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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

VINCENT RIZZUTO,	) NO. CV 14-1052-AS
	)
Plaintiff,	) <b>MEMORANDUM OPINION AND</b>
	)
v.	) <b>ORDER OF REMAND</b>
	)
CAROLYN W. COLVIN, Acting	)
Commissioner of Social	)
Security,	)
	)
Defendant.	)

**PROCEEDINGS**

On February 25, 2014, Plaintiff filed a Complaint seeking review of the Commissioner’s denial of Plaintiff’s application for a period of disability, and disability insurance benefits (“DIB”). (Docket Entry No. 3). On July 21, 2014, Defendant filed an Answer and the Administrative Record (“A.R.”). (Docket Entry Nos. 11, 12). The parties have consented to proceed before a United States Magistrate Judge. (Docket Entry Nos. 10, 18). On October 8, 2014, the parties filed a Joint Stipulation (“Joint Stip.”) setting forth their respective positions regarding Plaintiff’s claims. (Docket

1 Entry No. 21). The Court has taken this matter under submission  
2 without oral argument. See C.D. Local R. 7-15; "Order Re:  
3 Procedures in a Social Security Case," filed February 26, 2014  
4 (Docket Entry No. 7).

5  
6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

7  
8 Plaintiff, formerly employed as a boat engine technician and  
9 painter, insurance damage estimator, truck mechanic, auto body shop  
10 repairman, and auto body shop supervisor (A.R. 26), asserts  
11 disability beginning April 1, 2010, due to visual difficulties,  
12 left elbow pain, chronic bronchitis, left knee fracture, head  
13 trauma,<sup>1</sup> kidney stones, and depression. (A.R. 19, 214, 230). On  
14 May 23, 2012, a hearing was opened and then continued in order for  
15 Plaintiff to obtain representation and submit additional documents.  
16 (Id. 19, 49-55).

17 On August 3, 2012, the Social Security Administration ("SSA")  
18 issued a Notice of Hearing to be held on September 17, 2012. (Id.  
19 34-38). On August 22, 2012, Plaintiff signed the Acknowledgment of  
20 Receipt (Notice of Hearing), indicating he would be present at the  
21 hearing. (Id. 150). Also on August 22, 2012, Plaintiff retained  
22 counsel. (Id. 147). On August 23, 2012, counsel sent a letter to  
23 the SSA, requesting the hearing date be rescheduled because he had

24  
25 <sup>1</sup> Although there is some ambiguity about the date, it appears  
26 that on February 15, 2010, Plaintiff was severely beaten by two  
27 men. (See, e.g., A.R. 239-40, 300 (an examiner on June 21, 2012,  
28 noted that "claimant states that he was jumped about a year and a  
half ago"), 340; but see id. 230 (in reporting a change in  
condition, Plaintiff reported he had been attacked by two men on  
August 17, 2010); Joint Stip. 7 ("On August 17, 2010, plaintiff was  
attacked by two men") (citing A.R. 230)).

1 a previously scheduled hearing on that date. (Id. 149). There is  
2 no indication in the record that the Administrative Law Judge  
3 ("ALJ"), Gail Reich, ever acknowledged the letter or informed  
4 Plaintiff or his counsel whether the request had been approved or  
5 denied.

6  
7 On September 17, 2012, the hearing went forward over  
8 Plaintiff's objections. The ALJ examined the record and heard  
9 testimony from Plaintiff, medical expert ("ME") Thomas J. Maxwell,  
10 and vocational expert ("VE") Nick Corso, Jr. (Id. 19, 20, 58-76).  
11 Plaintiff's counsel did not appear at the hearing. (Id. 19, 58-  
12 60).

13 On January 12, 2013, the ALJ issued a decision denying  
14 Plaintiff's application for DIB. (Id. 19-28). The ALJ found that  
15 Plaintiff has the severe impairments of: chronic bronchitis,  
16 history of kidney stones, knee fracture, left eye impairment,  
17 history of head trauma from the attack, and residuals from a left  
18 elbow injury. (Id. 21).

19  
20 The ALJ determined that through Plaintiff's last insured date,  
21 September 30, 2010, Plaintiff has the residual functional capacity  
22 ("RFC") to perform a "limited range of the reduced light level of  
23 work," and can sit, stand, or walk six hours of an eight-hour  
24 workday, and can occasionally do posturals, except that he should  
25 not: climb ropes, ladders or scaffolds; work at unprotected heights  
26 or around hazardous machinery; do work that requires depth  
27 perception; or be exposed to concentrated dust, fumes, or odors.  
28 (Id. 22-23).

