Sarner v. Astrue Doc. 39

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----X
PHILIP SARNER,

Plaintiff,

MEMORANDUM & ORDER 08-CV-3281(JS)

- against -

MICHAEL J. ASTRUE, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,

Defendant.

-----X

APPEARANCES:

For Plaintiff: Philip Sarner, <u>Pro Se</u>

09-A-1529

Bare Hill Correctional Facility

Caller Box #20 181 Brand Road

Malone, NY 12953-0020

For Defendant: James Halleron Knapp, Esq.

United States Attorneys Office Eastern District of New York

610 Federal Plaza

Central Islip, NY 11722

Michelle L. Christ, Esq.

United States Attorney's Office Eastern District of New York 271 Cadman Plaza East, 7th Floor

Brooklyn, NY 11201

SEYBERT, District Judge:

On August 13, 2008, pro se Plaintiff, Philip Sarner, commenced this action in forma pauperis, seeking review of an administrative law judge's decision pursuant to 42 U.S.C. § 405(g). Pending before the Court is Plaintiff's motion for appointment of counsel. For the reasons set forth below, Plaintiff's request is denied at this juncture.

Pursuant to 28 U.S.C. § 1915(e)(1), courts may appoint an

attorney to represent someone unable to afford counsel. Courts possess broad discretion when determining whether appointment is appropriate, "subject to the requirement that it be 'guided by sound legal principle.'" Cooper v. A. Sargenti Co., Inc., 877 F.2d 170, 171-72 (2d Cir. 1989) (quoting Jenkins v. Chemical Bank, 721 F.2d 876, 879 (2d Cir. 1983)). The Second Circuit set forth the guiding legal principle as follows:

[T]he district judge should first determine whether the indigent's position seems likely to be of substance. If the claim meets this threshold requirement, the court should then consider the indigent's ability to investigate crucial the facts, whether conflicting evidence implicating the need cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

<u>Hodge v. Police Officers</u>, 802 F.2d 58, 61-62 (2d Cir. 1986).

The Second Circuit has explained that these factors are not restrictive and that "[e]ach case must be decided on its own facts." Id. at 61. A developed record assists the court in this regard. See Brooks v. New York, No. 92-CV-1508, 1992 WL 320402, at *3 (S.D.N.Y. Oct. 29, 1992) (denying, without prejudice, appointment of counsel based on pleadings' failure to satisfy Hodge's required threshold showing of likely merit).

In the instant case, Plaintiff seeks review of an administrative law judge's decision pursuant to 42 U.S.C. § 405(g).

The Court has reviewed Plaintiff's application and finds that the

appointment of counsel is not warranted at this stage of the

litigation because Plaintiff has not satisfied the threshold

requirement of Hodge. Moreover, even apart from the threshold

requirement, the Court is unable to conclude at this juncture in

the litigation--after considering the above referenced <u>Hodge</u>

factors in the context of the Complaint--that the appointment of

counsel is warranted.

Accordingly, Plaintiff's application for appointment of

counsel is DENIED. However, the Court may appoint counsel on its

own accord at a later point, without Plaintiff's reapplication, if

it finds that the circumstances of the proceeding have changed such

that appointment of counsel is warranted.

SO ORDERED.

<u>/s/ JOANNA SEYBERT</u>

Joanna Seybert, U.S.D.J.

Dated:

January <u>15</u>, 2010

Central Islip, New York

3