

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION**

BILLY J. KAIN, JR.
ADC #83093

PLAINTIFF

v.

Case No. 1:18-cv-00047-KGB/JJV

MARTY HEARYMAN, Doctor,
North Central Unit, Arkansas Department
of Correction; et al.

DEFENDANTS

ORDER

Before the Court are the Proposed Findings and Recommendations submitted by United States Magistrate Judge Joe J. Volpe (Dkt. No. 4). Plaintiff Billy J. Kain, Jr. filed objections to the Proposed Findings and Recommendations (Dkt. No. 5). After a review of the Proposed Findings and Recommendations and Mr. Kain's objections, as well as a *de novo* review of the record, the Court adopts the Proposed Findings and Recommendations as its findings in all respects (Dkt. No. 4).

In the Proposed Findings and Recommendations, Judge Volpe recommends denying Mr. Kain's application to proceed *in forma pauperis* ("IFP") or without prepayment of fees "because he is a three-striker, as defined by 28 U.S.C. § 1915(g), who failed to demonstrate that he is currently in imminent danger of serious physical injury." (Dkt. No. 4, at 2). "[A]n otherwise ineligible prisoner is only eligible to proceed IFP if he is in imminent danger *at the time of filing.*" *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998). In his objections, Mr. Kain asserts that he has sustained a shoulder injury and right knee injury, "which was seen by [an] orthopedic surgeon who recommended complete knee replacement" (Dkt. No. 4, at 2-3). Mr. Kain further states that he has "serious problems with [his] shoulder after four months with it still out of place and it's affecti[ng] the [rotator cuff]" (*Id.*, at 3). Mr. Kain also states that "[a]ny lifting is out of the

question with the right shoulder, no laying on [his] right side, losing feeling when [he] moved a certain way” (*Id.*). Mr. Kain attaches documents to his objections, including request and grievance forms, that do not show he was in imminent danger of serious physical injury at the time of his filing. For example, in a response to Mr. Kain’s grievance from April 24, 2018, where Mr. Kain complained about his shoulder injury, a prison official wrote that Mr. Kain previously saw separate defendant Dr. Marty Hearyman, the prison doctor, and “ortho[pedic] surgery was not recommended.” (Dkt. No. 4, at 20). For these reasons, the Court finds that there is no evidence that Mr. Kain was in imminent danger of serious physical injury.

Because Mr. Kain has failed to submit the statutory filing fee and has not shown that he was in imminent danger of serious physical injury, the Court dismisses without prejudice Mr. Kain’s complaint (Dkt. No. 2). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from this Order and the accompanying Judgment would not be taken in good faith.

So ordered this 11th day of February, 2019.



Kristine G. Baker
United States District Judge