1 Relying on the testimony of the VE, the ALJ determined that  
2 through the last insured date, Plaintiff was unable to perform his  
3 past relevant work as an auto body shop repairman and auto body  
4 shop supervisor, (Id. 26, 73), but was able to perform work at the  
5 light level such as cashier II, sales attendant, and information  
6 clerk. (Id. 27). The ALJ also determined that Plaintiff was able  
7 to perform such sedentary work as final assembler, document  
8 preparer, or ticket checker. (Id. 28).

9  
10 Accordingly, the ALJ found that Plaintiff was not disabled at  
11 any time from the alleged disability onset date of April 1, 2010,  
12 through September 30, 2010, the last insured date. (Id. 21, 28).

#### 13 **PLAINTIFF'S CONTENTIONS**

14  
15 Plaintiff contends that the ALJ erred (1) because Plaintiff  
16 did not knowingly and intelligently waive his right to counsel; and  
17 (2) because she did not satisfy her duties to Plaintiff. (Joint  
18 Stip. 2).

#### 19 **STANDARD OF REVIEW**

20  
21  
22 This Court reviews the Commissioner's decision to determine  
23 if: (1) the Commissioner's findings are supported by substantial  
24 evidence; and (2) the Commissioner used proper legal standards. 42  
25 U.S.C. § 405(g); see Carmickle v. Comm'r, 533 F.3d 1155, 1159 (9th  
26 Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007).  
27 "Substantial evidence is more than a scintilla, but less than a  
28 preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.

1 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.  
2 1997). It is relevant evidence "which a reasonable person might  
3 accept as adequate to support a conclusion." Hoopai, 499 F.3d at  
4 1074; Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)). To  
5 determine whether substantial evidence supports a finding, "a court  
6 must 'consider the record as a whole, weighing both evidence that  
7 supports and evidence that detracts from the [Commissioner's]  
8 conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.  
9 1997) (citation omitted); see Widmark v. Barnhart, 454 F.3d 1063,  
10 1066 (9th Cir. 2006) (inferences "reasonably drawn from the record"  
11 can constitute substantial evidence).

12 This Court "may not affirm [the Commissioner's] decision  
13 simply by isolating a specific quantum of supporting evidence, but  
14 must also consider evidence that detracts from [the Commissioner's]  
15 conclusion." Ray v. Bowen, 813 F.2d 914, 915 (9th Cir. 1987)  
16 (citation and internal quotation marks omitted); Lingenfelter v.  
17 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007) (same). However, the  
18 Court cannot disturb findings supported by substantial evidence,  
19 even though there may exist other evidence supporting Plaintiff's  
20 claim. See Torske v. Richardson, 484 F.2d 59, 60 (9th Cir. 1973).  
21 "If the evidence can reasonably support either affirming or  
22 reversing the [Commissioner's] conclusion, [a] court may not  
23 substitute its judgment for that of the [Commissioner]." Reddick,  
24 157 F.3d 715, 720-21 (9th Cir. 1998) (citation omitted).

25  
26 **APPLICABLE LAW**

27  
28 "The Social Security Act defines disability as the 'inability

1 to engage in any substantial gainful activity by reason of any  
2 medically determinable physical or mental impairment which can be  
3 expected to result in death or which has lasted or can be expected  
4 to last for a continuous period of not less than 12 months.'" Webb  
5 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting 42 U.S.C.  
6 § 423 (d)(1)(A)). The ALJ follows a five-step, sequential analysis  
7 to determine whether a claimant has established disability. 20  
8 C.F.R. § 404.1520.

9  
10 At step one, the ALJ determines whether the claimant is  
11 engaged in substantial gainful employment activity. Id. §  
12 404.1520(a)(4)(i). "Substantial gainful activity" is defined as  
13 "work that . . . [i]nvolves doing significant and productive  
14 physical or mental duties[] and . . . [i]s done (or intended) for  
15 pay or profit." Id. §§ 404.1510, 404.1572. If the ALJ determines  
16 that the claimant is not engaged in substantial gainful activity,  
17 the ALJ proceeds to step two which requires the ALJ to determine  
18 whether the claimant has a medically severe impairment or  
19 combination of impairments that significantly limits his ability to  
20 do basic work activities. See id. § 404.1520(a)(4)(ii); see also  
21 Webb, 433 F.3d at 686. The "ability to do basic work activities"  
22 is defined as "the abilities and aptitudes necessary to do most  
23 jobs." 20 C.F.R. § 404.1521(b); Webb, 433 F.3d at 686. An  
24 impairment is not severe if it is merely "a slight abnormality (or  
25 combination of slight abnormalities) that has no more than a  
26 minimal effect on the ability to do basic work activities." Webb,  
27 433 F.3d at 686.

28 If the ALJ concludes that a claimant lacks a medically severe

1 impairment, the ALJ must find the claimant not disabled. Id.; 20  
2 C.F.R. § 1520(a)(ii); Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th  
3 Cir. 2005) (ALJ need not consider subsequent steps if there is a  
4 finding of "disabled" or "not disabled" at any step).

5  
6 However, if the ALJ finds that a claimant's impairment is  
7 severe, then step three requires the ALJ to evaluate whether the  
8 claimant's impairment satisfies certain statutory requirements  
9 entitling him to a disability finding. Webb, 433 F.3d at 686. If  
10 the impairment does not satisfy the statutory requirements  
11 entitling the claimant to a disability finding, the ALJ must  
12 determine the claimant's RFC, that is, the ability to do physical  
13 and mental work activities on a sustained basis despite limitations  
14 from all his impairments. 20 C.F.R. § 416.920(e).

15  
16 Once the RFC is determined, the ALJ proceeds to step four to  
17 assess whether the claimant is able to do any work that he or she  
18 has done in the past, defined as work performed in the last fifteen  
19 years prior to the disability onset date. If the ALJ finds that  
20 the claimant is not able to do the type of work that he or she has  
21 done in the past or does not have any past relevant work, the ALJ  
22 proceeds to step five to determine whether - taking into account  
23 the claimant's age, education, work experience and RFC - there is  
24 any other work that the claimant can do and if so, whether there  
25 are a significant number of such jobs in the national economy.  
26 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999); 20 C.F.R. §  
27 404.1520(a)(4)(iii)-(v). The claimant has the burden of proof at  
28 steps one through four, and the Commissioner has the burden of  
proof at step five. Tackett, 180 F.3d at 1098.

1 DISCUSSION  
2

3 After consideration of the record as a whole, the Court finds  
4 that the Commissioner's findings are not supported by substantial  
5 evidence or free from material<sup>2</sup> legal error.

6  
7 A. The ALJ Failed to Fully Develop the Record, Resulting in  
8 Prejudice and Unfairness to Plaintiff

9  
10 Plaintiff contends that at the hearing he "manifested his  
11 intent to be represented by counsel by informing the ALJ that he  
12 had retained counsel, but that his counsel could not appear" and,  
13 therefore, Plaintiff "did not knowingly and intelligently waive his  
14 right to counsel." (Joint Stip. 3, 4). He also claims that the  
15 hearing was prejudicial and unfair because the ALJ failed to comply  
16 with her heightened duty to adequately develop the record, and did  
17 not "conscientiously and scrupulously 'probe into, inquire of, and  
18 explore' all the relevant facts to protect plaintiff's interests,"  
19 especially with regard to: (1) the additional documents that were  
20 not placed in Plaintiff's file; (2) Plaintiff's alleged  
21 psychological and neurological impairments; and (3) Plaintiff's  
22 testimony regarding his symptoms, medication, and any side effects.  
23 (Id. 3, 7). Plaintiff also contends that requiring the hearing to  
24 go forward without counsel present, over Plaintiff's objection,  
deprived him of a meaningful opportunity to be heard. (Id. 6).

25 \_\_\_\_\_  
26 <sup>2</sup> The harmless error rule applies to the review of  
27 administrative decisions regarding disability. See McLeod v.  
28 Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart,  
400 F.3d 676, 679 (9th Cir. 2005) (stating that an ALJ's decision  
will not be reversed for errors that are harmless).





1 Califano, 587 F.2d 988, 991 (9th Cir. 1978) (citation omitted); see  
2 also Vidal v. Harris, 637 F.2d 710, 713 (9th Cir. 1981); Key v.  
3 Heckler, 754 F.2d 1545, 1551 (9th Cir. 1985). This duty includes  
4 diligently ensuring that both favorable and unfavorable facts and  
5 circumstances are elicited at the administrative hearing. Cox, 587  
6 F.2d at 991; Vidal, 637 F.2d at 713; Key, 754 F.2d at 1551. Remand  
7 is only warranted if the plaintiff can demonstrate prejudice or  
8 unfairness in the administrative proceeding as a result of not  
9 having counsel present. Vidal, 637 F.2d at 713.

10  
11 Additionally, a claimant is entitled to receive meaningful  
12 notice and an opportunity to be heard before his claim for benefits  
13 may be denied. Boettcher v. Sec'y of Health & Human Servs., 759  
14 F.2d 719, 722-23 (9th Cir. 1985); Udd v. Massanari, 245 F.3d 1096,  
15 1099 (9th Cir. 2001). "The essence of due process is the  
16 opportunity to be heard at a meaningful time and in a meaningful  
17 manner." Id. at 723 (citing Mathews v. Eldridge, 424 U.S. 319,  
18 333 (1976)). A hearing affords the opportunity for a claimant to  
19 present his case and for an adjudicator to see the claimant and  
20 "engage in a searching factual inquiry . . . and should result in  
21 more accurate decision-making." Id.

