

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT R. OLESON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

05-C-33-C

Plaintiff Robert Oleson is proceeding in this civil action for monetary relief, brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. In his complaint, plaintiff alleges that on October 28, 2003, he suffered an electrical shock when he attempted to use a clothes dryer that had not been electrically grounded. He alleges that since the incident, he has had daily headaches, blurred vision in his left eye and intense pain in his left arm, limiting his ability to move it. On August 3, 2005, defendants filed an answer to plaintiff's complaint. Now plaintiff has filed a document that appears to be a reply to defendant's answer and a motion for a physical examination at government expense.

Plaintiff's reply to defendant's answer will not be considered, because Fed. R. Civ. P. 7(a) provides that a plaintiff may not submit a reply to an answer unless the court orders

him to and no such order has been made in this case. However, plaintiff should be aware that pursuant to Fed. R. Civ. P. 8(a), a party is deemed to deny averments in pleadings to which a response is not allowed. Therefore, although he is not permitted to respond to defendant's answer, the court considers that he has denied the averments contained in that answer.

As for plaintiff's motion for a physical examination, Fed. R. Civ. P. 35 allows a court to order the government to pay for a mental or physical examination of a party, but not in circumstances such as this. Rule 35 provides in part:

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner conditions, and scope of the examination and the person or persons by whom it is to be made.

Under this rule, the court could order plaintiff to submit to an examination at the request of the *opposing party*. Also, under proper circumstances, this rule would allow the court to compel a party who has a person in his or her custody or under his or her legal control to produce that person for a physical examination, on motion by an opposing party. For

example, a father suing to recover for injuries to his infant son allegedly sustained as the result of a defendant's negligence may be required to produce the son for a physical examination, on motion by the defendant.

The rule is not intended to cover a situation such as the one here, where plaintiff wishes an examination of himself. Obtaining evidence to prove his case is plaintiff's responsibility, not the government's. Plaintiff suggests no basis for an order compelling the government to pay for a physical examination, presumably by a doctor who is not working for the Department of Corrections. In any event, plaintiff does not explain why he needs a physical examination in order to prove his claims. Presumably, his own medical records will show his history of treatment for the ailments he alleges he sustained as a result of the electrical shock.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for a medical examination at government expense under Fed. R. Civ. P. 35 is DENIED; and

2. Plaintiff's reply to defendant's answer will not be considered.

Entered this 16th day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge