

NO. 44713-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

DALE WEEMS,

Appellant

v.

**WASHINGTON BOARD OF INDUSTRIAL INSURANCE
APPEALS,**

Respondent.

**BRIEF OF AMICUS CURIAE NORTHWEST JUSTICE
PROJECT**

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I. INTRODUCTION

This case concerns the Board of Industrial Insurance Appeals' (Board or BIIA) refusal to uphold the laws that every court and administrative tribunal in Washington must uphold: the fundamental right of equal access to justice embodied in the Due Process Clause of the Fourteenth Amendment, the Americans with Disabilities Act (ADA), and Washington Law Against Discrimination (WLAD).

The Board is the exclusive forum in which Washington's injured workers may get redress. The Board is unable to make a fair and impartial decision in Dale Weems' case because his mental disability renders him unable to carry out the basic actions needed to present his claims *pro se*. The court below effectively relieved the Board of its obligation to comply with laws protecting persons with disabilities from discrimination by reversing its previous order that the Board assess Mr. Weems' capacity for self-representation and appoint counsel, if necessary, to accommodate his mental disability. The Northwest Justice Project submits this amicus brief to illuminate the significant issues presented by the trial court's error and the Board's failure to accommodate Mr. Weems' mental disability.

II. IDENTITY AND INTEREST OF AMICUS

The Northwest Justice Project's identity and interest as amicus are described in its Motion for Leave to File Amicus Brief.

III. STATEMENT OF THE CASE

Amicus generally adopts Appellant's statement of the case.

IV. ARGUMENT

Each court and administrative tribunal in Washington must protect persons with disabilities from discrimination in judicial proceedings. *See* 42 U.S.C. §§ 12131-12134 (Title II of the ADA); RCW 49.60 (WLAD). To accomplish this objective, and thereby preserve the integrity of the judicial system, each court and tribunal must eliminate structurally imposed impediments to a litigant's ability to obtain a fair and impartial adjudication of his legal claims. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed.2d 820 (2004); 28 CFR 35.105-107 (requiring state agencies to develop a plan to accommodate disabilities).

As demonstrated below, the Board's lack of an ADA-compliant accommodations policy and rigid adherence to its existing hearings practice prevented Mr. Weems from receiving a fair and impartial adjudication of his claims in the exclusive forum available to him. It is precisely this type of structural discrimination against persons with disabilities the ADA and WLAD seek to abolish.

This Court should therefore hold the ADA and WLAD obligate the Board to end its structurally discriminatory practices and reasonably accommodate Mr. Weems' representational incapacity by providing

counsel to represent him before the Board.

A. Recognizing and Eliminating the Barriers to Full Participation in BIIA Proceedings is Imperative.

The significance of the lower court's error is best understood with some initial consideration of Washington's Industrial Insurance scheme and the social context and evolution of the ADA.

1. The State has a Heightened Responsibility to Ensure Meaningful Access to the Industrial Insurance System to Redress Workers' Rights.

The Industrial Insurance Act (Act), RCW Title 51, was the result of a compromise between employers and workers. In exchange for limited liability, an employer would pay on some claims for which there had been no common law liability. The worker gave up existing common law remedies, including the right to sue the employer, in exchange for being assured an award for an eligible claim, even if the amount was less than he would receive if he had prevailed in a court of law. *See* RCW 51.04.010.

The Act's provisions are to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment", and "to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 285, 996 P.2d 593 (2000) (citations omitted).

In all but very limited circumstances, the Industrial Insurance system is the only form of redress available to injured workers. Unlike other public benefits grievance hearings, the Board hearings are adversarial in nature, akin to superior court trials. *See* TR 6/3/08 at 3. The Department of Labor and Industries (L&I) is represented by counsel in the proceedings, and the Board strictly follows the Rules of Evidence. As Industrial Appeals Judge (IAJ) Gilligan explained, the Rules of Evidence, Civil Procedure, and Workers' Compensation laws are "fairly complicated" and "can be very complex for someone without legal training." TR 6/3/08 at 3, 25.

Moreover, the scheme relies heavily on attorney representation in Board proceedings. *See* Appellant's Brief at 29-35. Accordingly, the scheme poses serious risks of error in claims dispositions when claimants are unrepresented. That risk is significantly greater if the Board does not vigilantly ensure that claimants with mental disabilities are able to fully participate in its proceedings.

2. The Evolution of the ADA Underscores the Importance of Eliminating BIIA's Discriminatory Practices.

America has a long and troubled history of mistreating persons with disabilities in all aspects of life, including in the administration of judicial

services. *See Tennessee v. Lane*, 541 U.S. at 526, 531.¹ In 1990, Congress enacted the ADA to redress and safeguard against the grievous harm caused by an intolerant society.² *See* 42 U.S.C. § 12101(b) (providing for a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). In 2004, the Supreme Court unequivocally upheld the fundamental right of access to the courts for persons with disabilities through enforcement of Title II of the ADA.³ *See Tennessee v. Lane*, 541 U.S. at 511-512.

In 2008, Congress found that not all courts had fully embraced the sweeping change the ADA envisioned, resulting in inconsistent decisions involving the definition of disability and scope of coverage. *See* 42 U.S.C. § 12101, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553 (The ADA Amendments Act of 2008). Congress thus amended the ADA primarily to reject limiting judicial decisions, restore its broad scope of coverage, and make clear the primary focus of inquiry in ADA cases should not be

¹ *See also, The Americans With Disabilities Act: The Move to Integration*, Timothy M. Cook, 64 Temp. L. Rev 393 (1991) (exploring in more detail America’s shameful history of judicial and societal discrimination).

² Pre-ADA attempts to address discrimination were through other laws, e.g., Section 504 of The Rehabilitation Act (1973) and WLAD (1949). *See* 29 U.S.C. § 794; RCW 49.60.040. The ADA heralded a brighter national landscape: that of a more integrated and equal society. *See, e.g., National Council on Disability, Voices of Freedom: America Speaks Out on the ADA*, Abstract (1995), at <http://www.ncd.gov/publications/1995/07261995>.

³ Notably, the Washington attorney general supported the ADA’s application to state agencies. *See* Brief of the States of Minnesota et al. as Amici Curiae in Support of Respondents, 2003 WL 22733906 (2003) (“The states should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services.”).

“whether an individual’s impairment is a disability under the ADA”, but whether entities “have complied with their obligations”. 42 U.S.C. § 12101 note (b).

From its inception, the ADA obligated agencies to identify and eliminate barriers to access, including modifying its practices through reasonable accommodations. *See, e.g.*, 28 CFR 35.105. In light of the foregoing history and decades-old mandate to stamp out discrimination in the administration of justice, the Board’s failure to incorporate the ADA (and WLAD) into its proceedings is inexplicable.

B. Structural Discrimination Prevented Mr. Weems From Receiving a Fair Hearing.

Uninformed and misguided policies and practices have engendered structural discrimination that may, in some instances, prove to be a larger impediment to equal access than a physical barrier.⁴ The facts of this case unmistakably illustrate this point. Mr. Weems could physically access the courtroom, see documents, and hear witnesses. Yet, he could not fully comprehend those documents or witness testimony, elicit testimony helpful to his case or make requests of the IAJs to preserve his interests.