## 22 **2. Analysis**

23  
24 The following colloquy took place at the hearing:  
25  
26  
27  
28

1 ALJ: -- with the hearing.<sup>[3]</sup>

2 CLMT: You think that's fair to me? It says in writing,  
3 in black and white, in your letter to me, that if the attorney  
4 can't make it within the timeframe -- you sent the letter on  
5 August third, and that has to be within 20 days of the  
6 hearing. And he sent you the letter.

7  
8 ALJ: Okay, all right. . . .

9  
10 . . . .

11  
12 CLMT: When did he send you the letter?

13  
14 ALJ: Okay, let's go off the record for a minute.

15  
16 (At this point there ensued an off-the-record  
17 discussion.)

18 (A.R. 58).

19  
20 The hearing then went back on the record:

21  
22 ALJ: Okay. And we -- as we just discussed before  
23 going on the . . . record, there was a hearing in May.  
24 We continued it to give you an opportunity both to  
25 supplement . . . with the new additional records, and an  
26 opportunity to get an attorney. That was --

27  
28 <sup>3</sup> This is how the transcription of the hearing abruptly  
commenced. (A.R. 58).

1  
2 CLMT: Did [INAUDIBLE] forward the DR report to you?  
3

4 ALJ: Sir? We're going forward with the hearing.  
5 The record is as it is. You've gotten a copy of it and  
6 we're going forward today. You've just told me that if  
7 the record was complete, I told you what we had.  
8

9 CLMT: But I'm asking you, did she forward that to  
10 you?  
11

12 ALJ: She doesn't forward anything to me. The record  
13 is as-is. Everything is in there. It's electronic and  
14 you've received a copy of it. And, you had your  
15 opportunity, last May you were told, if you want an  
16 attorney you need to get one immediately so we can go  
17 forward at the next hearing. There will be no more  
18 continuances so we need to go forward today. We've set  
19 this time aside, we have our experts present and ready to  
20 go and we're going to proceed.

21 (Id. 59).  
22

23 A review of the record shows that on August 3, 2012, the  
24 Administration sent Plaintiff notice of the September 17, 2012,  
25 continued hearing date. (Id. 34-38). The notice indicated that if  
26 a postponement was requested, the "ALJ will decide whether you have  
27 a good reason for requesting the change. . . . [¶] If it is found  
28

1 you have a good reason for your request, we will set a new time and  
2 place for your hearing." (Id. 35). The SSA's Manual on Social  
3 Security Administration Hearings, Appeals and Litigation Law  
4 ("HALLEX")<sup>4</sup> suggests that "[i]f the ALJ does not find good cause to  
5 postpone the hearing, [she should] notify the claimant and  
6 representative that the hearing will be held as scheduled, and that  
7 failure to attend may result in a dismissal. Include in this  
8 notice an explanation of the ALJ's reasons for not finding good  
9 cause, and document the file (i.e., retain a copy of any written  
10 notice or prepare and retain a report of contact of any oral  
11 notice)." HALLEX I-2-3-20(C)(1). The Court finds no such notice  
12 in the record.

13  
14 On August 22, 2012, Plaintiff retained counsel (A.R. 147), and  
15 on August 23, 2012, twenty-five days prior to the scheduled  
16 hearing, counsel sent a letter to the SSA requesting a postponement  
17 because he had another hearing previously scheduled for September  
18 17, 2012 (id. 149). No response regarding the postponement request  
19 can be found in the record, and Plaintiff appeared at the hearing  
20 without his retained counsel. (Id. 19, 58).

21 At the hearing, Plaintiff objected to going forward without  
22

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23  
24 <sup>4</sup> The HALLEX is an internal policy manual that does not  
25 impose judicially enforceable duties on the ALJ. See Lockwood v.  
26 Comm'r Soc. Sec. Admin., 616 F.3d 1068, 1072 (9th Cir. 2010)  
27 ("HALLEX does not impose judicially enforceable duties on either  
28 the ALJ or this court."); see also Clark v. Astrue, 529 F.3d 1211,  
1216 (9th Cir. 2008) ("HALLEX is strictly an internal Agency  
manual, with no binding legal effect on the Administration or this  
court.").

