IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS SHELLEY,

Petitioner,

v.

DR. RENYOLDS,

Respondent.

ORDER

09-cv-30-bbc

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Petitioner Thomas Shelley, a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin, has filed a proposed civil complaint dated January 6, 2009, an affidavit that I construe as an attachment to his complaint and a request for leave to proceed in forma pauperis. He has struck out under 28 U.S.C. § 1915(g), which means that he cannot obtain indigent status under § 1915 in this or any other civil suit he files during the period of his incarceration unless his complaint alleges facts from which an inference may be drawn that he is in imminent danger of serious physical injury. After considering the facts that petitioner alleges in his complaint and its attachment, I will deny him leave to proceed in forma pauperis and dismiss the case because petitioner has failed to exhaust his administrative remedies.

In his complaint and its attachment, petitioner alleges the following facts:

ALLEGATIONS OF FACT

Petitioner Thomas Shelley is a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin. Respondent Renyolds is a doctor at the Jackson Correctional Institution. At some point in the past, petitioner was diagnosed by a Dr. Ticho and a Dr. Eggener with "ADHA, ADD, Acute Reaction and PTSD" (of which this court is able to identify at least Attention Deficit Disorder and Post-Traumatic Stress Disorder). Petitioner tried various medications and found that Adderall and Seroquel worked best for his illnesses. According to petitioner, Adderall was prescribed "to slow [his] reaction time. Seconds [he] need[s], before reacting without thought, gives focus, constration [sic], [and] maintains balance of my brain waves to the right levels." Seroquel is an anti-psychotic and helps with "mood, voices, anixety [sic], calm racing thoughts to sleep."

From at least 2005 to December 2008, petitioner was prescribed Adderall and Seroquel by several doctors, including those treating him while he was incarcerated in various Wisconsin prisons during this time period. Over this time, his doctors increased his dosages of these medications. A Dr. Smith at the Oakhill Correctional Institution increased petitioner's Adderall prescription twice in 2005-06. Petitioner met with a Dr. Decrest at the Dodge Correctional Institution three times between September 4, 2008 , and December 23,

2008. Decrest prescribed petitioner two 40 milligram doses of Adderall daily and two doses of Seroquel daily—50 milligrams at dinner time and 250 milligrams at bed time—which was an increase of what Dr. Eggener, petitioner's doctor outside of prison, had prescribed him.

Petitioner arrived at the Jackson Correctional Institution on December 23, 2008. He met with respondent Renyolds on January 6, 2009. This meeting lasted no longer than a minute and a half. At the meeting Renyolds discontinued petitioner's medications "due to Jackson's way, and medications are addicting." Renyolds did not prescribe anything new to treat petitioner's mental illnesses. Petitioner has experienced withdrawal from these medications in the past, and he knows without these medications he will not be able to sleep and he will have "an extremely painful, unnecessary experience."

DISCUSSION

28 U.S.C. § 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

On at least three or more prior occasions, petitioner has filed lawsuits or appeals that were dismissed as legally frivolous or because they failed to state a claim upon which relief may

be granted. See Shelley v. Bartels, 06-C-479-S (W.D. Wis. Sept. 19, 2006); Shelley v. Bailey, 07-C-231-S, (W.D. Wis. May 11, 2007); Shelley v. Hoenisch, 08-cv-107-bbc (W.D. Wis. May 10, 2008). Thus, he must prepay the filing fee for this lawsuit unless his complaint alleges that he is in imminent danger of serious physical injury.

In order to meet the imminent danger requirement of 28 U.S.C. § 1915(g), a petitioner must allege a physical injury that is imminent or occurring at the time the complaint is filed and the threat or prison condition causing the physical injury must be real and proximate. Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (citing Heimermann v. Litscher, 337 F.3d 781 (7th Cir. 2003); Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002)). In his complaint and supplement to the complaint, petitioner alleges that respondent discontinued his medication for treatment of various mental illnesses, and that he faces imminent painful symptoms of withdrawal.

I conclude that petitioner's complaint meets the imminent danger requirement of 28 U.S.C. § 1915(g). It is well-established that pro se complaints must be liberally construed. Ciarpaglini v. Saini, 352 F.3d at 330. Moreover, I must accept as true petitioner's claim that he is in imminent danger of extreme pain as a direct result of being denied his medications. Given this framework, I am inclined to accept petitioner's allegation that he faces imminent serious physical injury. Under Ciarpaglini, it is improper to adopt a "complicated set of rules [to discern] what conditions are serious enough" to constitute

"serious physical injury" under § 1915(g). Id. at 331. Therefore, petitioner need not prepay the $350 fee before submitting his claims to the court for consideration. It is appropriate for him to present his claims along with a request for leave to proceed in forma pauperis under 28 U.S.C. §§ 1915(a) and (b), as he has done here.