The Board’s repeated failure to recognize or eliminate the invisible

⁴ *See, e.g.*, 42 U.S.C. § 12101 note (a) (Findings and Purposes of the ADA Amendments Act of 2008) (“[P]eople with physical or mental disabilities are frequently precluded from [full participation in society] because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers...” (emphasis added)).

barriers in its hearing practices inevitably culminated in a courtroom

inaccessible to Mr. Weems from beginning to end. Namely:

1. The Board ignored or failed to recognize, despite sufficient indicia throughout the proceedings, that either Mr. Weems lacked the capacity for self-representation or further inquiry was necessary to make an accurate determination thereof.

2. The Board contemptuously disregarded a superior court's unchallenged finding that Mr. Weems lacked capacity for self-representation, and failed to utilize either an ADA or WLAD analytical framework to determine whether appointed counsel was required to accommodate Mr. Weems.

3. Despite the existence of the WLAD since 1949 and the ADA since 1990, the Board apparently had no established policy for accomplishing the objectives of either law until August 15, 2013.⁵ This new policy, however, is not ADA-compliant.

4. The Board displayed an alarming ignorance of both the purpose and mandate of anti-discrimination laws and significant and varied challenges that brain disorders may pose to an individual's capacity for self-representation by insisting that an IAJ's authority to assist unrepresented claimants develop a complete record suffices to meet the needs of *all* claimants "who may have mental problems". CP at 143.

5. Application of the Board's "flexible system" to Mr. Weems proved its inadequacy: the IAJs stymied full record development by yielding to hyper-technicalities, constricting Ms. Weems' efforts to assist Mr. Weems, denying Mr. Weems an opportunity to introduce medical records, and deeming Ms. Weems a suitable lay representative despite her apparent lack of sophistication, training, and own disruptive behavior.⁶

6. Finally, the Board rationalizes its discriminatory practices on the

⁵ See BIIA Reasonable Accommodation Policy for Customers, dated Aug. 15, 2013 (BIIA RA Policy). Appendix A.

⁶ See, e.g., TR 9/10/08 12 at 34-35, 43-44, 47-49, 57, 67; TR 9/15/08 at 81-85; TR 4/7/11 at 9-11; TR 6/13/11 at 4-14.

basis of the Legislature's alleged failure to expressly mandate, direct or fund the Board's compliance with anti-discrimination laws.

This is precisely the form of structural discrimination the ADA and WLAD seek to abolish.

1. An IAJ Has an Affirmative Duty Under the Due Process Clause to Determine Capacity for Self-Representation.

L&I misconstrues the services the Board must provide: it must provide a meaningful opportunity to be heard, not merely "an opportunity to be heard." L&I Brief at 36. A meaningful opportunity to be heard, which is at the root of due process, means an opportunity to present one's claims "at a meaningful time and in a meaningful manner [before] an impartial decision maker, [with] an opportunity to *confront all the evidence adduced against him and present his own evidence.*" *Jarvis v. Janney*, 876 F. Supp.2d 1204, 1216 (E.D. WA, 2012) (citations omitted) (emphasis added); *see also, Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976). Furthermore, "the opportunity to be heard *must be tailored to the capacities and circumstances of those who are to be heard.*" *Goldberg v. Kelly*, 397 U.S. 254, 268–69, 90 S. Ct.1022, 25 L.Ed.2d 287 (1970) (emphasis added).

Title II of the ADA seeks to enforce the constitutional right of due process by requiring, when necessary, accommodations of disabilities in judicial proceedings. *Tennessee v. Lane*, 541 U.S. at 532, quoting *Boddie*

v. Connecticut, 401 U.S. 371, 379, 523, 91 S. Ct. 780, 28 L. Ed 2d 113 (1971) (to afford parties a meaningful opportunity to be heard, States must “[remove] obstacles to their full participation in judicial proceedings.”).

Whether an unrepresented litigant can confront and present evidence undoubtedly depends on his ability to read, reason, comprehend, communicate, and regulate emotions. When faced with evidence of a probable lack of ability to perform these basic functions, an IAJ must inquire into a party’s capacity for self-representation. Before proceeding further, an IAJ should satisfy himself that either the litigant can present his claims sufficiently to develop a record upon which a fair and impartial decision may be made or that the litigant needs assistance to achieve this outcome. Only by engaging in such an inquiry and, as may be necessary, removing the structurally imposed obstacles to a litigant’s full participation, may a judge be assured that he will be able to fairly and accurately resolve the legal claims. *See, e.g., In re Meade*, 103 Wn.2d 374, 381, 693 P.2d 713 (1985) (when an attorney lacks the mental capacity to represent himself in a disciplinary hearing, even if not incompetent, due process is violated if the attorney is allowed to appear *pro se.*); *In re Diamondstone*, 153 Wn.2d 430, 445, 105 P.3d 1 (2005) (due process required appointment of counsel to an attorney with mental disabilities despite that attorney’s desire to represent herself in disciplinary

proceedings); *cf. Graves v. Adult and Family Services Division*, 76 Or. App. 215, 228, 708 P.2d 1180 (1985) (when a hearing officer in a public benefits hearing “is unable to get sufficient information from [a claimant with a mental disability] to develop an adequate record..., counsel must be appointed.”).

In *Graves*, the court aptly observed:

When a claimant falls within the category of mentally ill persons who retain the ability to function rationally, the risk of wrongful denial of [medical] benefits is no greater than it is for most indigent claimants, who often lack the educational attainment to present claims with sophistication. On the other hand, when a claimant, as a result of mental illness, lacks the ability to focus on the issues presented, to organize and develop the evidence and to express things in a coherent manner, the risk of erroneous deprivation is greater.

Id. at 224-25. The court thus concluded that such claimants may have a right to counsel determinable on a case-by-case basis. *Id.* at 225.

Here, the IAJs largely ignored Mr. Weems’ manifest inability to represent his claims and proceeded to a decision on an under-developed record.⁷ By failing to make a requisite capacity determination and then

⁷ In addition to the examples of Mr. Weems’ functional limitations cited by Appellant, other examples include: 1) In response to the IAJ’s explanation of the importance of presenting the best case possible at the hearing because Mr. Weems would “not get another chance”, Mr. Weems asked how many times L&I, doctors and the hospital had been able to hide medical records (TR 6/3/08 at 11); and 2) In response to IAJ Gilligan’s request for names of additional witnesses he intended to present, Mr. Weems asked if he could bring “the media”, i.e., AM Northwest or OPB. TR 6/3/08 at 19-20. Even assuming, *arguendo*, that Mr. and Ms. Weems’ interactions with the IAJs were insufficient to trigger a *sua sponte* inquiry, the superior court’s finding of incapacity

remove the evident obstacles to Mr. Weems' full participation, the Board violated Mr. Weems' fundamental right of due process.

2. Meaningful Access May Not be Achieved Through Rigid Adherence to a Neutral, Albeit, Convenient Rule.

i. The same access does not equal meaningful access.

