

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

ROBERT L. CAIN,)	
Plaintiff,)	Civil Action No. 7:99CV00898
)	
v.)	<u>Memorandum Opinion</u>
)	
FRED SHILLING, <u>et al.</u>,)	By: Samuel G. Wilson
Defendants.)	Chief United States District Judge

Robert Cain, a Virginia prisoner proceeding *pro se*, filed this action under 42 U.S.C. §1983 on December 10, 1999. Before Cain filed this complaint, at least three of his prior federal lawsuits, all of which were filed while Cain was incarcerated, had been dismissed for failure to state a claim on which relief could be granted. See Cain v. Miller, Civil Action No. 97-304-R (W.D. Va. May 28, 1997); Cain v. Rosenthal, Civil Action No. 3:93cv852 (E.D. Va. Nov. 2, 1994); and Cain v. Terry, Civil Action No. 2:90cv1532 (E.D. Va. Mar. 22, 1991). However, Cain was allowed to proceed *in forma pauperis* because at the time he filed the court found that the allegations in his complaint were sufficient to demonstrate that he was under “imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g). On January 26, 2000, Cain consented to paying the fee in installments as provided in §1915. However, the court has yet to collect any of the filing fee.

In his complaint, Cain names Dr. Wagner and Nurses Williams, Johnson, Looney and Flanary as defendants to the action.¹ Cain alleges that the defendants denied him proper medical treatment during his confinement at Wallens Ridge State Prison (“WRSP”).² Cain seeks monetary, injunctive,

¹ Cain originally named several other defendants. However, this court entered an order on March 13, 2000, dismissing all but the medical claims against the remaining defendants pursuant to its authority under 28 U.S.C. §1915(e)(2)(B). As a result of the court’s dismissal, several defendants were dropped from the action.

² Cain was transferred to WRSP in May, 1999. On January 2, 2001, Cain notified the court that he was transferred to Sussex One State Prison where he remains confined.

and declaratory relief. Defendants Wagner, Flanary, Looney, and Williams filed a motion for summary judgment on May 15, 2000. On June 1, 2000, defendant Johnson joined in that motion. On June 16, 2000, Cain filed a “Counter Motion for Summary Judgment and Motion to Strike the Defendants’ Motion for Summary Judgment.” After resolving various discovery issues, on October 20, 2000, this court granted Cain’s request for an enlargement of time in which to supplement his response to the defendant’s motion for summary judgment. Cain’s time to supplement his response has run; he has filed no additional response. Because evidence in the record placed Cain’s initial assertions of existing imminent physical danger in question, this court conducted a hearing on that discrete issue to determine whether Cain had satisfied the requirement under §1915(g) for proceeding *in forma pauperis*.

Under 28 U.S.C. §1915, as amended by the Prisoner Litigation Reform Act, a prisoner shall not be allowed to proceed *in forma pauperis* in a civil action or appeal if that inmate has, while incarcerated, brought an action or appeal that was dismissed because it was frivolous, malicious, or failed to state a claim upon which relief could be granted on three or more occasions. 28 U.S.C. 1915(g). However, a prisoner with three strikes does not have to pay the filing fee up front if he can show that he “is under imminent danger of serious physical injury.” *Id.* In order to determine what showing an inmate need make if he asserts that he is “under imminent danger of serious physical injury,” the court must look to the plain language of the section. The wording of the section uses the present tense which indicates that in order to qualify for the exception, the inmate must demonstrate that he is under imminent danger at the time of filing his action or appeal. Banos v. O’Guin, 144 F.3d 883, 884 (5th Cir. 1998). Furthermore, Congress revised §1915 to discourage inmates from filing frivolous lawsuits. *Id.* citing H.R.REP., No. 104-21, §202, at 22 (1995). Therefore, even inmates

who qualify for *in forma pauperis* status under §1915(b) must pay the full filing fee, but may do so in installments while their actions proceed in court. Banos, 144 F.3d at 884 (5th Cir. 1998). For those inmates that have abused the privilege to proceed *in forma pauperis*, §1915(g) acts to prevent them from proceeding on their claims until the filing fee is paid in full. Id. at 885. When such a delay threatens “imminent danger of serious physical injury,” the inmate must be allowed to proceed *in forma pauperis*. Id. Therefore, the statute is best effectuated by determining whether the imminent danger exists for the inmate at the time of filing the action or appeal. Id. See also Ashley v. Dilworth, 147 F.3d 715 (8th Cir. 1998); Abdul-Akbar v. McKelvie, 239 F.3d 307 (3rd Cir. 2001).

At the hearing, the following testimony was adduced. According to Cain, he has suffered from asthma all of his life, and for the past ten to fifteen years, suffered with COPD, a cardio pulmonary disorder. At the hearing, Cain admitted that he received a breathing treatment for his asthma on December 9, 1999, the day before he filed the instant action. Also on December 8, 1999, he had an EKG to monitor his heart. In fact, Cain admitted that numerous EKGs and breathing treatments had been administered in efforts to monitor and abate his suffering. Cain agreed that he had been prescribed inhalers and nitroglycerin for his chronic conditions. Defendants presented Cain’s medical records at the hearing to show that Cain had been seen several times by members of the medical staff from late November through January of 2000. While the defendants concede that Cain has chronic conditions, they maintain that those conditions have been monitored and that Cain has received the treatments that are available. Cain’s own testimony corroborates these assertions.

The determination as to whether Cain was under imminent danger of serious physical injury at the time he filed his action is necessarily one of fact. While there are conflicts in the record that could not be resolved under the summary judgment standard, the court is not so constrained under

§1915(g). Under §1915(g) there is only one relevant issue and the burden is on the plaintiff to establish that he has met the standard. Here, Cain admits that he received treatment on several occasions. The gravamen of Cain's complaint is that he did not receive the treatment he believes is necessary. That, however, is not the issue under §1915(g).

Based on Cain's initially unchallenged allegations, this court concluded that Cain had made the requisite showing under §1915(g) when he first filed. However, given Cain's testimony at the hearing and the medical records and affidavits produced by the defendants, this court finds that its initial conclusion was incorrect. Cain has not met his burden of establishing that he was under imminent danger of serious physical injury at the time he filed his complaint. As such, the privilege of proceeding *in forma pauperis* will be revoked, and Cain's complaint will be dismissed under 28 U.S.C. 1915(g).

An appropriate order will be entered this day.

ENTER: This _____ day of March, 2001.

Chief United States District Judge

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ROBERT L. CAIN,)	
Plaintiff,)	Civil Action No. 7:99CV00898
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v.)	<u>Order</u>
)	
FRED SHILLING, <u>et al.</u>,)	By: Samuel G. Wilson
Defendants.)	Chief United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby

ORDERED AND ADJUDGED

that this action is **DISMISSED** without prejudice pursuant to 28 U.S.C. §1915(g). All other pending motions are **DISMISSED** as moot; the matter is **STRICKEN** from the active docket of the court.

Cain is advised that he may appeal this decision by filing a notice of appeal in this court within thirty (30) days of the date of entry of this Order in accordance with Rules 3 and 4 of the Federal Rules of Appellate Procedure.

The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to plaintiff and to counsel of record for the defendants.

ENTER: This _____ day of March, 2001.

Chief United States District Judge