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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 EDWIN J. MCNICHOLS,
12 Plaintiff,
13 v.
14 COMMISSIONER OF THE SOCIAL
15 SECURITY ADMINISTRATION,
16 Defendant.

Case No.: 3:17-cv-00081-GPC-MDD

ORDER:

**(1) DENYING MOTION FOR LEAVE
TO PROCEED IN FORMA
PAUPERIS AND ORDERING
PAYMENT OF PARTIAL FILING
FEE;**

**(2) DENYING MOTION TO
APPOINT COUNSEL;**

**(3) REFERRING MATTER TO
MAGISTRATE JUDGE**

[ECF Nos. 2, 3.]

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23 On January 13, 2017, Plaintiff Edwin J. McNichols (“Plaintiff”), proceeding *pro*
24 *se*, filed a Complaint against the Commissioner of the Social Security Administration
25 (“Defendant”) seeking review of an unfavorable final decision by an administrative law
26 judge regarding his Title II claim for disability insurance. Plaintiff concurrently filed a
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1 motion for leave to proceed *in forma pauperis* (Dkt. No. 2) and a motion to appoint
2 counsel (Dkt. No. 3).

3 **I. Motion for Leave to Proceed *in Forma Pauperis* (“IFP”)**

4 All parties instituting any civil action, suit, or proceeding in a district court of the
5 United States, except an application for writ of habeas corpus, must pay a filing fee of
6 \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to
7 prepay the entire fee only if he is granted leave to proceed IFP pursuant to § 1915(a). *See*
8 *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d
9 1176, 1177 (9th Cir. 1999). The plaintiff must submit an affidavit demonstrating his
10 inability to pay the filing fee, and the affidavit must include a complete statement of the
11 plaintiff’s assets. 28 U.S.C. § 1915(a)(1). The facts as to the affiant's poverty must be
12 stated “with some particularity, definiteness, and certainty.” *United States v. McQuade*,
13 647 F.2d 938, 940 (9th Cir. 1981). When a plaintiff moves to proceed IFP, the court first
14 “grants or denies IFP status based on the plaintiff’s financial resources alone and then
15 independently determines whether to dismiss the complaint” pursuant to 28 U.S.C. §
16 1915(e)(2) (“§ 1915(e)(2)”). *Franklin v. Murphy*, 745 F.2d 1221, 1226 n.5 (9th Cir.
17 1984). IFP status may be acquired and lost during the course of litigation. *Wilson v. Dir.*
18 *of Div. of Adult Insts.*, No. CIV S–06–0791, 2009 WL 311150, at *2 (E.D. Cal. Feb. 9,
19 2009) (internal citation omitted).

20 District courts tend to reject IFP applications where the applicant can pay the filing
21 fee with acceptable sacrifice to other expenses. *See e.g., Stehouwer v. Hennessey*, 841
22 F.Supp. 316, 321 (N.D. Cal. 1994), *vacated in part on other grounds, Olivares v.*
23 *Marshall*, 59 F.3d 109 (9th Cir.1995) (finding that a district court did not abuse its
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50.
27 *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14
28 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons granted leave to
proceed IFP. *Id.*

1 discretion in requiring a partial fee payment from a prisoner who had a \$14.61 monthly
2 salary and who received \$110 per month from family). “Courts have discretion to
3 impose partial filing fees under the in forma pauperis statute.” *Olivares v. Marshall*, 59
4 F.3d 109, 111 (9th Cir. 1995).

5 Here, Plaintiff has supplied an affidavit in support of his application to proceed *in*
6 *forma pauperis*. (Dkt. No. 2.) Plaintiff declares that he receives \$1200 in retirement
7 income and \$620 in public assistance income per month, resulting in a total monthly
8 income of \$1820. (*Id.* at 2.) Plaintiff declares that his monthly expenses total \$1610.
9 (*Id.* at 5.) Plaintiff thus has about \$210 surplus income per month. Plaintiff also has
10 \$150 in a checking account. (*Id.* at 2.) Plaintiff additionally states that he has “other
11 obligations that [he] should be paying but cannot currently afford to,” including renter’s
12 insurance; liabilities from, *inter alia*, an overdrawn checking account and a credit card
13 (amounting to \$1500); and amounts owed to AT&T (amounting to \$175). (*Id.* at 5.)

14 In light of Plaintiff’s monthly surplus income, while recognizing Plaintiff’s
15 economic circumstances, the Court concludes that Plaintiff can afford to pay a partial
16 filing fee. *See* CivLR 3.2(d).