Under Respondents' unique theory of meaningful access, modifications specific to the disability-created needs of individual litigants are unnecessary because the Board's internal rule, WAC 263-12-020(1)(d), permits IAJs to assist unrepresented litigants develop a complete record. *See* Board's Brief at 11-18. An IAJ's assistance in developing a complete record may be all that is necessary to provide meaningful access to *some* litigants with mental disabilities. It does not follow, however, that such assistance will provide meaningful access to *all* such litigants.

ADA regulation, 28 CFR 35.130, prohibits an agency from providing a "service that is *not as effective in affording equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 CFR 35.130(b)(i)(iii) (emphasis added).⁸ Access that is not tailored to meet the disability-

should have triggered an inquiry.

⁸ The Board mistakenly quotes 45 CFR 84.4 as cited in *Alexander v. Choate*, 469 U.S. 287, 305, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), as the definition of equal access under the ADA; 45 CFR 84.4 is a pre-ADA regulation, and *Choate* is a pre-ADA decision.

created needs of individual litigants can hardly be deemed as effective in affording equal opportunity to obtain the same result (i.e., meaningful access). *See, e.g., Tennessee v. Lane*, 541 U.S. at 535-36 (Souter, J., concurring); 42 U.S.C. § 12101(a)(7) (“...the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity...”); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (“*limited participation*” does not rise to the level of “meaningful access” under the ADA) (emphasis added). The court in *Henrietta D. v. Guiliani*, 119 F. Supp.2d 181 (E.D.N.Y. 2000), *aff’d sub. nom., Henrietta D. v. Bloomberg*, 331 F.3d 261 (2nd Cir. 2003), elaborated:

The reasonable accommodation concept embodied in the federal disability statutes is meant to address the unique hurdles that people with disabilities face, and it recognizes that mere equality of treatment is not enough. ...‘It is not enough to open the door for the handicapped...; a ramp must be built so the door can be reached.’

119 F. Supp.2d. at 212-13 (citations omitted). *See also Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (offering all persons with hearing impairments the same accommodation without regard to whether the accommodation met the person’s individualized needs fell short of providing meaningful access).

ii. A one-size fits all hearings practice that systematically disregards disability type and attendant functional limitations hinders an IAJ's ability to achieve the objectives of Due Process, the ADA and WLAD.

Because the Board did not assess Mr. Weems' representational capacity or need for an individualized accommodation, the Court may not deem the Board's "flexible system" adequate to accommodate his needs. Mental disabilities commonly affect activities that are not readily visible, such as learning, reading, concentrating, thinking, and communicating – functions undoubtedly critical to self-representation. *See, e.g.*, 42 U.S.C. § 12102(2)(A) (defining major life activities for purposes of the ADA).⁹ As with individuals with physical disabilities, persons with mental disabilities will not necessarily have the same degree of impairment or functional limitation. Just like not all hearing impaired individuals are deaf and not all deaf individuals are able to communicate in American Sign Language, not all individuals with brain disorders are "incompetent", and those who are not incompetent are not *ipso facto* able to represent themselves in an adversarial proceeding.

⁹ For example, a traumatic brain injury may result in "cognition" and "communication" difficulties, "personality changes, aggression, [and] acting out", among other things. *National Institute of Neurological Disorders and Stroke. Traumatic Brain Injury: Hope Through Research*. Bethesda (MD): National Institutes of Health; 2002 Sept. NIH Publication No.: 02-158; *see also* Department of Justice ADA Title II Technical Assistance Manual at II-2.4000. Personality disorders may impair adaptive functioning, e.g., poor impulse control, outbursts, and suspicion of others. *See, generally*, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n 5th ed.) (2013), at 645-684. And, depression may result in decreased concentration and increased memory loss. *Id.* at 155,164.

The wide-ranging nature of mental disabilities and attendant impacts illustrates the unfeasibility of neutral hearings and an “accommodations” practice that ignores those significant differences and applies equally to all litigants. As the Board correctly stated, “anti-discrimination laws are best served by permitting [IAJs] flexibility in providing reasonable accommodations”. Board Brief at 28. Yet, the Board’s system does just the opposite by constraining an IAJ’s options of complying with anti-discrimination laws to appointing a lay representative and/or assisting in developing the record in every circumstance.

Logically, the ADA does not enumerate what accommodations are required for a given disability. And one may not assume the Board’s ostensible built-in “accommodations” constitute the universe of potential accommodations required by the ADA (and WLAD). *See, e.g., D’Amico v. New York State Board of Law Examiners*, 813 F.Supp 217, 221 (W.D.N.Y. 1993) (“The ADA...requires [an entity] to make ‘reasonable accommodations’ under the circumstances in light of plaintiff’s disability. An individual analysis must be made with every request for accommodations and the determination of reasonableness must be made on a case by case basis.”). Mr. Weems’ case is a perfect example of the invalidity of such an inflexible and misguided approach.

iii. BIIA may not force its preference or substitute its judgment for that of a claimant as to what will meet the claimant's needs.

The ADA does not authorize the Board to first engage in an interactive process with a claimant seeking a representational accommodation to ascertain whether the Board's preferred accommodations will suffice.¹⁰ The Board must *first* demonstrate the specific accommodation requested is unreasonable, *i.e.*, an undue financial or administrative burden or a fundamental alteration of the nature of its services, before it may deny the request and then engage in a more in-depth interactive process about what other alternatives might meet a party's needs. *See, e.g.*, 28 CFR 35.130(b)(7); .150(a)(3); .164; *cf.* GR 33(d). Moreover, the Board may not substitute its judgment for that of the person with the disability as to what accommodation will meet his needs. *See, e.g., Sullivan By and Through Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 958 (E.D. Cal.1990), applying reasonable accommodation under the Rehabilitation Act:

[T]he [Act] requires accommodation to the plaintiff's [disability]; it does not require that she accommodate to the views of the public about her condition. In sum, as long as the choices the [disabled] person makes concerning how to effectively address her circumstances are reasonable, the [Act] both protects those choices from scrutiny, and prohibits discrimination against the disabled person on the basis of

¹⁰ In contrast to the representational accommodation sought in this case, the Board's position rests on its interpretation of auxiliary aids and employment discrimination cases and regulations. *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007), is also inapposite.

those choices.

C. The ADA Does Not Limit Representational Appointments to Litigants Who are Mentally Incompetent and Facing a Loss of a Fundamental Liberty Interest.

L&I advances the radical position that the Board need only appoint counsel when an L&I claimant: 1) first makes an ADA- or WLAD-specific request for accommodation; 2) is mentally incompetent (begging the question of the person's ability to meet the first condition); and 3) the underlying claim involves a fundamental liberty interest.

1. BIIA May Not Shift the Burden of Ensuring Equal Access to Litigants Themselves.

The Board may not avoid reasonably accommodating claimants with disabilities who do not submit ADA-specific requests. *See* L&I Brief at 40-42; Appx. A (requiring a written request). Title II of the ADA does not demand that individuals with disabilities seek out their right of access through ADA-specific requests. Rather, it demands that each tribunal recognize and honor those rights by: 1) evaluating its processes for statutory and regulatory compliance; 2) establishing a procedure by which to accomplish the goals of the ADA; and 3) publicizing, implementing, and adhering to that procedure. *See* 28 CFR 35.105-107.¹¹ The Board, however, has yet to establish such a procedure.¹²

¹¹ *See* 28 CFR 35.105 (requiring agencies to develop an ADA plan and provide an opportunity for comment by individuals with disabilities and agencies representing such

2. Neither *Franco-Gonzales* Nor *Tran* Compel the Result that Representational Accommodations Are Limited to Mentally Incompetent Litigants Facing a Loss of Fundamental Liberties.

