

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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|--|---|------------------------------------|
| ALFONSO PERCY PEW, <i>Mental</i> |) | 1:16cv60 |
| <i>Health Inmate Stability Code C,</i> |) | Electronic Filing |
| |) | |
| Plaintiff, |) | Judge David Stewart Cercone |
| |) | Magistrate Judge Lisa Pupo Lenihan |
| v. |) | |
| |) | |
| BRUCE SIMMONS and UNKNOWN |) | |
| DOE, |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM ORDER

Plaintiff, Alfonso Percy Pew (“Plaintiff”), initiated this action in the United States District Court for the Eastern District of Virginia on February 9, 2016, with the filing of a civil rights complaint and a motion for leave to proceed *in forma pauperis* (“IFP”). (ECF Nos. 1, 2.) Because venue was improper in that district, the Eastern District of Virginia transferred the case to this Court on March 16, 2016. (ECF No. 4.) On April 7, 2016, Plaintiff’s IFP motion was mistakenly granted. (ECF No. 7.) On April 18, 2016, the case was reassigned to United States Magistrate Judge Lisa Pupo Lenihan for review in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rules of Court 72.C and 72.D.

On April 21, 2016, the Magistrate Judge issued a Report and Recommendation wherein she recommended that the Order granting Plaintiff’s IFP motion be vacated and that his IFP motion be denied in accordance with 28 U.S.C. § 1915(g). (ECF No. 9.) The Magistrate Judge determined that Plaintiff had incurred three or more “strikes,” and, therefore, pursuant to the dictates of 28 U.S.C. § 1915(g), he cannot proceed *in forma papueris*. She also determined that

Plaintiff had not met the threshold showing of imminent danger of serious physical injury in order to avail himself of the “imminent danger” exception to § 1915(g). It was therefore recommended that this action be dismissed without prejudice and reopened when Plaintiff paid the full \$400.00 filing fee. Id.

Plaintiff filed timely Objections to the Magistrate Judge’s Report and Recommendation. (ECF No. 12.) In his Objections, Plaintiff states that he meets the imminent danger exception to 28 U.S.C. § 1915(g) because the cold air that blows out of the vents in his cell exacerbate his many diseases, including spinal degeneration, sciatic nerve damage, and arthritis. Plaintiff complains that he is being denied long johns, thermals and an extra blanket. Although being subjected to cold temperature can indeed be uncomfortable, this does not put Plaintiff in such imminent danger of serious physical injury so as to rise to something akin to a genuine emergency. Furthermore, the exhibits submitted by Plaintiff in support of his Objections demonstrate that there is no clinical need for medical to approve Plaintiff state issued long johns or an extra blanket because Plaintiff does not have clinically proven impaired circulation and his x-rays show that he suffers only from “modest osteoarthritis of the lumbar spine.” (Pl.’s Ex. F; ECF No. 12-6.) Therefore, upon an independent review of the record and consideration of the Magistrate Judge’s Report and Recommendation, and Objections thereto, the following Order is entered.

AND NOW, this ¹⁵18 day of May, 2016,


IT IS HEREBY ORDERED that the Order granting Plaintiff’s IFP motion (ECF No. 7) is vacated and Plaintiff’s IFP motion (ECF No. 2) is hereby denied in accordance with 28 U.S.C. § 1915(g).

IT IS FURTHER ORDERED that this case is dismissed without prejudice to Plaintiff's right to reopen it by paying the full \$400.00 filing fee.

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation (ECF No. 9) is adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that the Clerk of Court mark this case **CLOSED**.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Petitioner has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.



David Stewart Cercone
United States District Judge

cc: Honorable Lisa Pupo Lenihan
United States Magistrate Judge

Alfonso Percy Pew
BT-7263
SCI Forest
PO Box 945
Marienville, PA 16239
(Via First Class Mail)