

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Mercado v. Kijakazi

No. 22-CV-1713 (NLS) (S.D. Cal. Mar. 2, 2023) · No. 22-CV-1713 (NLS) · Decided March 2, 2023

SUMMARY

The United States District Court for the Southern District of California dismissed Juan Carlos Mercado’s pro se complaint seeking review of a Social Security benefits decision, granting leave to amend within 60 days. The court denied Mercado’s motion to proceed in forma pauperis because he had sufficient financial resources to pay the filing fee. The court also denied without prejudice his motion for appointment of counsel because he had not shown exceptional circumstances or efforts to obtain counsel.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Nita L. Stormes
JURISDICTION	United States District Court for the Southern District of California
DECIDED	March 2, 2023
DOCKET	22-CV-1713 (NLS)
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff filed a pro se action seeking judicial review of the Commissioner's denial of Social Security benefits and moved to proceed in forma pauperis and for appointment of counsel. The court screened the complaint sua sponte under 28 U.S.C. § 1915(e), dismissed it with leave to amend, denied IFP status, and denied the motion for appointment of counsel without prejudice.
STANDARD OF REVIEW	Mandatory sua sponte screening under 28 U.S.C. § 1915(e)(2)(B); the court accepts factual allegations as true for screening purposes and applies the pleading standard of Federal Rule of Civil Procedure 8(a) (2), including the requirement that allegations plausibly show entitlement to relief.
PRECEDENTIAL VALUE	unpublished, nonprecedential district court order

PARTIES

Juan Carlos Mercado v. Kilolo Kijakazi, Acting Commissioner of Social Security Administration

TOPICS

administrative law judicial review of agency action civil procedure motions to dismiss
exhaustion of remedies

PRACTICE AREAS

Social Security administrative law civil procedure in forma pauperis appointment of counsel

QUESTIONS PRESENTED

1. Whether the complaint adequately stated a claim for judicial review of the Commissioner's denial of Social Security benefits under the screening and pleading requirements of 28 U.S.C. § 1915(e) and Federal Rule of Civil Procedure 8(a)(2).
2. Whether Mercado demonstrated indigence sufficient to proceed in forma pauperis under 28 U.S.C. § 1915(a).
3. Whether Mercado demonstrated the diligence and exceptional circumstances necessary for appointment of counsel under 28 U.S.C. § 1915(e)(1).

HOLDINGS

1. A Social Security appeal complaint must identify the basis for disagreement with the Commissioner's decision and allege sufficient facts or legal grounds showing entitlement to relief; a conclusory assertion that the decision was wrong is insufficient. Mercado's complaint failed this requirement and was dismissed with leave to amend.
2. Mercado failed to demonstrate indigence sufficient to proceed in forma pauperis because his reported assets permitted payment of the filing fee with reasonable financial sacrifices. The motion for IFP status was denied.
3. Mercado was not entitled to appointed counsel because he did not show a reasonably diligent effort to obtain counsel or exceptional circumstances warranting appointment. The motion was denied without prejudice.

KEY QUOTATIONS

“A complaint appealing the Commissioner’s denial of disability benefits must set forth a brief statement of facts setting forth the reasons why the Commissioner’s decision was wrong.” (at 2)

“There is no absolute constitutional guarantee to counsel in civil cases.” (at 5)

FACTUAL BACKGROUND

Mercado sought review of the denial of his application for Social Security benefits. He alleged that, during his administrative hearing, the ALJ repeatedly said he would grant the claim because of Mercado's age and stipulations, but Mercado did not identify a substantive legal or factual error in the unfavorable decision. Mercado also sought IFP status, reporting no current income, approximately \$8,000 in checking and savings, approximately \$340,000 from the sale of his house, two dependents, and monthly expenses of approximately \$1,100. He requested appointment of counsel but supplied no information showing that he had attempted to obtain counsel.

PROCEDURAL HISTORY

Mercado filed a complaint challenging a Social Security administrative decision, along with motions for IFP status and appointment of counsel. The parties consented to magistrate judge jurisdiction. The court determined that the complaint did not state a legally sufficient basis for relief, that Mercado had not demonstrated indigence, and that he had not shown the diligence or exceptional circumstances required for appointed counsel.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand. Plaintiff was granted 60 days to file an amended complaint addressing the deficiencies and was required to pay the filing fee if he pursued the action by amended complaint.