Respondents' reliance on the unpublished decision in *Tran v. Gore*, 2013 WL 878771 (S.D. Cal. 2013), is misplaced.¹³ The *Tran* court analyzed a request for counsel under 28 U.S.C. § 1915, a federal statute that permits federal courts to appoint counsel in "exceptional circumstances". *Id.* at *3. Under this analysis, not an ADA analysis, the court determined that no exceptional circumstances existed to warrant appointment of counsel. *Id.* The court also concluded, without analysis, that *Tran* did not show entitlement to counsel under the ADA. *Id.*

Additionally, unlike the plaintiff in *Franco-Gonzales v. Holder*, 828 F. Supp.2d 1133 (C.D. Cal. 2011), Mr. Zhalezny, Mr. Tran was a former inmate whose schizophrenia and other significant disabilities were, according to the court, reasonably mitigated. *Tran* at *5. And unlike Mr. Zhalezny and Mr. Weems, Mr. Tran submitted numerous motions in his case, filed nine other lawsuits, and was "actively litigating three of them"

individuals, and further requiring agencies with fifty or more employees to establish a grievance procedure). The Board's position in this case and its accommodations policy do not reflect the realities of individuals with disabilities and the objectives of the laws designed to protect those individuals from discrimination.

¹²Perhaps unintentionally, but nonetheless troubling, the Board's late-breaking RA Policy sets up impermissible barriers to meaningful access by, *inter alia*, 1) requiring that individuals submit written requests for accommodations (even though some may be illiterate, unable to see or physically write); 2) declaring the Board the arbiter of suitable accommodations; and 3) lacking a grievance procedure for accommodation denials.

¹³ Pursuant to GR 14.1(b), the *Tran* decision is attached here as Appendix B.

at the time, demonstrating his representational capacity. *Id.*, fn. 9. *Tran* does not, therefore, support a conclusion that *the ADA* requires appointment of counsel *only* when a party is mentally incompetent and facing a loss of a fundamental liberty interest.

When read in conjunction, the disparity in outcomes between *Franco-Gonzales* and *Tran* reveals the rule that actually emerges is this: whether appointment of counsel may be necessary to accommodate a disability must not be based on general assumptions of the functional abilities stemming from a particular mental health condition (e.g., schizophrenia) but on a case-by-case consideration of circumstances.

D. Lack of Direction, Instruction and Funding Do Not Shield BIIA From Complying with Due Process, the ADA or WLAD.

The Board contends, in essence, that it may discriminate against persons with disabilities because the Legislature has not expressly directed it not to, has not provided any instructions on how not to, or provided funding necessary to stop its discriminatory practices. Like any other public agency, however, the Board must abide by applicable federal and state constitutional provisions and statutes notwithstanding the silence of the Board's own implementing statutes and regulations.

Additionally, the Legislature, through the WLAD, specifically directs public agencies to reasonably accommodate disabilities. RCW 49.60.215,

WAC 162-26-060(1), (2); *see also* Exec. Order 96-04, Gov. of WA (Mar. 22, 1996). Congress, the Department of Justice, the Legislature, and courts have also provided ample guidance to assist the Board. *See, e.g.*, 28 CFR 35; 42 U.S.C. § 12206 (DOJ ADA Title II Technical Assistance Manual); RCW 49.60; *Duvall*, 260 F.3d at 1139. Also, Washington’s General Court Rule 33 contains an easily replicable procedure.

Finally, the lack of dedicated legislative funding does not excuse the Board from providing equal access to Mr. Weems. *See Mosier v. Kentucky*, 640 F. Supp.2d 875, 878 (E.D. Ky. 2009) (In holding that courts must accommodate a deaf attorney by providing ASL interpreters, the federal court observed, “[i]t would be nonsensical for the statutes to require government entities to provide such access but not permit the expenditures by those entities that are necessary to comply with the statute.”). If current funding is insufficient to meet its obligations under the law, the Board should seek additional funding, not disregard the law.

E. A Representational Accommodation Does Not Fundamentally Alter BIIA Proceedings.

Providing an attorney to accommodate representational incapacity is wholly consistent with the fundamental nature of the Board’s hearing proceedings. In short, an attorney would have been an effective tool to assist Mr. Weems present and rebut evidence and assist the IAJ to

efficiently process the evidence, administer the proceeding, and render a *fair* decision on the merits.¹⁴ Indeed, the only fundamental change that appointing counsel to Mr. Weems poses is that the hearing will now comport with due process.

V. CONCLUSION

The right to be heard has little meaning if a litigant is rendered voiceless by virtue of his disability and a tribunal's refusal to accommodate that disability. The Court should reverse the trial court and order the Board to appoint counsel to Mr. Weems. Alternatively, the Court should remand to the Board for a proper assessment of Mr. Weems' representational capacity and need for appointment of counsel.

Dated this 28th day of February, 2014.

Respectfully submitted,

By: 
Amy McCullough, WSBA No. 36401
Deborah Perluss, WSBA No. 8717
Patrick Pleas, WSBA No. 25737

Attorneys for *Amicus Curiae*
Northwest Justice Project

¹⁴ As it stands, a determination on the merits of Mr. Weems' claim has taken multiple hearings before the BIIA and two trips to superior court.

Appendix A



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • www.bila.wa.gov

BOARD OF INDUSTRIAL INSURANCE APPEALS REASONABLE ACCOMMODATION POLICY FOR CUSTOMERS

PURPOSE: The Board of Industrial Insurance Appeals (BIIA) is committed to providing equal access to services and facilities for persons with disabilities and ensuring the right of persons with disabilities to request and receive reasonable accommodation, without discrimination because of the disability. This policy sets forth the guidelines and policies for accommodating customers of the BIIA in compliance with state and federal law. This policy should not be construed as providing rights or imposing obligations not provided under applicable laws.

This policy is based on the provisions of the Americans with Disabilities Act of 1990 as amended by the Americans with Disabilities Amendment Act; the Rehabilitation Act of 1973; Chapter 49.60 of the Revised Code of Washington; and Executive Order 96-04.

SCOPE: This policy applies to all non-employees who interact with the agency for any reason. Persons with disabilities have the right to request and receive reasonable accommodation in accessing and participating in the agency's services.

DEFINITIONS: "Customer" means any individual, other than those employed by or applying for employment with the BIIA, who conducts business with or uses the services of the BIIA. The term includes, but is not limited to, parties, representatives, vendors, and suppliers.

"Person with disability" means (1) Under 42 USC 12102, a person with a physical or mental impairment that substantially limits one or more major life activities or (2) under chapter 49.60 RCW, a person who has an abnormal condition that is medically cognizable or diagnosable; exists as a record or history; or is perceived to exist, whether or not it exists in fact.

"Reasonable accommodation" refers to provisions for assistance or other services that do not impose an undue hardship on the agency. It includes:

- a. Making reasonable modifications in policies, practices, and procedures.
- b. Furnishing at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, readers, or note takers.

