

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

JAMES E. BRENNAN, JR.

v.

C.A. NO. 08-419 S

A.T. WALL, ET AL.

MEMORANDUM AND ORDER

Jacob Hagopian, Senior United States Magistrate Judge

Presently before the Court is a motion filed by plaintiff James E. Brennan, Jr., *pro se*, entitled “Motion to Compel Defendants to Deliver Plaintiff to Dr. M. Azzouz, Specialist in the Field of Hemochromotosis and Liver Disease” (Docket # 30). Plaintiff cites no authority for his motion. Defendants have objected to this motion (Dockets ## 42 & 45). This matter has been referred to me for determination pursuant to 28 U.S.C. § 636(b). For the reasons that follow, plaintiff’s motion is DENIED.

First, while it is clear that plaintiff disagrees with the doctors he is seeing and the course of treatment the Rhode Island Department of Corrections is providing him, a prisoner has no constitutional right to choose his doctor or his course of treatment. *See Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993); *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988). Thus, the Court will not order defendants to deliver plaintiff to Dr. Azzouz for treatment purposes.

Additionally, to the extent that plaintiff is seeking a motion to compel a court ordered medical examination for discovery purposes pursuant to Rule 35 of the Federal Rules of Civil Procedure, his motion is misplaced. Federal Rule 35 empowers a court to “order a party whose mental or physical condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner ... [or] to order a party to produce for examination a

person who is in its custody or under its legal control.” Fed.R.Civ.P. 35(a). However, here it appears that plaintiff’s primary interest is obtaining treatment from Dr. Azzouz, and a plaintiff may not use Federal Rule 35 to obtain medical care and treatment or complain of deliberate indifference to medical needs. *See Green v. Branson*, 108 F.3d 1296, 1304 (10th Cir. 1997).

Further, Federal Rule 35 allows the court to compel a medical examination on the motion of an *opposing party*, it “does not vest the court with authority to appoint an expert to examine a party wishing an examination of himself.” *Brown v. U.S.*, 74 Fed. App’x 611, 614 (7th Cir. 2003); *see also Cabrera v. Williams*, No. 4:05CV3121, 2007 WL 2682163 at *2 (D.Neb. Sept 7, 2007); *Lindell v. Daley*, No. 02-C-459, 2003 WL 23111624 at *1-2 (W.D.Wis. June 30, 2003).¹

Additionally, plaintiff may not use Federal Rule 35 to obtain an expert medical witness at the court’s expense, as plaintiff seeks to do here. *Whaley v. Erickson*, No. 05-C-898, 2006 WL 3692633 at *2-3 (E.D.Wis. Dec. 11, 2006). “[T]he court is not obligated to subsidize the plaintiff’s litigation by paying for him to present expert witness testimony, even though he is proceeding *in forma pauperis*.” *Id.* at 3 (citing *McNeil v. Lowery*, 831 F.2d 1368, 1373 (7th Cir. 1987)(“A litigant’s constitutional right of access to the courts does not include a waiver of witness fees so that an indigent plaintiff can present his case fully to the court.”)).

¹Although Federal Rule 35 was amended in 1970 to give courts authority to order a party to “produce for examination a person who is in its custody or under its legal control,” it appears that this language was intended to allow courts to compel a parent, guardian or other person suing to recover injuries to a minor or other person under his or her control to produce such minor or other person on the motion of an opposing party. *See* 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §2233 (2d ed. 1994); *see also Lindell*, 2003 WL 23111624 at *1-2 (Federal Rule 35 allows court to compel production by parent or guardian of minor upon motion of opposing party; it is not intended for a situation where plaintiff wishes an examination of himself). It does not appear that the rule was designed for courts to compel defendant prison officials to bring a plaintiff prisoner to a medical examination at government expense upon a motion of the prisoner. *See Cunningham v. Orr*, No. Civ. S88-384, 1989 WL 516269 at *1 (N.D.Ind. May 8, 1989)(“Nothing in the Federal Rules of Civil Procedure pertaining to discovery, or Rule 35 which is specifically concerned with the physical and mental examination of persons, appears to contemplate or authorize a party to compel his or her own physical examination - the obvious assumption being that persons do not need court orders if they want to have themselves examined. Indeed, the Rules appear to make no allowance for prisoners who may be unable to have themselves examined in strict conformity with their wishes.”).

Accordingly, for the foregoing reasons, plaintiff's motion, seeking an order that he be delivered to Dr. Azzouz, a particular doctor of his choosing, is hereby DENIED.

IT IS SO ORDERED.

/s/ Jacob Hagopian
Jacob Hagopian
Senior United States Magistrate Judge
March 24, 2009