Once a complaint passes the "imminent danger" pleading requirement, it must still pass this court's screening process under 28 U.S.C. § 1915A. Ciarpaglini, 352 F.3d at 331. In an ordinary case, I would not screen petitioner's complaint until I received his initial partial payment of the filing fee under 28 U.S.C. § 1915(b)(1). However, this is not an ordinary case. It makes no sense to hold on the one hand that petitioner's complaint alleges facts from which an inference may be drawn that he faces imminent danger of serious physical injury, but to rule on the other hand that the case cannot move forward until some later date after the initial partial payment is made. Norwood v. Strahota, 08-cv-446 (W.D. Wis. Aug. 11, 2008). When petitioner's allegations are taken as true as they are required to be, they mandate a swifter response from the court. After all, as the court of appeals has acknowledged, § 1915(g) is just "a simple statutory provision governing when a prisoner must pay the filing fee for his claim." Ciarpaglini, 352 F.3d at 331. Therefore, I will not wait until an initial partial payment is made before screening the merits of his case under § 1915(e)(2).

After screening the merits of petitioner's claims, I must deny him leave to proceed in

forma pauperis and dismiss the case because petitioner has failed to exhaust his administrative remedies. Under the Prison Litigation Reform Act, "[n]o 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." 42 U.S.C. § 1997e(a). In Ford v. Johnson, 362 F.3d 395, 398-99 (7th Cir. 2004), the court held that a lawsuit is "brought" within the meaning of the exhaustion statute "when the complaint is tendered to the district clerk." Generally, to comply with § 1997e(a), a prisoner must "properly take each step within the administrative process," Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002), which includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), "in the place, and at the time, the prison's administrative rules require." Pozo, 286 F.3d at 1025. The purpose of these requirements is to give the prison administrators a fair opportunity to resolve the grievance without litigation. Woodford v. Ngo, 548 U.S. 81, 88-89 (2006). In addition, exhaustion promotes efficiency, as claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. Id.

Wisconsin inmates have access to an administrative grievance system governed by the procedures set out in Wis. Admin. Code §§ DOC 310.01-310.18. Under these provisions,

prisoners start the complaint process by filing an inmate complaint with the institution complaint examiner. Wis. Admin. Code §§ DOC 310.09, 310.10 or 310.16(4). An institution complaint examiner may investigate inmate complaints, reject them for failure to meet filing requirements or recommend to the appropriate reviewing authority (the warden or the warden's designee)that the complaint be granted or dismissed. Wis. Admin. Code § DOC 310.07(2). If the institution complaint examiner makes a recommendation that the complaint be granted or dismissed on its merits, the appropriate reviewing authority may dismiss, affirm or return the complaint for further investigation. Wis. Admin. Code § DOC 310.12. If an inmate disagrees with the decision of the reviewing authority, he may appeal to a corrections complaint examiner, who is required to conduct an additional investigation when appropriate, and make a recommendation to the Secretary of the Wisconsin Department of Corrections. Wis. Admin. Code § DOC 310.13. Within ten working days following receipt of the corrections complaint examiner's recommendation, the Secretary must accept the recommendation in whole or with modifications, reject it and make a new decision or return it for further investigation. Wis. Admin. Code § DOC 310.14.

Given the timing of petitioner's complaint it is clear he failed to follow this process for his concerns regarding his medications. Petitioner alleges that respondent discontinued his medications on January 6, 2009. Both his complaint and attachment to the complaint

are dated that same day, January 6, 2009. The last two paragraphs of the attachment to his complaint state that he received his morning dose of Adderall, that he did not receive his lunch dose of Adderall or his lunch and bed time doses of Seroquel, and that he knew from prior experience that without his medications he will not be able to sleep and he will have "an extremely painful, unnecessary experience." Thus it is apparent that petitioner wrote his complaint the same day respondent discontinued his medications, and he could not have possibly exhausted his administrative remedies before filing the complaint. Therefore I must deny him leave to proceed in forma pauperis and dismiss this case without prejudice. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (dismissal for failure to exhaust is always without prejudice).

ORDER

IT IS ORDERED that:

1. Petitioner Thomas Shelley's request for leave to proceed in forma pauperis on his Eighth Amendment claim is DENIED and this case is DISMISSED without prejudice because petitioner failed to exhaust his administrative remedies.

2. Petitioner is obligated to pay his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Jackson Correctional

Institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

3. The clerk of court is directed to close the file.

Entered this 30th day of January, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge