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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CABRUN E. WATSON,	)	No. CV 07-5223-RC
	)	
Plaintiff,	)	
	)	OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Cabrun E. Watson filed a complaint on August 29, 2007, seeking review of the Commissioner’s decision denying his application for disability benefits. The Commissioner answered the complaint on January 16, 2008, and the parties filed a joint stipulation on March 18, 2008.

**BACKGROUND**

**I**

On August 30, 2004 (protective filing date), plaintiff applied for disability benefits under the Supplemental Security Income program (“SSI”) of Title XVI of the Act, 42 U.S.C. § 1382(a), claiming an

1 inability to work since June 14, 2002, due to shortness of breath,  
2 lung problems, and right ankle pain. Certified Administrative Record  
3 ("A.R.") 64-67, 76. The plaintiff's application was denied on  
4 December 17, 2004. A.R. 49-54. The plaintiff then requested an  
5 administrative hearing, which was held before Administrative Law Judge  
6 Robert A. Evans ("the ALJ") on August 1, 2006. A.R. 55-57, 199-215.  
7 On October 23, 2006, the ALJ issued a decision finding plaintiff is  
8 not disabled. A.R. 15-26. The plaintiff appealed the decision to the  
9 Appeals Council, which denied review on June 20, 2007. A.R. 4-11.

## 11 II

12 The plaintiff, who was born on February 3, 1966, is currently 42  
13 years old. A.R. 65. He has an eleventh-grade education, and  
14 previously worked as a janitor and loader/unloader. A.R. 77, 80, 82-  
15 83, 203, 208.

## 17 DISCUSSION

### 18 III

19 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
20 review the Commissioner's decision denying plaintiff disability  
21 benefits to determine if his findings are supported by substantial  
22 evidence and whether the Commissioner used the proper legal standards  
23 in reaching his decision. Stubbs-Danielson v. Astrue, 539 F.3d 1169,  
24 1172 (9th Cir. 2008); Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d  
25 1155, 1159 (9th Cir. 2008).

26  
27 The claimant is "disabled" for the purpose of receiving benefits  
28 under the Act if he is unable to engage in any substantial gainful

1 activity due to an impairment which has lasted, or is expected to  
2 last, for a continuous period of at least twelve months. 42 U.S.C. §  
3 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the  
4 burden of establishing a prima facie case of disability." Roberts v.  
5 Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122  
6 (1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

7  
8 The Commissioner has promulgated regulations establishing a five-  
9 step sequential evaluation process for the ALJ to follow in a  
10 disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ  
11 must determine whether the claimant is currently engaged in  
12 substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the  
13 **Second Step**, the ALJ must determine whether the claimant has a severe  
14 impairment or combination of impairments significantly limiting him  
15 from performing basic work activities. 20 C.F.R. § 416.920(c). If  
16 so, in the **Third Step**, the ALJ must determine whether the claimant has  
17 an impairment or combination of impairments that meets or equals the  
18 requirements of the Listing of Impairments ("Listing"), 20 C.F.R. §  
19 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the  
20 **Fourth Step**, the ALJ must determine whether the claimant has  
21 sufficient residual functional capacity despite the impairment or  
22 various limitations to perform his past work. 20 C.F.R. § 416.920(f).  
23 If not, in **Step Five**, the burden shifts to the Commissioner to show  
24 the claimant can perform other work that exists in significant numbers  
25 in the national economy. 20 C.F.R. § 416.920(g).

26  
27 Applying the five-step sequential evaluation process, the ALJ  
28 found plaintiff has not engaged in substantial gainful activity since

1 his alleged onset date, June 14, 2002. (Step One). The ALJ then  
2 found plaintiff has "mild degenerative joint disease of the right  
3 elbow and right forearm, right ankle chronic strain, and status post  
4 laparotomy and splenectomy for gunshot wound," which are severe  
5 impairments (Step Two); however, he does not have an impairment or  
6 combination of impairments that meets or equals a Listing. (Step  
7 Three). The ALJ next determined plaintiff cannot perform his past  
8 relevant work. (Step Four). Finally, the ALJ found plaintiff can  
9 perform a significant number of jobs in the national economy;  
10 therefore, he is not disabled. (Step Five).

#### 11 12 IV

13 "A Social Security [recipient] has a statutory right, which may  
14 be waived, to be represented by counsel before an ALJ." Graham v.  
15 Apfel, 129 F.3d 1420, 1422 (11th Cir. 1997) (per curiam); Skinner v.  
16 Astrue, 478 F.3d 836, 841 (7th Cir. 2007); Mendoza v. Barnhart, 436  
17 F. Supp. 2d 1110, 1114 (C.D. Cal. 2006); 42 U.S.C. § 406. However,  
18 "[l]ack of counsel does not affect the validity of the hearing unless  
19 the plaintiff can demonstrate prejudice or unfairness in the  
20 administrative proceedings." Key v. Heckler, 754 F.2d 1545, 1551 (9th  
21 Cir. 1985) (quoting Vidal v. Harris, 637 F.2d 710, 714-15 (9th Cir.  
22 1981)); Mendoza, 436 F. Supp. 2d at 1115. Thus, the pertinent issue  
23 is whether the administrative proceeding was fair, not whether  
24 plaintiff properly waived his right to counsel. Higbee v. Sullivan,  
25 975 F.2d 558, 561-62 (9th Cir. 1992); Mendoza, 436 F. Supp. 2d at  
26 1115; see also Hall v. Sec'y of Health, Educ. & Welfare, 602 F.2d  
27 1372, 1378 (9th Cir. 1979) ("[E]ven if [claimant] did not completely  
28 understand his right to representation by counsel, he would not be

1 entitled to relief absent a showing of prejudice, or unfairness in the  
2 proceedings." ).

3  
4        " `In Social Security cases, the ALJ has a special duty to fully  
5 and fairly develop the record and to assure that the claimant's  
6 interests are considered.' " Smolen, 80 F.3d at 1288 (citation  
7 omitted); Widmark v. Barnhart, 454 F.3d 1063, 1068 (9th Cir. 2006);  
8 see also Higbee, 975 F.2d at 561 (per curiam) ("We have long  
9 recognized that the ALJ is not a mere umpire at [an administrative  
10 hearing], but has an independent duty to fully develop the record.  
11 . . ."). When, as here, a recipient or claimant is not represented by  
12 counsel, "it is incumbent upon the ALJ to scrupulously and  
13 conscientiously probe into, inquire of, and explore for all the  
14 relevant facts." Higbee, 975 F.2d at 561 (quoting Cox v. Califano,  
15 587 F.2d 988, 991 (9th Cir. 1978)); Celaya v. Halter, 332 F.3d 1177,  
16 1183 (9th Cir. 2003). To satisfy this requirement, the ALJ must be  
17 especially diligent in ensuring that favorable, as well as  
18 unfavorable, facts and circumstances are elicited. Higbee, 975 F.2d  
19 at 561.

20  
21        At the administrative hearing, plaintiff testified he was  
22 examined at the Hubert H. Humphrey Comprehensive Health Center ("HHH")  
23 in 2004, and subsequently received extensive medical treatment,  
24 including surgery, while in prison from January 3, 2005, to July 14,  
25 2006. A.R. 201-05. Although the ALJ obtained plaintiff's medical  
26 records from HHH, A.R. 181-93, he did not obtain plaintiff's prison  
27 medical records -- despite advising plaintiff he would hold the  
28 administrative record open and try to obtain the records. A.R. 214-

