IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

DAVID ESTRADA,

ORDER

Plaintiff,

3:07-cv-442-bbc

v.

JAMES REED, M.D.,
MICHAEL CARR, HSA,
VIRGINIA JONES, HSA,
MR. HOBART, Warden, and
A. SALAS, Captain,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Plaintiff, a prisoner presently confined at the Federal Medical Center in Springfield, Illinois, is proceeding in this case on his claims that defendants were deliberately indifferent to a variety of medical needs plaintiff had while he was confined at the Oxford Correctional Institution, following a stroke he suffered in 2005.

For the third time in this case, plaintiff has moved for appointment of counsel. Both of plaintiff's earlier motions were denied as premature. When he filed the first motion, plaintiff had not made the threshold showing that he had made reasonable efforts to retain counsel and was unsuccessful. Subsequently, he made the showing by providing letters he

had received from lawyers who declined to represent him. I denied plaintiff's second motion because it was too early in the lawsuit to determine whether he is capable of litigating this case on his own.

Now plaintiff asks for appointment of counsel because he is "a layman without knowledge or experience of legal matters." He says he has relied on a "jail house lawyer" for legal assistance until now and is concerned that this individual will be leaving the Federal Medical Center in Springfield. In addition, plaintiff says that "[h]is hand and arm are both damaged by his stroke and [that he] may never again regain proper function."

The test for determining whether to appoint counsel is two-fold. "[T]he question is whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself. Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007).

To the extent that plaintiff is contending that he is at a disadvantage because he does not have the required legal knowledge or skills to litigate his case, this is a common situation for every pro se plaintiff. Plaintiff does not suggest that he has any mental impairments and his submissions to date suggest that he is at least as capable as the average pro se litigant to present his claims. Even if plaintiff were to lose the help of a jailhouse lawyer, he will be instructed at a preliminary pretrial conference soon to be set in this case about how to use the discovery techniques available to all litigants under the Federal Rules of Civil Procedure

so that he can gather the evidence he needs to prove his case. In addition, he will receive this court's procedures for filing or opposing dispositive motions and for calling witnesses, both of which were written for the very purpose of helping pro se litigants understand how these matters work. In sum, plaintiff's lack of familiarity with court procedures and his possible separation from a jailhouse lawyer are not exceptional circumstances warranting appointment of counsel.

With regard to plaintiff's concerns about his physical condition, plaintiff does not say that the loss of proper function of his hand and arm prevents him from drafting submissions in this case. Indeed, plaintiff does not say that the affected hand is his writing hand, although I will assume that it is. In any event, if plaintiff writes or types slower than the average person because of the effects of his stroke, he is free to ask the magistrate judge to take his physical condition into consideration as he sets the schedule for moving this case to resolution. I am not convinced that plaintiff's physical condition will prevent him from prosecuting his case.

With respect to the complexity of the case, there is nothing in the record to suggest that this case is factually or legally difficult. Plaintiff's case raises a straightforward Eighth Amendment claim of denial of medical care. The law governing this type of claim has been settled since Estelle v. Gamble, 429 U.S. 97, 103 (1976), and was explained to plaintiff in the order granting him leave to proceed.

As for the facts, plaintiff has personal knowledge of the treatment he did or did not get and he should be able to obtain access to his own medical records to corroborate this information. His medical records should show how long he was deprived of appropriate treatment and what injuries resulted, if any. If the treatment plaintiff was denied and the injuries he suffered are not beyond a layperson's grasp, he will not need an expert witness. Gil v. Reed, 381 F.3d 649, 659 (7th Cir. 2004) (citing Ledford v. Sullivan, 105 F.3d 354, 360 (7th Cir. 1997)). Even if plaintiff were to require a medical expert, he suggests no reason why he could not seek out such a professional witness on his own. If plaintiff is requesting counsel with the idea that he will be able to shift to the lawyer the cost of hiring an expert, he should understand that regardless whether he is represented by counsel, his indigent status does not do away with his obligation to pay the costs of deposing witnesses or hiring experts to testify on his behalf.

Finally, although it is true that prisoner cases raising Eighth Amendment claims of denial of medical care almost always present "tricky issues of state of mind and medical causation," Hudson v. McHugh, 148 F.3d 859, 862, n.1(7th Cir. 1998), the challenges that plaintiff faces in proving the facts of his case are the same challenges faced by every other pro se litigant claiming deliberate indifference to a serious medical need. Like the plaintiff in Hudson, plaintiff will have to prove defendants' state of mind and the medical causation for the injuries he suffered, if any. Such proof may well be difficult to come by. But the fact

that matters of state of mind and medical causation are tricky to prove is not sufficient reason by itself to find that plaintiff's case presents exceptional circumstances warranting appointment of counsel. If this obstacle alone were enough to require appointed counsel, then counsel would be mandated in such cases under the law. They are not. In Pruitt, the court of appeals emphasized that there are no "categorical rules regarding recruitment of counsel in particular types of cases." A judge has unfettered discretion to deny counsel if, in the opinion of the judge, the plaintiff has demonstrated that he is capable of litigating his case on his own.

Having examined carefully the complexity of this case against plaintiff's ability to litigate his claim, I conclude that plaintiff's motion for appointment of counsel should be denied.

ORDER

IT IS ORDERED that plaintiff's third motion for appointment of counsel is DENIED.

Entered this 22d day of January, 2008.

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