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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HENRY ORTIZ,	)	Case No. CV 12-3348-PJW
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
CAROLYN W. COLVIN,	)	
ACTING COMMISSIONER OF THE	)	
SOCIAL SECURITY ADMINISTRATION,	)	
	)	
Defendant.	)	

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I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying his application for Supplemental Security Income ("SSI"). He claims that the Administrative Law Judge ("ALJ") erred when he required Plaintiff to leave the hearing during testimony and when he rejected the consultative psychologist's opinion. For the reasons discussed below, the Agency's decision is reversed and the case is remanded for further proceedings.

1 II. SUMMARY OF PROCEEDINGS

2 Plaintiff was born in April 1988.<sup>1</sup> (AR 35-36, 78, 104, 503.) In  
3 March 2002, his mother applied for SSI on his behalf, alleging that he  
4 was disabled due to walking problems, dermatitis, migraine headaches,  
5 major depressive disorder, post-traumatic stress disorder, learning  
6 disorder, eating disorder, anxiety, insomnia, and psychotic disorders.  
7 (AR 33, 78-81, 94.) His application was approved in May 2002. (AR  
8 33-34.) After Plaintiff turned 18, however, his eligibility was  
9 reviewed under the rules governing disability for adults. On December  
10 5, 2007, the Agency found that he was not disabled under those  
11 standards. (AR 37-40.) He then requested and was granted a hearing  
12 before an ALJ. (AR 56-61.) On June 24, 2009, he appeared for the  
13 hearing without counsel. (AR 496-537.) On February 24, 2010, the ALJ  
14 issued a decision denying benefits. (AR 21-29.) Plaintiff appealed  
15 the decision to the Appeals Council, which denied review. (AR 6-10,  
16 15.) This action followed.

17 III. ANALYSIS

18 A. Right to a Fair Hearing

19 Plaintiff contends that the ALJ deprived him of his right to a  
20 fair hearing when he required Plaintiff to leave the hearing room  
21 while his mother testified. (Joint Stip. at 17-18.) For the  
22 following reasons, the Court agrees.

23 Social security claimants are entitled to due process in the  
24 determination of their claims. *Holohan v. Massanari*, 246 F.3d 1195,  
25 1209 (9th Cir. 2001) (citing *Richardson v. Perales*, 402 U.S. 389, 401-

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26  
27 <sup>1</sup> The ALJ gives Plaintiff's date of birth as October 13, 1985;  
28 the correct date appears to be April 11, 1988. (*Compare*  
Administrative Record ("AR") 27 with AR 35-36, 78, 104, and 503).

1 02 (1971)). This includes the right to a full and fair hearing, see  
2 *Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008), in which the  
3 claimant is given an opportunity to be heard in a meaningful manner.  
4 See *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). This is  
5 particularly true with regard to a claimant who has already been  
6 afforded benefits and is at risk of losing them because, once granted,  
7 those benefits become a property right protected under the Fifth  
8 Amendment. *Id.* at 332.

9 In the context of the administrative proceedings in this case,  
10 due process required that Plaintiff be allowed to remain in the  
11 hearing room for the taking of testimony. Because Plaintiff was  
12 representing himself, his exclusion from the hearing prevented him  
13 from meaningfully participating in it. And, though the ALJ did his  
14 best to fully and fairly develop the record, it was not a substitute  
15 for Plaintiff's right to be present at and participate in the hearing.

16 Excluding Plaintiff from the hearing was prejudicial and unfair.  
17 Plaintiff did not know what testimony had been introduced when he was  
18 in the hallway. And, when he returned, the ALJ did not tell him what  
19 his mother had said or give him an opportunity to question her. (AR  
20 532.) Instead, he told Plaintiff that the questioning of his mother  
21 was over and that the ALJ would now question the vocational expert.  
22 (AR 532.) As Plaintiff pointed out in his supplemental brief, had he  
23 been allowed to be present when his mother testified, he would have  
24 attempted to have her explain how he was unable to stand and walk for  
25 six hours and how his paranoia interfered with his daily life.  
26 (Plaintiff's Response to Order Re: Supplemental Briefing at 2-3.) The  
27 fact that Plaintiff was not able to develop the record along these  
28 lines amounts to prejudice. The fact that Plaintiff was in the

1 hallway when his mother testified and had no one to represent him in  
2 the hearing room was unfair.