"Undue hardship" means an excessively costly, extensive, substantial, or disruptive modification, or one that would fundamentally alter the nature of the services, the proceedings, or the operation of the agency.

POLICY: The BIIA and its employees shall provide reasonable accommodations to the known physical, mental, or sensory limitations of an individual with a disability in order to enable a customer to access and participate in the services of the BIIA in a manner equivalent to the ability of similarly situated non-disabled customers, unless doing so would impose an undue hardship on the operation of the agency.

GENERAL PROVISIONS: Generally, it is the obligation of an individual with a disability to request a reasonable accommodation. It is also the responsibility of the individual with a disability to cooperate with the agency in the identification and evaluation of accommodations.

All information submitted in relation to a request for accommodation regarding the presence or nature of a customer's disability will be treated as a confidential medical record and will be maintained in a secure manner, separate and apart from any applicable appeal file. Access to the information will be restricted to designated personnel on a need-to-know basis. If a request for the information is made under the Public Records Act, the person with a disability will be notified of such request in accordance with the BIIA public disclosure policy.

Reasonable accommodations will be made only after careful consideration. Advice may be requested from appropriate state and federal entities to determine the extent of the BIIA's obligation to accommodate a customer and explore optional accommodations.

If there are two or more effective accommodations that would allow the individual with a disability to access or participate in the services or proceedings of the agency, the agency may select the accommodation to be provided after considering the preference of the individual with a disability.

The agency's responsibility to make a particular reasonable accommodation is limited by the defense that doing so would impose an undue hardship on the operation of the agency. In determining undue hardship, the BIIA will consider the nature and cost of the accommodation, the overall financial resources of the agency, and the impact of the accommodation on the operation of the agency, including the impact on the ability of employees to perform their duties and the agency's ability to conduct business. If a particular accommodation would impose an undue hardship, the agency shall consider whether there are alternative accommodations which would not impose such hardship. If accommodation is denied, the BIIA will issue a written decision explaining the nature of the hardship.

Customers will be notified of their right to reasonable accommodation through a statement on all notices of proceedings, by signs posted in conspicuous areas in BIIA facilities, and by a statement posted on the front page of the BIIA web page.

Requests for reasonable accommodation must be submitted in writing. BIIA employees should assist a customer with a disability in completing the form used for this purpose.

Adopted this 15th day of August, 2013.

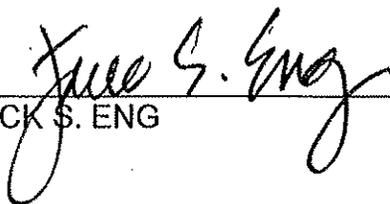
BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



FRANK E. FENNERTY, JR. Member



JACK S. ENG Member

Appendix B

Not Reported in F.Supp.2d, 2013 WL 878771 (S.D.Cal.)
(Cite as: 2013 WL 878771 (S.D.Cal.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
HOANG MINH TRAN, Plaintiff,

v.

William D. GORE, et al., Defendants.

No. 10cv2682–BTM (BLM).
March 8, 2013.

Hoang Minh Tran, San Diego, CA, pro se.

Ricky R. Sanchez, County of San Diego Office of
County Counsel, Stephen T. Sigler, Neil Dymott
Frank McFall & Trexler, San Diego, CA, for De-
fendants.

**ORDER DENYING (1) PLAINTIFF'S MOTION
FOR REASONABLE ACCOMMODATION
UNDER THE ADA, (2) PLAINTIFF'S REQUEST
FOR A COMPETENCY HEARING, AND (3)
ALLAN TRACY GILMORE'S MOTION FOR
APPOINTMENT OF NEXT FRIEND OR
COUNSEL**

BARBARA L. MAJOR, United States Magistrate
Judge.

*1 Currently before the Court is Plaintiff's November 8, 2012 "Motion For Entitlement of Americans Disability Act (ADA) Reasonable Accommodation Under Rehabilitation Act Title II Required Appointment Of Counsel" [ECF. No. 36], November 13, 2012 Motion For A Competency Hearing [ECF. No. 38], Defendants' Opposition to Plaintiff's Request for Competency Hearing [ECF No. 52], and Mr. Allan Tracy Gilmore's January 14, 2013 "Ex Parte Motion and Request for Court to Appoint Next Friend or Appoint Counsel to Litigate on Behalf of Hoang Minh

Tran Due to Incompetence" [ECF No. 51].

Having considered all of the briefing and supporting documents presented, and for the reasons set forth below, the motions [ECF Nos. 36, 38 & 51] are **DENIED**.

BACKGROUND

Plaintiff initiated this action with the filing of his complaint on December 20, 2010. ECF No. 1. On July 25, 2011, Plaintiff filed his First Amended Complaint. ECF No. 7 ("FAC"). In his FAC, Plaintiff alleges that his civil rights were violated and he was denied equal protection, freedom of speech, due process, adequate medical care, and freedom from cruel and unusual punishment while he was detained in the George F. Bailey Detention Facility on August 1st, 6th, and 12th 2009. *Id.* at 1–4. Specifically, Plaintiff alleges that he was denied a welfare package containing various personal hygiene products and forced into solitary confinement without any type of hearing. *Id.* at 2–3. Plaintiff further contends that he was improperly denied medication for hemorrhoids in retaliation for his alleged role in the high profile escape of another inmate from the detention facility. *Id.* at 4–5. Finally, Plaintiff alleges that certain Defendants illegally confiscated his bible, violating his right to freedom of religion. *Id.* at 6.

Plaintiff filed a motion for appointment of counsel on December 20, 2010. ECF No. 3. That motion was denied on May 23, 2011 in an order finding that "neither the interests of justice nor exceptional circumstances" warranted the appointment of counsel. ECF No. 4.

On February 21, 2012, Defendant John Gill, M.D., filed a motion to dismiss Plaintiff's FAC pursuant to Rule 12(b)(6) for failure to state a claim. ^{FN1} ECF No. 19. On May 31, 2012, Defendants Sarandi

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Marina, Lizzie Womack, and Brandt O. Pile filed answers to the FAC. ECF Nos. 21 and 22.

FN1. Defendant Gill's motion to dismiss was granted on November 14, 2012 and Plaintiff was given thirty days in which to file and serve a second amended complaint which he did not do. ECF No. 39.

On August 27, 2012, Plaintiff filed another motion for appointment of counsel after being released from incarceration. ECF No. 25. That motion was denied on October 24, 2012 because Plaintiff again failed to establish "the extraordinary circumstances necessary to justify a pro bono appointment." ECF No. 30 at 3.

On October 11, 2012, Defendants Sarandi Marina, Lizzie Womack, and Brandt O. Pile filed a Motion to Compel Plaintiff to Respond to Discovery and the Court issued a briefing schedule that same day. ECF Nos. 26 & 27. The motion was granted in part and denied in part by the Court on November 7, 2012. ECF No. 34. In the order, Plaintiff was not sanctioned, but was ordered to respond to Defendants' written discovery by November 30, 2012. *Id.* at 4.