1 counsel and also expressed concern that all of the relevant  
2 documents had not been received by the ALJ. (Id. 58-61).  
3 Nevertheless, the ALJ went forward with the hearing, stating  
4 “[w]e’ve set this time aside, we have our experts present and ready  
5 and we’re going to proceed.” (Id. 59). The ALJ’s decision also  
6 included the following statement:

7  
8 The claimant not only waited a prolonged period to secure  
9 representation but waited until after the second notice<sup>[5]</sup>  
10 of the rescheduled hearing to obtain an attorney and then  
11 obtained an attorney who would not be available for the  
12 already scheduled hearing. Under the circumstances,  
13 claimant was not entitled to any further continuances.

14 (Id. 19).

15  
16 Where a claimant is unrepresented, there are certain  
17 procedures that ALJs are to follow to ensure that the claimant is  
18 “capable of making an informed choice about representation.” See,  
19 e.g., Perez, 2009 WL 3170041, at \*3 (citing HALLEX I-2-6-52).  
20 There is no indication in the record that the ALJ followed these  
21 procedures or discussed a waiver of the right to counsel with  
22 Plaintiff at the hearing. In any event, the Court does not  
23 construe this case as one involving waiver of the right to  
24

25  
26 \_\_\_\_\_  
27 <sup>5</sup> The record does not include two notices informing Plaintiff  
28 of the rescheduled hearing. The *only* notice in the record is the  
notice dated August 3, 2012. (A.R. 34)

1 counsel.<sup>6</sup> Plaintiff knew he had a right to counsel at the hearing  
2 and had exercised that right by retaining counsel to represent him  
3 at a hearing - in fact, he explicitly objected to going forward  
4 without counsel. Additionally, counsel had provided the SSA with  
5 ample notice of his conflict with the scheduled date, such that the  
6 ALJ could have informed the ME and the VE, ahead of time, that the  
7 hearing was going to be postponed, thereby obviating the need for  
8 the ALJ to proceed with the hearing merely because she had "set  
9 this time aside" and the experts were "present and ready to go."<sup>7</sup>  
10 (A.R. 59).

11  
12 Nor does the Court construe Plaintiff's attendance at the  
13 hearing as his implied acquiescence to going forward with the  
14 hearing without his retained counsel. Indeed, the SSA had informed  
15 Plaintiff that if he failed to attend the hearing, his action would  
16 be subject to dismissal for failure to attend. (See, e.g., id. 34  
17 ("If you do not come to the hearing and it is not found you have a  
18 good reason, your request for hearing may be **dismissed.**"); see also

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19 <sup>6</sup> Even if the Court were to consider whether Plaintiff waived  
20 his right to counsel, there is no evidence of a knowing and  
21 intelligent waiver of the right to counsel in the record. In fact,  
22 Plaintiff objected to going forward without counsel. However, the  
23 Court finds that, regardless of whether the record is analyzed to  
24 determine whether the hearing was fair despite a deficient waiver,  
whether - given the absence of counsel - the ALJ met her heightened  
duty to fully and fairly develop the record, or whether Plaintiff  
was deprived of a meaningful opportunity to be heard, a remand is  
warranted.

25 <sup>7</sup> Indeed, the ALJ's annoyance with the situation, ostensibly  
26 because the time had been set aside and the ME and VE were "present  
27 and ready to go," does not constitute "good cause" for denying  
counsel's request for postponement four weeks after that request  
was made and at a hearing that counsel was unable to attend.

1 id. 50-51; McNatt v. Apfel, 201 F.3d 1084, 1087, 1088 (9th Cir.  
2 2000) (when claimant "simply refuses to attend a hearing, either  
3 personally or through counsel," "[he] is not entitled to judicial  
4 review of a dismissal for failure to attend") (citation omitted).  
5 Thus, Plaintiff may well have decided to attend the hearing in  
6 order to avoid this result.<sup>8</sup>

7  
8 Preliminarily, the Court notes that the entire hearing  
9 transcript is only seventeen pages long. In fact, without the  
10 testimony of the VE and the ME, and the initial colloquy regarding  
11 the missing exhibits and explanation of the proceedings, it is only  
12 nine pages long. Although there is no requirement that an  
13 administrative hearing last any specific length of time, the  
14 brevity of the record of the administrative hearing in this case,  
15 coupled with the absence of counsel, and Plaintiff's objections to  
16 proceeding without his counsel present at the outset, casts doubt  
17 on the diligence of the ALJ's inquiry. See Higbee v. Sullivan,  
18 975 F.2d 558, 562 (9th Cir. 1992) (per curiam) (stating that "[a]n  
19 adequate hearing record is indispensable because a reviewing court  
20 may consider only the Secretary's final decision, the evidence in  
21 the administrative transcript on which the decision was based, and  
22 the pleadings.") (citing Russell v. Bowen, 856 F.2d 81, 84 (9th  
23 Cir. 1988)); Battles v. Shalala, 36 F.3d 43, 45 (8th Cir. 1994)  
24 (explaining that "[a]lthough the length of a hearing is not  
25 dispositive, it is a consideration," and concluding that a ten-

---

26 <sup>8</sup> Here, in contrast to the circumstances in McNatt, it was  
27 Plaintiff who appeared at the hearing without his retained  
28 representative.



1 minute hearing that was transcribed in eleven pages was  
2 inadequate); Cruz v. Sullivan, 912 F.2d 8, 11 (2d Cir. 1990)  
3 (stating that a "scant" thirteen-page transcript "reveals a host of  
4 lost opportunities to explore the facts"); Lashley v. Sec'y of  
5 Health and Human Servs., 708 F.2d 1048, 1052 (6th Cir. 1983)  
6 (concluding that the ALJ did not probe sufficiently during a  
7 twenty-five minute hearing). Here, the Court questions whether the  
8 ALJ met her duty to fully and fairly develop the record to ensure  
9 that Plaintiff's interests were protected in the absence of his  
10 counsel.

11  
12 Additionally, at the hearing, although Plaintiff acknowledged  
13 that he had received a copy of the record, he repeatedly asked  
14 whether certain records had been received and included. (See,  
15 e.g., A.R. 59, 61, 64, 67). Despite Plaintiff's objection to going  
16 forward with the hearing without his counsel present, and  
17 Plaintiff's questions and obvious concern that the record still was  
18 not complete, the ALJ never asked Plaintiff, on the record, whether  
19 he had reviewed the records or needed more time to review them,  
20 whether the exhibits were complete or whether Plaintiff had any  
21 objections to, or problems with, them. Nor did the ALJ seek to  
22 determine the content of the documents that Plaintiff claimed were  
23 not in the record. Based on Plaintiff's repeated questions  
24 regarding whether the "DR records"<sup>9</sup> had been received and were  
25 included in the record, it appears that Plaintiff may not have had

---

26 <sup>9</sup> These records appear to relate to the police report  
27 documenting the attack on Plaintiff. (A.R. 64, 241, 256-58, 298,  
28 318).

1 an opportunity to review the two CDs of exhibits he had received  
2 prior to the first hearing.<sup>10</sup> (See id. 51).

3  
4 Moreover, Plaintiff's lack of counsel is also apparent in the  
5 ALJ's failure to fully elicit information from Plaintiff, and in  
6 the ALJ's questioning of the ME and the VE.

7  
8 For instance, the ALJ only briefly questioned Plaintiff about  
9 Plaintiff's prior work experience. (Id. 62). Plaintiff  
10 spontaneously testified to the job title for his two most recent  
11 jobs, and stated he had to leave one of them because of a kidney  
12 stone attack and the other because of "another kidney problem"  
13 (id.). The ALJ did not ask Plaintiff to expand upon this response,  
14 or inquire as to the current status of Plaintiff's kidney stone,  
15 and other "kidney problem." (Id.) With respect to Plaintiff's  
16 impairments, although Plaintiff volunteered some information (see,  
17 e.g., id. 61-67), the ALJ did not ask Plaintiff further questions  
18 about: (1) the nature, degree, or areas of his symptoms; (2) his  
19 medical history, including frequency and purpose of visits; (3) any  
20 other treatment Plaintiff had received or was getting; (4) any  
21 neurological/mental limitations resulting from his head trauma; (5)

---

22  
23 <sup>10</sup> Plaintiff, who is homeless (A.R. 62), stated at the first  
24 hearing that he had received two CDs with the exhibits but had been  
25 unable to access them (id. 51). He also stated at that hearing  
26 that he had talked to Concita Morrow at the SSA who indicated to  
27 him that new information regarding his battery case had been  
28 received. (Id. 53-54; see also id. 64, 241, 256-58, 298, 318).  
However, the ALJ stated that nothing had been received more  
recently than a year prior. (Id. 54). The DR report does not  
appear to be part of the record. Nor are there any medical  
documents relating to the 2010 incident.