3         The Agency believes that it was proper for the ALJ to exclude  
4 Plaintiff from the hearing. (Joint Stip. at 18-20; Defendant's Reply  
5 to Plaintiff's Response to Order Re: Supplemental Briefing at 2-7.)  
6 It points out that the ALJ thoroughly explained to Plaintiff that he  
7 had a right to counsel before the hearing started and that Plaintiff  
8 waived that right. (Joint Stip. at 18-19.) It appears that the  
9 Agency believes that, by waiving counsel, Plaintiff, in effect, waived  
10 his right to be present at the hearing, too. The Court does not see  
11 any connection between the two rights. Nor did the ALJ, as evidenced  
12 by the fact that he never told Plaintiff when he was taking the waiver  
13 that by waiving counsel Plaintiff was also giving up his right to be  
14 present at the hearing. (AR 497-99.)

15         The Agency also argues that excluding Plaintiff from the hearing  
16 was not improper because Plaintiff did not have a right to unlimited  
17 cross examination of his mother. (Joint Stip. at 19-20; Defendant's  
18 Reply to Plaintiff's Response to Order Re: Supplemental Briefing at 2-  
19 3.) Again, the Court does not see any connection between the right to  
20 be present at the hearing and the ALJ's discretion to limit cross  
21 examination. Plaintiff's right to be present at the hearing did not  
22 flow from and was not dependent on his right to cross examine the  
23 witnesses. He had a constitutional right to hear what was being said  
24 in the hearing, a hearing that had been called to determine whether  
25 his benefits were going to be terminated.

26         In addition to the due process considerations, the Agency's own  
27 manual governing administrative hearings provides that claimants are  
28 entitled to be present "during the *entire* hearing." See HALLEX,

1 Social Security Hearings, Appeals and Litigation Law Manual,  
2 Transmittal I-2-6-60 (emphasis added.). So, too, do the Agency's  
3 regulations. See, e.g., 20 C.F.R. §§ 404.916(b)(4) ("You may present  
4 witnesses and question any witnesses at the hearing."); 404.944 ("A  
5 hearing is open to the parties . . . ."); 404.950(a) ("Any party to a  
6 hearing has a right to appear before the administrative law judge . .  
7 . ."); 404.950(e) ("The administrative law judge may ask the witnesses  
8 any questions material to the issues and *shall* allow the parties or  
9 their designated representatives to do so.") (emphasis added).

10 Finally, the Agency attempts to justify what the ALJ did by  
11 providing a reason for him excluding Plaintiff, i.e., "to ensure  
12 truthful testimony from the witnesses." (Plaintiff's Response to  
13 Order Re: Supplemental Briefing at 4.) With good reason, the Agency  
14 does not cite to the record for this explanation because the ALJ never  
15 provided it. In fact, the ALJ never provided any reason for excluding  
16 Plaintiff. (AR 520-21.) He simply announced that Plaintiff had to  
17 leave when his mother testified. (AR 520-21.) Because the Agency is  
18 not allowed to invent reasons for an ALJ's actions, this justification  
19 is also rejected. Further, even assuming, arguendo, that the ALJ had  
20 set forth in the record that that was the reason for excluding  
21 Plaintiff, it would not be enough to overcome Plaintiff's right to be  
22 present at the hearing.

23 Plaintiff also complains that the ALJ erred when he precluded him  
24 from questioning the vocational expert about the hypothetical  
25 questions the ALJ had posed. Again, the Court agrees. Plaintiff  
26 should have been allowed to question the vocational expert about his  
27 testimony, including the bases for his assumptions. On remand,  
28 Plaintiff, or his counsel, should be given an opportunity to do so.

1 B. The Consultative Psychologist's Opinion

2 Plaintiff contends that the ALJ failed to properly take into  
3 account the opinion of consultative psychologist Scott Kopoian.  
4 (Joint Stip. at 4-7.) According to Plaintiff, the ALJ's residual  
5 functional capacity determination conflicted with Dr. Kopoian's  
6 findings--that Plaintiff would be limited to "simple, 2 to 3 sequence  
7 tasks for 6 to 8 hours without continuous supervision" and might need  
8 more than ordinary supervision--yet the ALJ did not provide any reason  
9 for rejecting those findings. (Joint Stip. at 5-6.) Defendant argues  
10 that the ALJ did not err because he essentially accepted Dr. Kopoian's  
11 findings and incorporated them into the residual functional capacity  
12 finding. Though, in the context of the state of the record as it  
13 stands now, the Court would be inclined to agree with the government,  
14 in light of the fact that the Court is remanding the case to the  
15 Agency for further proceedings, it need not resolve this claim on the  
16 merits. The ALJ may, however, want to revisit this issue after  
17 receiving any additional evidence.

18 IV. CONCLUSION

19 For the reasons set forth above, the Agency's decision is  
20 reversed and the case is remanded for further proceedings.

21 IT IS SO ORDERED.

22 DATED: June 6, 2013

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PATRICK J. WALSH  
25 UNITED STATES MAGISTRATE JUDGE