*2 On October 19, 2012, the Court held a Mandatory Settlement Conference and Plaintiff failed to appear. ECF No. 29. On that same day, the Court issued an Order to Show Cause why Sanctions Should not be Imposed for Plaintiff's failure to appear and required Plaintiff to file a declaration regarding his failure. *Id.* Plaintiff filed a Motion for Relief of Sanctions on November 2, 2012 that the Court interpreted as Plaintiff's declaration. ECF No. 33. After reviewing Plaintiff's declaration and speaking with Plaintiff at the hearing, the Court declined to impose sanctions. ECF No. 41.

On November 8, 2012, Plaintiff filed a "Motion For Entitlement of Americans Disability Act (ADA)

Reasonable Accommodation Under Rehabilitation Act Title II Required Appointment Of Counsel." ECF No. 36. On November 13, 2012, Plaintiff filed a Motion For A Competency Hearing, and on November 29, 2012, Plaintiff filed a notice of voluntary dismissal. ECF Nos. 38 & 43. All three documents were accepted on discrepancy by District Judge Barry T. Moskowitz and the first two referred to Magistrate Judge Barbara L. Major. ECF. Nos. 35, 37 & 42. To aid in evaluating Plaintiff's motions, the Court issued an order on December 14, 2012 asking Plaintiff to submit "all of his medical records from January 1, 2012 to the present, that support his allegations that he is incompetent" and Defendants to respond. ECF No. 44. Plaintiff timely filed his supporting documents on January 7, 2013 and Defendants filed an opposition to the motion for a competency hearing on January 25, 2013. ECF Nos. 48, 49 & 52.

On January 14, 2013, Mr. Allan Tracy Gilmore filed an "Ex Parte Motion and Request for Court to Appoint Next Friend or Appoint Counsel to Litigate on Behalf of Hoang Minh Tran Due to Incompetence." ECF No. 51.

The Court vacated all dates set forth in the Court's June 1, 2012 Order Regulating Discovery and Other Pretrial Proceedings [ECF No. 23] on February 6, 2012 in response to Defendants' February 1, 2013 motion to continue dates [ECF No. 53]. ECF No. 54.

DISCUSSION

A. Motion For Entitlement of Reasonable Accommodation

In his "Motion for Entitlement of Americans Disability Act (ADA) Reasonable Accommodation Under Rehabilitation Act Title II Required Appointment Of Counsel," Plaintiff argues that he is a person with a disability under the ADA due to his numerous physical and mental conditions and, therefore, is entitled to the "appropriate and reasonable accommodation [of] attorney representation." ECF No. 36 at 1-4. In support, Plaintiff states that the medication that he

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takes has “adversary [sic] side effect[s] such as: drowsiness, dizziness, light headache, and lack of concentration to focus while [sic] prevented him to learn how to or become an [sic] competent pro se litigant or attorney” and that “[d]enying appointed counsel for certain disabled civil litigants violated Title II ... of the ADA.” *Id.* at 2. Plaintiff further states that the Court's failure to appoint counsel would be tantamount to preventing Plaintiff from bringing his case and a denial of “equal justice and fair treatment.” *Id.* at 4. Finally, Plaintiff argues that appointing counsel should be considered along the same lines as providing an interpreter or closed caption decoders because counsel would interpret the law and allow Plaintiff to participate in litigating his case. *Id.* at 5–6. The Court interprets Plaintiff's motion as his third request for counsel.

*3 The Constitution provides no right to appointment of counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). However, under 28 U.S.C. § 1915(e)(1), courts are granted discretion to appoint counsel for indigent persons under “exceptional circumstances.” *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir.2004). A finding of exceptional circumstances demands at least “an evaluation of the likelihood of the plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his claims ‘in light of the complexity of the legal issues involved.’” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.1986)).

Since the outset of this case more than a year-and-a-half ago, Plaintiff has drafted and submitted numerous pleadings and motions without the assistance of counsel. For example, Plaintiff has submitted a complaint and an amended complaint [ECF Nos. 1 & 7], two previous motions to appoint counsel [ECF Nos. 3 & 25], a motion for relief from sanctions [ECF No. 33], the instant ADA motion [ECF No. 36], a motion for a competency hearing [ECF No. 38], and

a notice of voluntary dismissal [ECF No. 43]. From the Court's review of these documents, it is apparent that Plaintiff has a sufficient grasp of his case and the issues involved, and he is able to adequately articulate the factual and legal basis of his claims.^{FN2} Although Plaintiff's allegations are sufficient to state a claim for relief, the Court finds that Plaintiff's likelihood of success on the merits is low. However, even if the Court determined that it is likely that Plaintiff will succeed on the merits, Plaintiff fails to establish the requisite “exceptional circumstances” warranting the appointment of counsel.

FN2. Plaintiff's reliance on prisoners for assistance in drafting his pleadings [*see* ECF No. 3 at 10 & 25 at 7] does not alter this analysis. *See, e.g., Montano v. Solomon*, 2010 WL 4137476, at *7 (E.D.Cal. Oct.19, 2010) (denying plaintiff's motion for appointment of counsel where “plaintiff has adequately presented, albeit through another inmate, the salient factual allegations of this case”).

Plaintiff's instant motion to appoint counsel makes essentially the same arguments: he is physically disabled, he is mentally disabled^{FN3}, and he is relying upon another layman for legal assistance. ECF Nos. 3, 25, & 36. Plaintiff essentially makes the same argument that every *pro se* inmate could make—namely, that an attorney could or would handle this case better than he can. ECF No. 36 at 5–6. This argument does not warrant the appointment of counsel. Thus, in his instant motion, Plaintiff does not allege any different facts or circumstances to change the Court's prior decision that there are no exceptional circumstances that warrant appointing an attorney to represent him. In addition, Plaintiff has not demonstrated that he is entitled to counsel under the ADA or that his medical conditions prevent him from litigating this case.

FN3. The Court addresses this allegation in

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more detail in Section B.

Plaintiff contends that appointed counsel would assist him in interpreting communications from the Court and participating in “pretrial proceedings such as deposition, discovery, and interrogatory, and gather fact finding or when it comes to trial.” ECF No. 36 at 5–6. However, factual disputes and anticipated examinations of witnesses at trial do not warrant the finding of exceptional circumstances supporting an appointment of counsel. *See Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir.1997), overruled on other grounds, 154 F.3d 952 (9th Cir.1998) (en banc) (holding that the appellant “may well have fared better [with appointed counsel]—particularly in the realms of discovery and the securing of expert testimony—but this is not the test”); *see also Peterson v. Anderson*, 2009 WL 4506542, at *3 (D.Mont. Dec.2, 2009) (citing *Wilborn*, 789 F.2d at 1331) (“Although Plaintiff contends he is not in a position to litigate this matter, pro se litigants are rarely in a position to research and investigate facts easily. This alone does not deem a case complex.”). “[A]ny pro se litigant certainly would be better served with the assistance of counsel.” *Rand*, 113 F.3d at 1525; *see also Wilborn*, 789 F.2d at 1331 (“[A] pro se litigant will seldom be in a position to investigate easily the facts necessary to support the case.”). But a plaintiff is only entitled to appointed counsel if he can show “that because of the complexity of the claims he [is] unable to articulate his positions.” *Rand*, 113 F.3d at 1525; *see also Wilborn*, 789 F.2d at 1331 (“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.”). Despite his assertions to the contrary, Plaintiff has not shown anything in the record that makes this case “exceptional” or the issues in it particularly complex.