1 how long he could do certain activities, including lifting and  
2 carrying, walking and standing; (6) the extent of his functional  
3 limitations with respect to his vision problems,<sup>11</sup> chronic  
4 bronchitis, elbow injury, knee injury, and head trauma, and the  
5 effect of any pain on these limitations; (7) Plaintiff's alleged  
6 depression;<sup>12</sup> or (8) whether Plaintiff wished to testify to anything  
7 else.<sup>13</sup> (Id. 61-67, 69-72). On several occasions, when Plaintiff  
8 attempted to interject additional information, the ALJ and/or the  
9 ME cut him off, or the ALJ went off the record. (See, e.g., id.  
10 58, 61, ("Okay, so now, we're back on the record. We've relayed  
11 the ground rules."), 68 ("ME: Okay, I'm speaking now. ALJ: Yeah,  
12 you'll have your opportunity, okay? No more interrupting, okay?"  
13 and "CLMT [to ME]: I don't know if you had seen this -- [¶] ALJ:  
14 Okay, what did we just say, that you'll have your opportunity.")).  
15 Finally, the ALJ did not question Plaintiff about the fact that the  
16 record did not include any medical records documenting Plaintiff's  
17 treatment for the 2010 beating incident. Indeed, even the date of

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18  
19 <sup>11</sup> The ME asked Plaintiff questions about his vision in an  
20 attempt to clarify Plaintiff's allegations, and about the pain in  
21 his knee. (See, e.g., A.R. 64-66, 66-67).

21 <sup>12</sup> In fact, the ALJ mentioned Plaintiff's claim of depression  
22 only once in the decision. See A.R. 19 (noting that Plaintiff  
23 alleged disability beginning April 1, 2010, "due to visual  
difficulties, left elbow pain, chronic bronchitis and  
depression").

24 <sup>13</sup> The ALJ briefly questioned Plaintiff about his schooling  
25 (A.R. 62); his source of income (id. 62); his ability to drive (id.  
26 69-70); how he gets his food (id. 70); whether he looks for work or  
27 has started to work (id. 70-71); whether he sleeps in his motorhome  
28 (id. 71); and for further information regarding an eye infection  
that Plaintiff claimed to have gotten worse in the past six months  
(id. 72).

1 that incident cannot be accurately determined from the records.  
2 (See supra note 1). Nor did the ALJ seek to obtain a neurological  
3 or psychological consultative examination.  
4

5 After swearing in the VE, the ALJ asked the VE to summarize  
6 Plaintiff's past relevant work, by skill and exertional level.  
7 (Id. 73). The ALJ asked the VE to assume a hypothetical individual  
8 "who had all the limitations that had just been identified."  
9 (Id.). However, because the ALJ never identified any limitations  
10 herself, the Court can only assume that the VE relied on the  
11 earlier testimony of the ME that Plaintiff's impairments created  
12 certain functional work limitations, including lifting and/or  
13 carrying twenty pounds occasionally and ten pounds frequently;  
14 sitting for six hours; standing/walking for six hours; no climbing  
15 ladders, ropes or scaffolds; occasional posturing; avoidance of  
16 unprotected heights and hazardous machinery; work that does not  
17 require depth perception; and no exposure to concentrated dust,  
18 fumes and odors. (Id. 69, 71). After the VE identified various  
19 light and sedentary jobs that such an individual could still  
20 perform, the ALJ asked Plaintiff whether he had any questions of  
21 the VE, which he did not, and the ALJ concluded the hearing. (Id.  
22 74-75). Thus, Plaintiff never asked the VE any questions about  
23 Plaintiff's ability to do these suggested jobs based on his  
24 physical and/or mental limitations (if any), the lifting, carrying,  
25 manipulative, postural, or visual requirements required for those  
26 jobs, or questions that might serve to demonstrate that the VE's  
27 testimony was inconsistent with the Dictionary of Occupational  
28 Titles and needed additional explanation.

1           The ALJ also routinely questioned the ME regarding the ME's  
2 findings of Plaintiff's impairments. Although the ME challenged  
3 Plaintiff about his visual problems, as reflected in the medical  
4 record, and also questioned him about the pain in his left knee  
5 (id. 64-66, 66-67), he otherwise apparently relied only on Exhibits  
6 1F-8F in forming his opinions. However, these exhibits do not even  
7 include any medical records relating to Plaintiff's head trauma and  
8 any treatment he may have received as a result of that incident.  
9 The ALJ asked the ME to list Plaintiff's impairments "in order of  
10 severity." Id. 68. The ME indicated chronic bronchitis, amblyopia  
11 of the left eye, history of kidney stones, a history of knee  
12 fracture, history of left elbow injury in 2007, and history of head  
13 trauma in 2010, and testified that the impairments did not  
14 individually or in combination meet or equal a listing. (Id. 68-  
15 69).

