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DISTRICT COURT OF GUAM

CHARLES WEATHERBY,
Plaintiff,

vs.

JOSE B. PALACIOS, Director of Guam
Department of Corrections; JOSEPH
AFAISENT, Administrator Diagnostic and
Treatment Services of Guam Department of
Corrections; LINDA ORTIZ, Caseworker III
at the Guam Department of Corrections; DR.
YOUNG CHANG, Physician of the Guam
Department of Corrections; CHRISTINA
TOVES, Casworker of the Guam Department
of Corrections,
Defendants.

Civil Case No. No. 10-00021

**ORDER RE: APPLICATION TO
PROCEED WITHOUT PREPAYMENT
OF FEES, MOTION FOR SERVICE OF
PROCESS BY UNITED STATES
MARSHAL, AND MOTION FOR
APPOINTMENT OF COUNSEL**

This matter comes before the court on the Application to Proceed without Prepayment of Fees, Motion for Service of Process by United States Marshals and Motion for Appointment of Counsel, filed by the Plaintiff Charles Weatherby on August 4, 2010. *See* Docket Nos. 2, 3, and 4.

A. Request to proceed without prepayment of fees

The Plaintiff is an inmate confined at the Guam Department of Corrections (“DOC”). *See* Docket No. 1. The court has reviewed Plaintiff’s application and affidavit, which indicates that he is not employed at DOC, does not receive any payment from DOC, and has no cash, checking or savings accounts. *See* Docket No. 4. Furthermore, the Plaintiff has not received any money from any source in the last twelve months. *See id.*

1 The court finds that the Plaintiff has sufficiently shown that he is unable to pay the fees
2 required to maintain this action. Therefore, the Application to Proceed Without Prepayment of Fees
3 is hereby **GRANTED**.

4 **B. Request for service by U.S. Marshals Service**

5 The Plaintiff has requested that service of the summons and complaint be effected by the
6 U.S. Marshals Service. *See* Docket No. 3. The Ninth Circuit has held that “an incarcerated pro se
7 plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the
8 summons and complaint.” *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990). Based on this
9 court’s finding that the Plaintiff is qualified to proceed in forma pauperis, he therefore “is entitled
10 to rely on the U.S. Marshal for service of the summons and complaint.” *Id.* Accordingly, the
11 Motion is hereby **GRANTED**.

12 **C. Motion for appointment of counsel**

13 The Plaintiff requests the court to appoint counsel to assist him in his case. *See* Docket No.
14 2. He contends that the issues in the case are complex and will require investigation that cannot be
15 undertaken while he is in DOC custody. *See id.* He further contends, *inter alia*, that the DOC Law
16 Library lacks legal materials and that he has limited knowledge of the law, and that counsel would
17 be able to explain to him the legal principles and limit litigation to meritorious claims. *See id.*

18 28 U.S.C. § 1915 (e)(1) provides for the appointment of counsel, and states: “The court may
19 request an attorney to represent any person unable to afford counsel.” However, an appointment
20 pursuant to this statute is discretionary, not mandatory. *United States v. \$292,888.04 in U.S.*
21 *Currency*, 54 F.3d 564, 569 (9th Cir. 1995).¹ “Generally, a person has no right to counsel in civil
22 actions.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). An appointment of counsel in a
23 civil case requires a court to find that “exceptional circumstances” exist. *Terrell v. Brewer*, 935 F.2d
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26 ¹ This case cites § 1915(d), the former codification of 28 U.S.C. § 1915(e)(1). Section
27 1915(d) stated: “The court may request an attorney to represent any such person unable to employ
counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action
is frivolous or malicious.”

1 1015, 1017 (9th Cir. 1991).² “A finding of exceptional circumstances requires an evaluation of both
2 ‘the likelihood of success on the merits [and] the ability of the petitioner to articulate his claims pro
3 se in light of the complexity of the legal issues involved.’” *Wilborn v. Escalderon*, 789 F.2d 1328,
4 1331 (9th Cir. 1986) (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). “Neither of
5 these factors is dispositive and both must be viewed together before reaching a decision on request
6 of counsel . . .” *Id.* Therefore, the court examines the Plaintiff’s claims and to determine whether
7 “exceptional circumstances” exist.