*4 The Court denied Plaintiff’s previous requests for counsel [ECF Nos. 4 & 30], and Plaintiff’s current request does not provide any new facts justifying such

an extraordinary remedy. Plaintiff has failed to demonstrate an inability to represent himself beyond the ordinary burdens encountered by *pro se* parties, and the Court finds that the “exceptional circumstances” required for court-appointed counsel are absent. *See, e.g., Agyeman*, 390 F.3d at 1103; *Wilborn*, 789 F.2d at 1331. Accordingly, Plaintiff’s Motion for Appointment of Counsel is **DENIED**.

B. Motion For A Competency Hearing

In his Motion For A Competency Hearing, Plaintiff seeks to have the Court hold a competency hearing pursuant to Federal Rule of Civil Procedure (“FRCP”) 17(c). ECF No. 38. In support, Plaintiff states that he suffers from “[s]chizophrenia; PTSD; severe depression; and chronic anxiety which making [sic] it very very difficulty [sic] for him to comprehend and comply with the pretrial proceedings Court’s ordered” and that his “psychotropic and painkiller medications” are causing him to feel drowsy, dizzy, and have headaches and are leaving him unable to concentrate. *Id.* at 1–2. Additionally, Plaintiff submitted copies of his recent medical records which he believes supports his claim of incompetency. ECF Nos. 48 & 49.

In their opposition, Defendants contend that Plaintiff’s motion should be denied “because he understands the nature and consequences of his lawsuits against Defendants and is repeatedly demonstrating his ability to represent himself.” ECF No. 52 at 3. In support, Defendants state that Plaintiff “has been selective about how to advance his litigation posture” and that his behavior has shown that “he understands the nature and extent of the proceedings, and when convenient he can represent himself.” *Id.* For example, when faced with the threat of sanctions from the Court, Plaintiff attended and participated in an Order to Show Cause hearing. *Id.* Defendants further state that the mental health records submitted by Plaintiff in support of his claim do not provide reasonable cause to believe that Plaintiff is incompetent. *Id.* at 7. Specifically, Defendants note that the records show that

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Plaintiff is stable on his current medications and that despite speaking broken English, Plaintiff is able to “advocate for himself very well.” *Id.*

The Ninth Circuit Court of Appeals has held that a district court must hold a competency hearing “when substantial evidence of incompetence is presented.” *Allen*, 408 F.3d 1150, 1153 (9th Cir.2005). If a competency hearing is warranted, the Court must appoint counsel for the limited purpose of representing the petitioner at the competency hearing. *See* Rule 8(c) of the Rules Governing Section 2254 Cases (“[i]f an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A(g)”). Although the *Allen* court did not specify what constitutes “substantial evidence” of incompetence or what is the “appropriate standard,” it gave some guidance. In determining whether Petitioner has presented “substantial evidence of incompetence,” the Court may consider any appropriate evidence including sworn declarations by Petitioner or other inmates, sworn declarations or letters from treating or prison psychiatrists or psychologists, and relevant medical records. *Id.* at 1151–53.

*5 In *Allen*, the petitioner submitted his own sworn declaration and a declaration from a fellow inmate which stated that Allen was mentally impaired and did not understand the court's orders. *Id.* at 1151. He also submitted a letter from a prison psychiatrist which stated that Allen was in the Enhanced Outpatient Program (“EOP”) at the prison, had been “diagnosed with Chronic Undifferentiated Schizophrenia and [was] taking two psychotropic medications.” *Id.* at 1151–52. Allen filed a second declaration in support of his motion for appointment of counsel in which he stated that he suffered from a “ ‘debilitating mental illness that requires a course of treatment that includes the use of various psychotropic medications’ ” and that the mental illness combined with the medications “ ‘severely [hinder] his ability to comprehend or correctly respond to the determinations and Orders made

by the Court.’ ” *Id.* at 1152. The Ninth Circuit concluded that this was sufficient to require the district court to make a determination as to Allen's competency by appointing counsel and conducting a competency hearing. *Id.* at 1153–54.

Here, Plaintiff has failed to submit substantial evidence of incompetence to justify a competency hearing. Like the prisoner in *Allen*, Plaintiff has submitted a declaration from a former fellow inmate, Mr. Gilmore, who states that he is “a witness to in affirmation Plaintiff Hoang Ming Tran's mental incompetence, and physical disability and further Plaintiff's severe lack of ability to prosecute his case in a court of law.” ^{FN4} ECF No. 51 at 9. However, unlike the plaintiff in *Allen*, Plaintiff does not have medical records to support his claim of incompetency. ECF No. 49. Specifically, Plaintiff has submitted numerous documents which show that he has a history of mental illness including depression, schizophrenia, post traumatic stress disorder, anxiety, and a suicide attempt ^{FN5}, and that he has been treated with various medications and therapy for those illnesses ^{FN6}; however, none of those documents show that Plaintiff, in his current state and with his current medications, is incompetent. ECF No. 49 at 8, 36, 51, & 73. In fact, the documentation shows that with his current medication, Plaintiff “feels relatively stable” and that Plaintiff's doctors found him to be of average intellect and have age appropriate and normal memory, insight, and judgment *Id.* at 8, 12, & 36. On February 6, 2012 that doctor noted that Plaintiff's “English is a little broken but can advocate for self very well.” *Id.* at 32. In March 2012, Plaintiff's doctors considered him to be anxious, but alert and oriented. *Id.* at 25.

FN4. While the Court accepts Mr. Gilmore's opinion that Plaintiff is mentally incompetent and lacks the ability to prosecute his claims, the Court finds it difficult to evaluate these opinions since Mr. Gilmore provides no facts or observations to support his conclusions.

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FN5. Plaintiff attempted to cut his left wrist on March 2010 in response to a command from an auditory hallucination to end his life. No stitches were required. *Id.* at 47.

FN6. Plaintiff received counseling while incarcerated that was helpful. *Id.* at 8.

In addition to his mental difficulties, Plaintiff's records demonstrate that he has a variety of physical health problems. The medical records show that Plaintiff has a history of hernias, epileptic seizures, joint pain, hearing loss, insomnia, and hemorrhoids. *Id.* at 57–58, 60–61 & 71. The records do not, however, state or imply that any of these physical conditions have left Plaintiff incompetent and unable to care for himself or proceed with this litigation. *Id.* While Plaintiff's records show that Plaintiff does have some difficulties,^{FN7} for the reasons described above, Plaintiff has not shown substantial evidence of incompetence.

FN7. *See Id.* at 8 (“he hears some voices (non command) when he is alone”), 33 (“poorly coping/engages was selected due to clt reporting increase in Sx distress which is negatively affecting his daily functioning”), 34 (Plaintiff has “difficulty with organizing his appts and information”), 40 (“he has some flashbacks from time to time ... [from] his family[’s] escape from Vietcong”), and 76 (“appears older than stated age”).