17 Accordingly, the Court **DENIES** Plaintiff’s request to proceed IFP. (Dkt. No. 2.)
18 **Plaintiff is to pay a partial filing fee of \$150.**

19 **II. Motion to Appoint Counsel**

20 “[T]here is no absolute right to counsel in civil proceedings.” *Hedges v.*
21 *Resolution Trust Corp. (In re Hedges)*, 32 F.3d 1360, 1363 (9th Cir. 1994) (internal
22 citation omitted). Federal courts do not have the authority “to make coercive
23 appointments of counsel.” *Mallard v. United States District Court*, 490 U.S. 296, 310
24 (1989); *see also United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th
25 Cir. 1995). Districts courts have discretion, however, pursuant to 28 U.S.C. § 1915(e)(1),
26 to “request” that an attorney represent indigent civil litigants upon a showing of
27 “exceptional circumstances.” *See Agyeman v. Corrections Corp. of America*, 390 F.3d
28 1101, 1103 (9th Cir. 2004). “A finding of the exceptional circumstances of the plaintiff

1 seeking assistance requires at least an evaluation of the likelihood of the plaintiff's
2 success on the merits and an evaluation of the plaintiff's ability to articulate his claims 'in
3 light of the complexity of the legal issues involved.'" *Agyeman*, 390 F.3d at 1103
4 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)); *see also Terrell v.*
5 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

6 Here, Plaintiff moves the Court to appoint him counsel on the following grounds:
7 (1) Plaintiff has made diligent efforts to obtain legal counsel, but everyone he has
8 contacted has not taken his case and could not refer him to someone who litigates in
9 federal court; and (2) "the nature of [his] psychiatric condition makes it very difficult for
10 [him] to focus for long enough to compile a coherent argument and comply with
11 deadlines." (Dkt. No. 3.)

12 Neither the interests of justice nor exceptional circumstances warrant the
13 appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987);
14 *Terrell*, 935 F.2d at 1017. The Court preliminarily notes that Plaintiff has contacted a law
15 firm as recently as December 1, 2016, and that Plaintiff has not yet met with intake staff
16 regarding his case and is allegedly "still pursuing contact" with this law firm. (Dkt. No. 3
17 at 2.) Plaintiff may still be able to retain counsel for purposes of the instant appeal.
18 Moreover, Plaintiff has thus far been able to participate in the administrative proceedings
19 below and has been able to articulate relief in his pleading papers. (Dkt. No. 1.) In
20 addition, given the existence of a full administrative record, it does not appear that the
21 legal issues involved in Plaintiff's appeal are so complex that counsel is warranted at this
22 stage of the proceedings. *See Wilborn v. Escalderon*, 789 F.3d 1328, 1331 (9th Cir.
23 1986) (noting that, "If all that was required to establish successfully the complexity of the
24 relevant issues was a demonstration of the need for development of further facts,
25 practically all cases would involve complex legal issues."); *see also Peterson v.*
26 *Anderson*, 2009 WL 4506542, at *3 (D. Mont. Dec. 2, 2009) ("Although Plaintiff
27 contends he is not in a position to litigate this matter, pro se litigants are rarely in a
28 position to research and investigate facts easily. This alone does not deem a case

1 complex.”). While Plaintiff asserts that an attorney would help him form coherent
2 arguments and comply with deadlines, Plaintiff has not demonstrated exceptional
3 circumstances warranting the appointment of counsel. Indeed, “any pro se litigant
4 certainly would be better served with the assistance of counsel.” *Rand v. Rowland*, 113
5 F.3d 1520, 1525 (9th Cir. 1997).

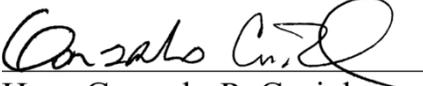
6 Accordingly, the Court **DENIES** Plaintiff’s motion to appoint counsel. (Dkt. No.
7 3.)

8 **III. Referral to Magistrate Judge**

9 All matters arising in the above-captioned social security appeal are hereby
10 referred to the Honorable Mitchell D. Dembin, United States Magistrate Judge, for report
11 and recommendation pursuant to section 636(b)(1)(B) of Title 28 of the United States
12 Code and Civil Local Rule 72.1. *See* 28 U.S.C. § 636(b)(1)(B); S.D. Cal. Civ. R. 72.1.

13 **IT IS SO ORDERED.**

14 Dated: January 23, 2017

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16 Hon. Gonzalo P. Curiel
17 United States District Judge
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