrative authority can refuse to hear the case, and the prisoner's claim can be indefinitely unexhausted." *Dole*, 438 F.3d at 809.

In *Pavey*, the Seventh Circuit set forth procedures for a court to follow in a situation where failure to exhaust administrative remedies is raised as an affirmative defense. The Seventh Circuit stated the following:

> (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

Pavey, 544 F.3d at 742.

As an inmate confined within the Illinois Department of Corrections, Reed was required to follow the regulations contained in the Illinois Department of Correction's Grievance Procedures for Offenders ("grievance procedures") to exhaust his claims properly. *See* 20 ILL. ADMIN. CODE §504.800, *et seq*. The grievance procedures first require inmates to file their grievance with the counselor within 60 days of the discovery of an incident. *See* 20 ILL. ADMIN. CODE §504.810(a). The grievance form must:

> contain factual details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint. This provision does not preclude an offender from filing a grievance when the

> names of individuals are not known, but the offender must include as much descriptive information about the individual as possible.

20 ILL. ADMIN. CODE §504.810(c). Grievances that are unable to be resolved through routine channels are then sent to the grievance officer. *See* 20 ILL. ADMIN. CODE §504.820(a). The grievance officer will review the grievance and provide a written response to the inmate. *See* 20 ILL. ADMIN. CODE §504.830(a). "The Grievance Officer shall consider the grievance and report his or her findings and recommendations in writing to the Chief Administrative Officer within two months after receipt of the grievance, when reasonably feasible under the circumstances." 20 ILL. ADMIN. CODE §504.830(e). "The Chief Administrative Officer shall review the findings and recommendation and advise the offender of his or her decision in writing." *Id.*

If the inmate is not satisfied with the CAO's response, he or she can file an appeal with the Director through the ARB. *See* 20 ILL. ADMIN. CODE §504.850(a). The grievance procedures specifically state, "[i]f, after receiving the response of the Chief Administrative Officer, the offender still believes that the problem, complaint or grievance has not been resolved to his or her satisfaction, he or she may appeal in writing to the Director. The appeal must be received by the Administrative Review Board within 30 days after the date of the decision." 20 ILL. ADMIN. CODE §504.850(a). The inmate shall attach copies of the Grievance Officer's report and the CAO's decision to his appeal. *Id.* "The Administrative Review Board shall submit to the Director a written report of its findings and recommendations." 20 ILL. ADMIN. CODE §504.850(d). "The Director shall review the findings and recommendations of the Board and make a final determination

of the grievance within six months after receipt of the appealed grievance, when reasonably feasible under the circumstances. The offender shall be sent a copy of the Director's decision." 20 ILL. ADMIN. CODE §504.850(e).

The grievance procedures also allow an inmate to file an emergency grievance. *See* 20 ILL. ADMIN. CODE §504.840. In order to file an emergency grievance, the inmate must forward the grievance directly to the CAO who may "[determine that] there is a substantial risk of imminent personal injury or other serious or irreparable harm to the offender [such that] the grievance [should] be handled on an emergency basis." 20 ILL. ADMIN. CODE §504.840(a). If the CAO determines the grievance should be handled on an emergency basis, then the CAO "shall expedite processing of the grievance and respond to the offender indicating what action shall be or has been taken." 20 ILL. ADMIN. CODE §504.840(b). If the CAO determines the grievances "should not be handled on an emergency basis, the offender shall be notified in writing that he or she may resubmit the grievance as non-emergent, in accordance with the standard grievance process." 20 ILL. ADMIN. CODE §504.840(c). When an inmate appeals a grievance deemed by the CAO to be an emergency, "the Administrative Review Board shall expedite processing of the grievance." 20 ILL. ADMIN. CODE §504.850(f).

ANALYSIS

Thurston argues that administrative remedies were unavailable to him at Pinckneyville, pointing to the three grievances he attached to his responsive brief that do not contain responses from prison officials. A prisoner is not obligated to exhaust administrative remedies that are unavailable. *See Pyles v. Nwaobasi*, 829 F.3d 860, 864 (7th

Cir. 2016). "Administrative remedies are primarily 'unavailable' to a prisoner where 'affirmative misconduct' prevents prisoners from pursuing" them. *Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016)(quoting *Dole*, 438 F.3d at 809 (noting that remedies were unavailable where prison officials "do not respond to a properly filed grievance.")). Defendant argues that unavailability is irrelevant because the grievances Thurston points to do not relate to his claims in this case.

The undersigned did not find Thurston's testimony as to the unavailability of administrative remedies as to the specific claims in this case to be credible. Thurston claimed that he did not receive responses to his grievances and that it was not his fault that they were not fully exhausted, but the June 2016 and July 2016 grievances had responses from prison officials on them. The June grievance was determined to be a non-emergency on June 20, 2016. Thurston claims he then re-submitted it and never had it returned to him again, but, if he did, he would not have a copy of the CAO's June 20th response in his possession. Similarly, the July 2016 grievance had a response from the grievance counselor, but there is no response from a grievance officer or from the CAO, suggesting that Thurston did not fully pursue the grievance procedure through to exhaustion after his counselor returned the grievance to him.

The March 2016 grievance originally was dated June 25, 2016, but that date was scratched out and changed to March 25, 2016, and the undersigned is not convinced that it was submitted to a grievance counselor as Thurston describes. While Thurston's argument that the substance of these grievances is sufficiently on-point to provide notice to Pinckneyville is persuasive, the undersigned is not convinced that prison officials

thwarted Thurston's attempts to exhaust the grievances. As such, the grievance process was not unavailable to him, and Thurston failed to exhaust his administrative remedies prior to filing suit.

CONCLUSION

For the above-stated reasons, the undersigned **RECOMMENDS** that the Court **GRANT** Defendant Vipin Shah's motion for summary judgment (Doc. 39). It is further **RECOMMENDED** that the Court dismiss without prejudice Plaintiff Darrell Thurston, Sr.'s claims due to his failure to exhaust administrative remedies and close this case.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 73.1(b), the parties may object to any or all of the proposed dispositive findings in this Recommendation. The failure to file a timely objection may result in the waiver of the right to challenge this Recommendation before either the District Court or the Seventh Circuit Court of Appeals. *See, e.g.*, *Snyder v. Nolen*, 380 F.3d 279, 284 (7th Cir. 2004). Accordingly, objections to this Report and Recommendation must be filed on or before Tuesday, October 29, 2019.

IT IS SO ORDERED.

Dated: October 15, 2019.

Digitally signed by Magistrate Judge Gilbert C. Sison
Date: 2019.10.15 09:18:58 -05'00'

GILBERT C. SISON
United States Magistrate Judge