

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

-----  
EDUARDO M. PEREZ,

Petitioner,

v.

WIS. DOC EX-SEC. MICHAEL SULLIVAN,  
WIS. DOC SECRETARY, MATTHEW FRANK,  
BHS- DOC R/N SHARON ZUNKER,  
BHS NURSE MRS. WENDY DE MOTTS,  
in their personal and official capacities,

Respondents.  
-----

ORDER

05-C-711-C

Petitioner Eduardo Perez, a prisoner at the Stanley Correctional Institution in Oshkosh, Wisconsin, has submitted a proposed civil action pursuant to 42 U.S.C. § 1983 and requests leave to proceed in forma pauperis. In examining a certified copy of petitioner's trust fund account statement and reviewing this court's own financial records, I have discovered that petitioner is not paying the debt he incurred under the 1996 Prison Litigation Reform Act in connection with an appeal he filed in another lawsuit in this court, Perez v. Sullivan, 01-C-519-C.

Specifically, I find that on September 4, 2001, plaintiff's case no. 99-C-1228, which

was filed originally in the Eastern District of Wisconsin, was transferred to this court and assigned case no. 01-C-519-C. On May 1, 2002, I granted defendants' motion for summary judgment and closed the case. On May 6, 2002, plaintiff filed a notice of appeal. On May 29, 2002, I granted plaintiff leave to proceed in forma pauperis on appeal and directed him to submit an initial partial payment of the \$105 filing fee. Plaintiff paid the initial partial payment on June 6, 2002. He has made no further payment since that date.

In Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit cautioned prisoner litigants to keep a watchful eye on their accounts and insure that amounts owed under the Prisoner Litigation Reform Act are withdrawn on a monthly basis. "If in a given month the prison fails to make the required distribution from the trust account, the prisoner should notice this and refrain from spending funds on personal items until they can be applied properly." Id. at 776. Nonpayment of obligations a prisoner incurs under the Prisoner Litigation Reform Act for any reason other than destitution is to be understood as a voluntary relinquishment of the prisoner's right to file future suits in forma pauperis, just as if the prisoner had a history of frivolous litigation. Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996).

Petitioner is not destitute. In support of his request for leave to proceed in forma pauperis in this action, he has submitted a certified trust fund account statement for the period beginning June 9, 2005 and ending November 28, 2005. During this period,

petitioner has been receiving regular deposits into his account. This means that since at least July 2005, and probably earlier, petitioner has been obligated to direct the prison to use twenty percent of the preceding month's deposits in his account to pay off the debt he incurred when he filed his appeal in case no. 01-C-519-C.

Although failure to pay a debt incurred under the Prison Litigation Reform Act is a serious matter that ordinarily would result in a petitioner's being barred from filing any new lawsuit in forma pauperis until his previous debt is paid, there is one exception to this rule that applies in this case. Where, as here, the petitioner is alleging that he is under imminent danger of serious physical injury, he is to be allowed to proceed despite his past debt if he is financially eligible for pauper status. In this case, petitioner alleges that he is suffering severe pain stemming from arthritis in his spine and "chronic nerve root damage." He alleges that if respondents had approved surgery that was recommended in 1997 to laminate certain disks in his back, he would not be suffering the pain he experiences today. In addition, he alleges that in early 2004, he saw a neurosurgeon who performed a nerve root block treatment for his pain. Shortly after that, on March 10, 2004, the surgeon advised petitioner that although petitioner could not benefit from surgery, he would refer petitioner to the University of Wisconsin pain clinic for evaluation. Two months later, petitioner was taken to the pain clinic but his appointment was cancelled. Since that time, he has been told that another appointment will be made but as of the time he filed his complaint in this

court, he has not been scheduled for an appointment. Petitioner contends that he continues to experience severe pain.

In Ciarpaglini v. Saini, 352 F.3d 328 (7th Cir. 2003), the Court of Appeals for the Seventh Circuit overturned a district court's determination that the petitioner did not qualify for the exception to § 1915(g) was erroneous. In that case, the petitioner had alleged in his complaint that he was being denied prescribed medication for attention deficit hyperactivity disorder and panic disorder. The court ruled that harm that is imminent or occurring at the time the complaint is filed meets the imminent danger requirement. Id. at 330 (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003)). Section § 1915(g)'s imminent danger requirement is satisfied by petitioner's allegations that he is presently suffering severe pain and that respondents have delayed for nearly two years taking him to a pain clinic. Therefore, I will assess petitioner an initial partial payment of the fee for filing this case and take his complaint under advisement for screening as soon as the payment is received. However, petitioner will be expected to begin making payments immediately on the \$87.63 balance he owes for filing his appeal in case no. 01-C-519-C. Through a copy of this order to the warden of the Stanley Correctional Institution, I am advising him of petitioner's unpaid obligation and requesting that appropriate arrangements be made to begin collecting the \$87.63 balance owed using the mechanism set out in 28 U.S.C. § 1915(b)(2).

ORDER

IT IS ORDERED that petitioner is assessed \$6.71 as an initial partial payment of the \$250 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$6.71 on or before January 4, 2006. If, by January 4, 2006, petitioner fails to make the initial partial payment or show cause for his failure to do so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Further, IT IS ORDERED that petitioner is to arrange promptly to have 20% of each month's income sent to this court in accordance with 28 U.S.C. § 1915(b) until the \$87.63 balance he owes in case no. 01-C-519-C has been paid.

Entered this 13th day of December, 2005.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge