

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALBERT MALCOM,)
)
 Plaintiff,)
)
 v.) Civ. No. 02-465-SLR
)
 VETERANS ADMINISTRATION,)
)
 Defendant.)

MEMORANDUM ORDER

On May 31, 2002, pro se plaintiff Albert Malcom ("Malcom") filed this 42 U.S.C. § 1983 action alleging that defendant Veterans Administration ("VA") refused to provide dental treatment following his discharge from military service in Vietnam. (D.I. 1) In response, the VA moved to transfer the case pursuant to 28 U.S.C. § 1631 and 38 U.S.C. § 7252 or, in the alternative, to dismiss under Fed.R.Civ.P. 12(b)(1)(6) and (h)(3). (D.I. 16) Malcom filed responses to the motion. (D.I. 18, 19) By the November 7, 2003 Memorandum Order, the court granted defendant's motion to transfer to the United States Court of Appeals for Veterans Claims ("Veterans Claims Court") and denied as moot the motion to dismiss. (D.I. 22) Consistent with the decision, the entire case file was sent to the Veterans Claims Court in Washington, D.C. for resolution. (D.I. 23)

On April 12, 2004, the Veterans Claims Court ordered the case transferred back to this court. (D.I. 26, 27) Essentially, the court found that Malcolm's claim was being reviewed by a VA

regional office and to the extent that he alleged violations under 42 U.S.C. § 1983, the court concluded it lacked jurisdiction to review those allegations pursuant to 38 U.S.C. § 7252. (D.I. 27) After Malcom's file and docket were returned to Delaware, this court entered a scheduling order setting discovery and motions deadlines. (D.I. 28, 29)

On May 6, 2004, the VA renewed its motion to dismiss and moved to stay discovery, notwithstanding the July 21, 2004 discovery deadline imposed by the court. (D.I. 30, 31) The VA contends that Malcom has not raised any civil rights allegations necessary to implicate relief under § 1983. Malcom filed a letter response expressing his intention to pursue this lawsuit "to the end" and indicating that X-rays will demonstrate that his injury occurred in Vietnam and, accordingly, warrants compensation. (D.I. 33)

It is well-settled that a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to appointed counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). It is within this court's discretion, however, to seek representation by counsel for plaintiff, but this effort is made only "upon a showing of special circumstances indicating the likelihood of substantial prejudice to [plaintiff] resulting from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but

arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); accord Tabron v. Grace, 6 F.3d 147, 155 (3d Cir. 1993) (representation by counsel may be appropriate under certain circumstances, after a finding that a plaintiff's claim has arguable merit in fact and law).

The convoluted administrative and judicial posture of this case warrant referral to the Federal Civil Panel for the purpose of finding plaintiff representation.

Therefore, IT IS ORDERED this 24th day of September, 2004, that:

1. The Clerk of Court is directed to refer representation of plaintiff to a member of the Federal Civil Panel.

2. Defendant's motions to dismiss and to stay discovery are denied without prejudice to renew. (D.I. 30)

3. This case is stayed pending the results of the Federal Civil Panel's review.

Sue L. Robinson
United States District Judge