CASES CITED

- Lopez v. Smith, 203 F.3d 1122, 1127, 1129 (9th Cir. 2000)
- Hoagland v. Astrue, No. 1:12cv00973-SMS, 2012 WL 2521753, at *1-*3 (E.D. Cal. June 28, 2012)
- Calhoun v. Stahl, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam)
- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
- Montoya v. Colvin, No. 16cv00454-RFB-NJK, 2016 WL 890922, at *2 (D. Nev. Mar. 8, 2016)
- Graves v. Colvin, No. 15cv106-RFB-NJK, 2015 WL 357121, at *2 (D. Nev. Jan. 26, 2015)
- Cribbet v. Comm'r of Social Security, No. 12cv1142-BAM, 2012 WL 5308044, at *3 (E.D. Cal. Oct. 29, 2012)
- Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-40 (1948)
- Escobedo v. Applebees, 787 F.3d 1226, 1234-36 (9th Cir. 2015)
- Cal. Men's Colony v. Rowland, 939 F.2d 854, 858 (9th Cir. 1991), rev'd on other grounds, 506 U.S. 194 (1993)
- Venable v. Meyers, 500 F.2d 1215, 1216 (9th Cir. 1974)
- United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981)
- Jefferson v. United States, 277 F.2d 723, 725 (9th Cir. 1960)
- Temple v. Ellertorpe, 586 F. Supp. 848, 850 (D.R.I. 1984)

- *Alvarez v. Berryhill*, No. 18-cv-2133 W (BGS), 2018 WL 6265021, at *1 (S.D. Cal. Oct. 1, 2018)
- *Jaime B. v. Saul*, No. 19-CV-02431-JLB, 2020 WL 1169671, at *2 (S.D. Cal. Mar. 10, 2020)
- *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994)
- *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004)
- *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)
- *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015)
- *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)
- *Bailey v. Lawford*, 835 F. Supp. 550, 552 (S.D. Cal. 1993)
- *Dupre v. City of San Diego*, No. 22CV169-JO-AGS, 2022 WL 3639288, at *1 (S.D. Cal. Aug. 23, 2022)
- *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
 CALIFORNIA 10 11 JUAN CARLOS MERCADO, Case No.: 22-CV-1713 (NLS) 12 Plaintiff, (1)
 ORDER DISMISSING 13 v. COMPLAINT WITH LEAVE TO AMEND; 14 KILOLO
 KIJAKAZI, Acting Commissioner of Social Security 15 (2) ORDER DENYING MOTION
 Administration, FOR APPOINTMENT OF 16 Defendant. COUNSEL; and 17 (3) ORDER
 DENYING MOTION 18 FOR IFP 19 [ECF Nos. 2, 3] 20 21 Juan Carlos Mercado (“Plaintiff”),
 proceeding pro se, seeks review of a decision 22 by the Social Security Commissioner that denied
 his application for benefits.

ECF No. 1. 23 The parties have consented to Magistrate Judge jurisdiction over the case. ECF No.
 5. 24 Before the Court is Plaintiff’s complaint seeking review of the Social Security 25
 Administration’s decision, motion to proceed in forma pauperis (IFP), and motion for 26
 appointment of counsel to represent him in this action. ECF Nos. 1-3.

For the following 27 reasons, the Court DISMISSES the complaint with leave to amend, if
 amended within 60 28 1 days of this order, DENIES the motion to proceed IFP, and DENIES
 without prejudice 2 the motion for appointment of counsel. 3 I. Screening Under 28 U.S.C. §
 1915(e) 4 A complaint filed pursuant to the IFP provisions of 28 U.S.C. § 1915(a), is subject 5 to a
 mandatory and sua sponte review by the Court.

Lopez v. Smith, 203 F.3d 1122, 1127 6 (9th Cir. 2000). The Court must dismiss the complaint if it
 is frivolous or malicious, fails 7 to state a claim upon which relief may be granted, or seeks
 monetary relief from a 8 defendant immune from such relief. 28 U.S.C. § 1915(e)(2)(B). Social
 security appeals 9 are not exempt from this § 1915(e) screening requirement.