16           After the ME's testimony concluded, the ALJ asked Plaintiff  
17 whether he had any questions for the ME, and Plaintiff indicated  
18 that he had no questions. (Id. 71). Thus, Plaintiff never asked  
19 the ME about his conclusions regarding Plaintiff's alleged  
20 functional ability to lift and carry twenty pounds occasionally and  
21 ten pounds frequently; and sit, stand, or walk for six hours of an  
22 eight-hour workday. Nor did Plaintiff question the ME about the  
23 order of severity in which the ME listed Plaintiff's impairments,  
24 i.e., whether it was from most to least severe, or vice versa, or  
25 about medical records, if any, that might have refuted the ME's  
26 testimony. (Id. 71-72). Moreover, although Plaintiff attempted to  
27 raise several issues during the ME's testimony, including  
28

1 Plaintiff's continuous eye infection and the severe pain he  
2 experiences when exposed to bright light, the ME never acknowledged  
3 or asked Plaintiff any questions about these issues. (See, e.g.,  
4 id.).

5  
6 The ALJ spent almost no time delving into any of Plaintiff's  
7 impairments, his treatment, dates of treatment, where treatment was  
8 obtained, work history, daily activities,<sup>14</sup> and alleged limitations.  
9 Nor did the ALJ ask any questions of the ME or VE. If Plaintiff's  
10 counsel had been present at the hearing, he could have asked  
11 Plaintiff questions to expand on these and other issues, including  
12 Plaintiff's depression, the head trauma incident and any resulting  
13 treatment and neurological deficits, as well as Plaintiff's  
14 functional limitations, including his ability to sit, stand, walk,  
15 lift, and carry. Counsel could have also obtained additional  
16 testimony from the VE and the ME regarding their opinions in light  
17 of Plaintiff's limitations. If the ALJ had diligently ensured that  
18 both favorable and unfavorable facts and circumstances were  
19 elicited at the hearing, the additional evidence adduced might have  
20 altered the ALJ's decision.<sup>15</sup> (See Joint Stip. at 7-8, 11).

21 The Court finds the ALJ's refusal to continue the hearing so  
22 that Plaintiff's counsel could attend - given the circumstances in  
23

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24  
25 <sup>14</sup> The ALJ primarily relied on Plaintiff's April 26, 2011,  
26 Function Report with respect to his daily activities and did not  
27 seek to obtain any recent information about daily activities from  
28 Plaintiff at the hearing.

<sup>15</sup> The Court expresses no opinion on the merits.

1 this case - and the ALJ's failure to "scrupulously and  
2 conscientiously probe into, inquire of, and explore for all the  
3 relevant facts" at the hearing so as to protect Plaintiff's  
4 interests and afford him a meaningful opportunity to be heard,  
5 establishes prejudice and unfairness, warranting remand. Vidal, 637  
6 F.2d at 713-14 (interests of justice demand that case be remanded  
7 where claimant was prejudiced by inadequate examination of  
8 vocational expert and lack of counsel at hearing).

9  
10 **B. Remand Is Required**

11  
12 The decision whether to remand for further proceedings or  
13 order an immediate award of benefits is within the district court's  
14 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.  
15 2000). Under the credit-as-true rule, a district court should  
16 remand for an award of benefits when the following three conditions  
17 are satisfied: "(1) the record has been fully developed and  
18 further administrative proceedings would serve no useful purpose;  
19 (2) the ALJ has failed to provide legally sufficient reasons for  
20 rejecting evidence, whether claimant testimony or medical opinion;  
21 and (3) if the improperly discredited evidence were credited as  
22 true, the ALJ would be required to find the claimant disabled on  
23 remand." Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014).  
24 The third of these conditions "incorporates . . . a distinct  
25 requirement of the credit-as-true rule, namely that there are no  
26 outstanding issues that must be resolved before a determination of  
27 disability can be made." Id. n.26; see also Harman, 211 F.3d at  
28 1179-81 (where there are outstanding issues that must be resolved

1 before a determination of disability can be made, and it is not  
2 clear from the record that the ALJ would be required to find the  
3 claimant disabled if all the evidence were properly evaluated,  
4 remand is appropriate).

5  
6 Here, the Court has determined that Plaintiff was prejudiced  
7 by the ALJ's refusal to continue the hearing so that Plaintiff's  
8 counsel could attend. Because outstanding issues must be resolved  
9 before a determination of disability can be made, and it is not  
10 clear from the record that the ALJ would be required to find  
11 Plaintiff disabled if all the evidence were properly evaluated, the  
12 Court finds that further administrative proceedings would serve a  
13 useful purpose and remedy defects.

14  
15 **CONCLUSION**

16  
17 For all of the foregoing reasons, this matter is remanded for  
18 further administrative action consistent with this Opinion.

19 LET JUDGMENT BE ENTERED ACCORDINGLY.

20  
21 DATED: December 19, 2014.

22  
23  
24  /s/  
ALKA SAGAR  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28