*6 In addition to their content, the medical records also show that Plaintiff has diligently followed up with his medical care, attended his appointments, taken his medications as prescribed, and advocated for himself when he felt that a medication was not working or there was some other problem with his treatment, which supports the finding that Plaintiff has not demonstrated incompetency.^{FN8}

FN8. *See Id.* at 29 (“client verbalized complaint about Abilify keeping him awake at night and he is requesting Wellbutrin instead”), 30 (“Client presented to clinic as a stand by patient to see provider for a record review and possible copying of requested records. Client also wanted to discuss medication changes”), 57 (Plaintiff “wants to change to Percocet from Tylenol # 3 or something different and better”), and 63 (Plaintiff “[w]ould also like a ‘grip’ for his cane. Cane is hurting his hand”).

Finally, this Court had the opportunity to personally observe Plaintiff during the Order to Show Cause hearing and did not observe any behavior or statements indicating mental incompetence. ECF No. 52, Exhibit 1. While Mr. Tran repeatedly asked for a lawyer to be appointed to represent him, his responses were appropriate to the Court's questions and indicated that he clearly understood the proceedings. *Id.* Plaintiff explained to the Court that he could not comply with the written discovery requests now that he was out of custody because he does not have access to his “prisoner assistant” and he experienced “emotional anxieties” or “panic attack[s]” when he tried to answer the discovery requests. *Id.* at 7. These symptoms do not indicate incompetence and Plaintiff's oral advocacy supports competence. The Court's observations are buttressed by the number of and quality of Plaintiff's pleadings.^{FN9}

FN9. In addition, to this case, Plaintiff has filed nine other lawsuits in this district and has been actively litigating three of them. The other seven cases are closed.

Because Plaintiff has not presented substantial evidence of current incompetence, other than his own motion stating that he suffers “drowsiness, dizziness, light headache and lack of concentration”^{FN10}, and Mr. Gilmore's conclusory declaration, which is refuted by legitimate medical records, Petitioner's request for

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a competency hearing is **DENIED**.

FN10. While potentially uncomfortable and frustrating, Plaintiff does not present any medical evidence that these symptoms leave him incompetent.

C. *Ex Parte* Motion for Court to Appoint Next Friend or Appoint Counsel

In his “*Ex Parte* Motion and Request for Court to Appoint Next Friend or Appoint Counsel to Litigate on Behalf of Hoang Minh Tran Due to Incompetence,” Mr. Allan Tracy Gilmore seeks to have the Court appoint a next friend to Plaintiff or, in the alternative, appoint counsel to litigate on behalf of Plaintiff. ECF No. 51. In support, Mr. Gilmore states that under FRCP 17(c) Plaintiff may “sue by a next friend or by guardian ad litem” since he does not have a duly appointed representative. *Id.* at 4. Mr. Gilmore also states that Plaintiff qualifies for counsel under 18 U.S.C.A. § 3006A. *Id.* Finally, Mr. Gilmore notes that while he has been assisting Plaintiff up to this point, he “has done all that he is able to do” and “is an incarcerated individual and surely cannot appear in court on behalf of Plaintiff ... acting in the capacity as counsel.” *Id.* at 2.

In their opposition to Plaintiff's request for a competency hearing, Defendants also oppose Plaintiff's request for appointment of a next friend. ECF No. 52 at 5. In support, Defendants note that “Mr. Gilmore would be ill suited to be appointed as an officer of the court. And as Mr. Gilmore himself acknowledges, as an incarcerated person he cannot make appearances for plaintiff.” *Id.*

*7 If Mr. Gilmore is motioning for the Court to appoint a next friend in support of Plaintiff's motion for a competency hearing, the request is **DENIED**. As discussed above, the Court does not find that Plaintiff has presented sufficient evidence to support his claim of incompetence and Mr. Gilmore's motion does

nothing to alter that finding. If Mr. Gilmore is requesting that the Court appoint him as Plaintiff's next friend, the request is **DENIED** for the reasons discussed below.

“‘[N]ext friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another.” *Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). “In order to establish next-friend standing, the putative next friend must show: (1) that the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, the petitioner.” *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1159–1160 (9th Cir.2002) (citing *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir.2001)).

Mr. Gilmore fails to satisfy the first prong of the next friend test as he has not demonstrated that Plaintiff is unable to litigate his own case. While Mr. Gilmore states that Plaintiff's mental incompetence and physical disability render him unable to litigate this action, Mr. Gilmore fails to provide any support for his conclusion or evidence that he is qualified to make a determination as to Plaintiff's competency.

With respect to the second prong, Mr. Gilmore has not demonstrated that he is dedicated to the best interest of Plaintiff. As quoted above, Mr. Gilmore believes that he has done all that he is able to do and cannot make appearances for Plaintiff or perform other duties because he is currently incarcerated. ECF No. 51 at 2. Also, in *Whitmore*, the Supreme Court explained that “‘[h]owever friendly’ ” and “‘sympathetic’ ” a petition may be, and however concerned the petitioner is that “‘unconstitutional laws [are being] enforced,’ ” a petitioner without a significant relationship does not suffer a sufficient grievance for standing purposes.” *Whitmore*, 495 U.S. at 166. Here, Mr. Gilmore has not indicated that he has any rela-

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tionship with Plaintiff apart from assisting him with his legal affairs. ECF No. 52. Having demonstrated no significant relationship with Plaintiff, Mr. Gilmore has failed to satisfy the second prong of the test for “next friend” status.^{FN11} Mr. Gilmore merely states that he is “a witness ... to Plaintiff Hoang Minh Tran's mental incompetence, and physical disability.” *Id.* at 9. This relationship is insufficient to support “next friend” standing. As such, Mr. Gilmore's motion is **DENIED**.

FN11. Mr. Gilmore cites to a *Bowen v. Rubin*, 213 F.Supp.2d 220, 226 (E.D.N.Y. Aug.24, 2001) for the proposition that “a close relationship or blood tie need not exist between a proposed next friend and an individual in need of representation.” ECF No. 51 at 2. While Mr. Gilmore's citation is correct, the Court notes that the next line of the case makes it clear that this is the position of the Second Circuit (stating “[t]he Second Circuit has construed Fed.R.Civ.P. 17(c) broadly, stating that a next friend include[s] any one who has an interest in the welfare of an infant [or incompetent] who may have a grievance or a cause of action” (internal quotations omitted)) which is not binding on our Court which is located in the Ninth Circuit.

IT IS SO ORDERED.

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

DALE WEEMS,

Appellant,

vs.

**WASHINGTON BOARD OF INDUSTRIAL
INSURANCE APPEALS,**

Respondent.

COA NO. 44713-4-II

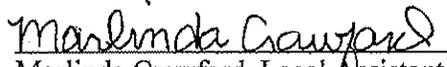
**DECLARATION OF
ELECTRONICALLY TRANSMITTED
DOCUMENT**

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing electronically transmitted document for service and certify that it is on bond paper.
2. My address is: 711 Capitol Way South, Suite 704, Olympia, WA 98501.
3. My phone number is: 360-753-3610 extension 229.
4. The email address where I received the document is: marlindac@nwjustice.org.
5. I have examined the foregoing document, determined that it consists of forty-two (42) pages, including this Declaration page, and that it is complete and legible.

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated this 28th day of February, 2014, in Olympia, Washington.



Marlinda Crawford, Legal Assistant