8 **1. Likelihood of success on the merits**

9 The Plaintiff’s action is made pursuant to 42 U.S.C. § 1983, and he alleges that the
10 defendants’ failure to provide him with medical treatment amounts to deliberate indifference and
11 violates his constitutional rights. The Plaintiff argues he has not received dentures or treatment
12 for his gallstones. He contends that he “is suffering from acute physical conditions and is in urgent
13 need of medical care that the defendants have failed to provide. As a result, plaintiff suffers from
14 pain and discomfort due to his medical conditions.” *See id.*

15 According to the Plaintiff, he was already missing eight teeth when he was incarcerated in
16 September 2003, and in between March to May 2006, five more teeth were removed. *See* Docket
17 No. 1. He was never taken for another appointment after these extractions. *See id.* He submitted
18 Remedy Requests on October 31, 2006 and July 27, 2007, asking to be provided with dentures, but
19 no appointments were ever scheduled. *See id.* The Plaintiff filed a grievance on August 9, 2007 and
20 met with Caseworker Linda Charfauros, who advised that there would need to be a treatment
21 estimate and that he was one of several inmates waiting for dentures. The Plaintiff suffered from
22 severe toothaches in July and August 2008, and was given Motrin and antibiotics, and again advised
23 that an appointment with a dentist would be made. *See id.* He filed a Grievance on August 16,
24 2008, and again on May 3, 2009, as well as another Remedy Request on June 8, 2009. *See id.* To
25 date, the Plaintiff has not seen a dentist nor has he received dentures.

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27 ² *Terrell* interpreted § 1915(d). *See supra*, note 1.

1 The Plaintiff also complains that he has not received treatment for his gallstones. *See id.* He
2 contends that on April 8, 2009, he was suffering from severe pain and a fever. He was diagnosed
3 by Defendant Chang as having a kidney infection and was prescribed antibiotics and Motrin. *See*
4 *id.* He received antibiotics on April 11, 2009, but did not receive the Motrin. He continued to
5 experience fever, pain, and swelling. *See id.* On April 12, 2009, his condition worsened and he was
6 brought to the Guam Memorial Hospital, where he was told that he was suffering from a severe
7 urinary tract infection and a high blood sugar level. The doctor also told the Plaintiff that he had
8 gallstones, which should be treated before the condition became more serious. *See id.* On April 13,
9 2009, the Plaintiff was seen by Defendant Chang, who said that the Plaintiff did not need medication
10 for his high blood sugar, and that the gallstones would not be treated because the Plaintiff was not
11 in pain. The Plaintiff submitted Remedy Requests on June 8, 2009 and August 11, 2010. *See id.*
12 To date, the Plaintiff has not been scheduled to see a specialist about his gallstones and has not
13 received any treatment for his gallstones.

14 “An inmate’s complaint of inadequate medical care amounts to a constitutional violation if
15 the inmate alleges ‘acts or omissions sufficiently harmful to evidence deliberate indifference to
16 serious medical needs.’” *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990) (quoting
17 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Therefore, this court examines whether the Plaintiff
18 can show: 1) “deliberate indifference” by prison officials; 2) to the Plaintiff’s “serious medical
19 needs.” *Estelle*, 429 U.S. at 104. Both factors are examined below.

20 To find deliberate indifference, the court asks whether a prison official “knows of and
21 disregards an excessive risk to inmate health and safety.” *Farmer v. Brennan*, 511 U.S. 825, 837
22 (1994). “[W]e scrutinize the particular facts and look for substantial indifference in the individual
23 case, indicating more than mere negligence or isolated occurrences of neglect. . . . Prison officials
24 are deliberately indifferent to a prisoner’s serious medical needs when they ‘deny, delay or
25 intentionally interfere with medical treatment.’” *Wood*, 900 F.2d at 1334 (quoting *Hutchinson v.*
26 *United States*, 838 F.2d 390, 394 (9th Cir.1988)). The Plaintiff’s teeth were extracted more than
27 four years ago. *See* Docket No. 1. Since that time, he has filed three Remedy Requests and two

1 grievances regarding his dental treatment. On his June 8, 2009 Remedy Request is a notation
2 indicating that the treatment plan is \$6,000 and pending approval from the DOC director. *See*
3 Docket No. 1, Exh. G. To date, the Plaintiff has not seen a dentist for dental treatment.