1 15. In fact, there is absolutely no evidence in the administrative  
2 record demonstrating the ALJ made any attempt to obtain plaintiff's  
3 prison records.<sup>1</sup> This is especially problematic because the ALJ  
4 recognized "the key is going to be . . . [plaintiff's] right hand,"  
5 and the prison medical records "dealt with the problems with [the]  
6 gunshot to that right hand." A.R. 213. Moreover, plaintiff testified  
7 that "[t]he doctor at . . . Tehachapi [State Prison] said that  
8 [plaintiff] would never use [his dominant right] hand again." A.R.  
9 204. This, if true, clearly would assist plaintiff in showing he is  
10 disabled. See A.R. 20-21, 211 (ALJ determined plaintiff had the  
11 residual functional capacity to perform a limited range of light work;  
12 however, vocational expert testified that if plaintiff had no  
13 functional ability to use his right dominant hand, he could not work).  
14 Thus, the ALJ failed to fully and fairly develop the record on behalf  
15 of plaintiff.<sup>2</sup> Celaya, 332 F.3d at 1183; Tonapetyan v. Halter, 242  
16 F.3d 1144, 1150 (9th Cir. 2001); see also Struck v. Astrue, 247 Fed.  
17 Appx. 84, 86 (9th Cir. 2007) (ALJ failed to fully and fairly develop  
18 record for unrepresented claimant when ALJ failed to request needed

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19  
20 <sup>1</sup> In Tidwell v. Apfel, 161 F.3d 599 (9th Cir. 1999), the  
21 Ninth Circuit held an ALJ satisfied his duty to develop the  
22 record when he "voiced his concerns [about a treating physician's  
23 opinions] to [claimant] and her counsel, requested an additional  
24 inquiry into the basis for [the] opinions and explained that he  
25 would keep the record open so that it could be supplemented by  
26 the responses from [the treating physician]." Id. at 602.  
27 Tidwell is inapposite here since, among other reasons, plaintiff  
28 was not represented by counsel, plaintiff explained he had no way  
of getting the prison records, A.R. 201, and the ALJ stated he  
would try and get the records. A.R. 214.

<sup>2</sup> The ALJ also found plaintiff was not fully credible  
because "[t]he record shows little in the way of treatment since  
the gunshot wound in June 2002[,]" A.R. 24; however, plaintiff's  
prison medical records might remedy this deficiency.

1 hospital records, which ALJ recognized were vital to claimant's  
2 claim).<sup>3</sup>

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4 **V**

5 When the Commissioner does not apply the proper legal standards,  
6 the Court has authority to affirm, modify, or reverse the  
7 Commissioner's decision "with or without remanding the cause for  
8 rehearing." 42 U.S.C. § 405(g); McCartey v. Massanari, 298 F.3d 1072,  
9 1076 (9th Cir. 2002). "Generally when a court . . . reverses an  
10 administrative determination, 'the proper course, except in rare  
11 circumstances, is to remand to the agency for additional investigation  
12 or explanation.'" Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir.  
13 2004) (citations omitted); Moisa v. Barnhart, 367 F.3d 882, 886 (9th  
14 Cir. 2004). In this case, "[s]ince the claimant was not represented  
15 by counsel and the [ALJ] did not 'scrupulously and conscientiously  
16 probe into, inquire of and explore for all relevant facts,' the  
17 interests of justice demand that the case be remanded." Vidal, 637  
18 F.2d at 715 (quoting Cox, 587 F.2d at 991); Tonapetyan, 242 F.3d at  
19 1150-51.

20  
21 **ORDER**

22 IT IS ORDERED that: (1) plaintiff's request for relief is  
23 granted; and (2) the Commissioner's decision is reversed, and the  
24 action is remanded to the Social Security Administration for further  
25 proceedings consistent with this Opinion and Order, pursuant to  
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<sup>3</sup> See Fed. R. App. P. 32.1(a); Ninth Circuit Rule 36-3(b).

1 sentence four of 42 U.S.C. § 405(g), and Judgment shall be entered  
2 accordingly.

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DATE: December 12, 2008

/S/ Rosalyn M. Chapman  
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

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12/11/08