4 The Plaintiff's case can be analogized to *Hunt v. Dental Dep't*, 865 F.2d 198 (9th Cir. 1989),
5 where a delay of three months in providing treatment for the plaintiff's serious dental problems
6 (including loss of dentures and inability to eat properly) was "sufficient to state a claim of deliberate
7 medical indifference under section 1983" to overcome summary judgment. *Id.* at 199. The Ninth
8 Circuit held that standing alone, delay in dental treatment is not a violation of constitutional rights,
9 *id.*, but the issue in Plaintiff's case is not solely delay in receiving treatment. The Plaintiff alleges
10 that he has been unable to eat and has been on a soft food diet for four years, has suffered from
11 dental infections, and still has not received dentures. Since June 2009, he has been waiting for
12 approval for his dental treatment. *See* Docket No. 1, Exh. G. "Dental care is one of the most
13 important medical needs of inmates." *Hunt*, 865 F.2d at 199 (quoting *Ramos v. Lamm*, 639 F.2d
14 559, 576 (10th Cir. 1980)). The Plaintiff's dental condition constitutes a serious medical need.
15 Thus, there may be a likelihood of success on the merits of this claim.

16 The same cannot be said for the Plaintiff's second claim regarding treatment of gallstones.
17 The Plaintiff was told by the hospital doctor on April 12, 2009 that he had "severe gallstones" and
18 that he needed "to look into it before it becomes a more serious problem." Docket No. 1. The next
19 day, Defendant Chang told the Plaintiff since he "was not in pain from his gallstones, [Defendant
20 Chang] was not going to do anything about [the gallstones] because . . . D.O.C. does not have the
21 money to spend on treatment." Docket No. 1. The Plaintiff disagrees with Defendant Chang's
22 conclusion that there was "no urgency" as to gallstones, and seemingly argues that Defendant Chang
23 should defer to the hospital doctor's opinion that the gallstones should be treated immediately.

24 This dispute constitutes a difference in opinion as to treatment. "A difference of opinion"
25 between medical professionals as to the appropriate course of treatment does not amount to
26 deliberate indifference to serious medical needs. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).
27 "A difference of opinion between a prisoner-patient and prison medical authorities regarding

1 treatment does not give rise to a s 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir.
2 1981). For the Plaintiff to successfully challenge this decision, he must show that the course
3 followed by Defendant Chang was “chosen ‘in conscious disregard of an excessive risk to [the
4 prisoner’s] health.’” *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (quoting *Jackson v.*
5 *McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)). He has not made this showing. Rather, the record
6 shows that the Plaintiff received treatment for his urgent medical condition when he was given
7 antibiotics for his kidney infection and then treated at the hospital for his urinary tract infection.

8 Thus, although there may be a likelihood of success on the merits on the claim regarding
9 Plaintiff’s dental treatment, there is no likelihood of success as to the claim regarding treatment for
10 gallstones.

11 **2. Complexity of the issues**

12 The second factor requires evaluation of the Plaintiff’s ability to articulate his claims in light
13 of the complexity of the issues raised. The Plaintiff contends that he needs an attorney to assist him,
14 as he has a limited knowledge of the law, DOC does not provide inmates with legal assistance from
15 those trained in the law, and the DOC Law Library lacks legal materials. Moreover, he argues that
16 the case will require investigation and that appointed counsel would give him “representation
17 equally qualified with the professional counsel provided by the Government of Guam for the
18 defendants.” Docket No. 2. Finally, he argues that “the ends of justice would be served” if counsel
19 were appointed in this case. *See id.*

20 Contrary to the Plaintiff’s contention, the issues in this case are not complex. Quite simply,
21 he challenges the DOC’s responses to his requests for treatment of his dental condition and
22 gallstones. Furthermore, the court is not persuaded by his argument that investigation is needed.

23 The Ninth Circuit has recognized:

24 Most actions require development of further facts during litigation and a pro se
25 litigant will seldom be in a position to investigate easily the facts necessary to
26 support the case. If all that was required to establish successfully the complexity of
the relevant issues was a demonstration of the need for development of further facts,
practically all cases would involve complex legal issues.

27 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (footnote omitted). The record in the

1 case, including Plaintiff's pro se court documents and the exhibits (his communications to DOC),
2 reveal that he is able to articulate his arguments. This factor weighs against a finding of exceptional
3 circumstances.

4 **3. Conclusion**

5 The court concludes that the Plaintiff has demonstrated a likelihood of success on the merits
6 of one claim he raised. However, he has not shown that the complexity of the issues involved is
7 sufficient to require the appointment of an attorney. Accordingly, the court finds that the Plaintiff
8 has not demonstrated exceptional circumstances to warrant the appointment of counsel pursuant to
9 § 1915(e)(1). Therefore, his Motion for Appointment of Counsel is **DENIED**.

10 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Sep 14, 2010