Hoagland v. Astrue, No. 10 1:12cv00973-SMS, 2012 WL 2521753, at *1 (E.D. Cal. June 28,
 2012); see also *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam) (noting section
 1915(e)(2)(B) is 12 “not limited to prisoners”); *Lopez*, 203 F.3d at 1129 (“section 1915(e) applies

to all in 13 forma pauperis complaints”). 14 To pass screening, all complaints must contain a “short and plain statement of the 15 claim showing that the pleader is entitled to relief.” Fed.

R. Civ. P. 8(a)(2). Although 16 detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a 17 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. 18 Iqbal*, 556 U.S. 662, 678 (2009). A complaint in a social security appeal is “not exempt 19 from the general rules of civil pleading.” *Hoagland*, 2012 WL 2521753, at *2.

20 Several courts within the Ninth Circuit have set forth the following basic 21 requirements for complaints to survive the Court’s § 1915(e) screening: 22 First, the plaintiff must establish that she has exhausted her administrative remedies pursuant to 42 U.S.C. § 405(g), and that the civil action was 23 commenced within sixty days after notice of a final decision.

Second, the 24 complaint must indicate the judicial district in which the plaintiff resides. Third, the complaint must state the nature of the plaintiff's disability and 25 when the plaintiff claims she became disabled. Fourth, the complaint must 26 contain a plain, short, and concise statement identifying the nature of the plaintiff's disagreement with the determination made by the Social Security 27 Administration and show that the plaintiff is entitled to relief.

28 1 See, e.g., *Montoya v. Colvin*, No. 16cv00454-RFB-NJK, 2016 WL 890922, at *2 (D. 2 Nev. Mar. 8, 2016) (collecting cases); *Graves v. Colvin*, No. 15cv106-RFB-NJK, 2015 3 WL 357121, *2 (D. Nev. Jan. 26, 2015) (same). 4 As for the fourth requirement, “[e]very plaintiff appealing an adverse decision of 5 the Commissioner believes that the Commissioner was wrong.” *Hoagland*, 2012 WL 6 2521753, at *3.

Thus, a complaint merely stating that the Commissioner's decision was 7 wrong or that “merely parrots the standards used in reversing or remanding a case” is 8 insufficient to satisfy a plaintiff’s pleading requirement. See, e.g., *Cribbet v. Comm’r 9 of Social Security*, No. 12cv1142-BAM 2012 WL 5308044, *3 (E.D. Cal. Oct. 29, 2012); 10 *Graves*, 2015 WL 357121, at *2.

11 Instead, “[a] complaint appealing the Commissioner’s denial of disability benefits 12 must set forth a brief statement of facts setting forth the reasons why the Commissioner’s 13 decision was wrong.” *Hoagland*, 2012 WL 2521753, at *2.

The plaintiff must provide a 14 statement identifying the basis of the plaintiff’s disagreement with the Social Security 15 Administration’s determination and must make a showing that she is entitled to relief, “in 16 sufficient detail such that the Court can understand the legal and/or factual issues in 17 dispute so that it can meaningfully screen the complaint pursuant to § 1915(e).” *Graves*, 18 2015 WL 357121, at *2.

19 Plaintiff alleges that during his hearing, the administrative law judge (ALJ) 20 “repeatedly said he would grant [his] claim due to age and stipulations.” ECF No. 1 at 2. 21 As for relief, Plaintiff

states that he asks “to listen to the court recording of the trial.” Id. 22 at 3.

However, Plaintiff has failed to articulate any substantive reason indicating the ALJ 23 erred in denying the claim. To survive screening, Plaintiff must be able to allege how the 24 Social Security Administration erred in its decision and why he is entitled to relief. Even 25 accepting the allegations as true, that the ALJ stated the claim would be granted, Plaintiff 26 fails to explain how those statements would arise to legal error or entitle him to relief.

27 Because Plaintiff’s fails to state a claim, the Court must DISMISS the complaint. 28 However, Plaintiff shall have 60 days to amend the deficiencies in the complaint. 1 Plaintiff must provide substantive reasons why the ALJ should have granted his request 2 for benefits based on his actual disabilities. 3 II. Motion to Proceed in forma pauperis 4 An applicant need not be completely destitute to proceed IFP, but he must 5 adequately prove his indigence.

Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 6 339–40 (1948). An adequate affidavit should “allege[] that the affiant cannot pay the 7 court costs and still afford the necessities of life.” Escobedo v. Applebees, 787 F.3d 1226, 8 1234 (9th Cir. 2015) (citing Adkins, 335 U.S. at 339). No exact formula is “set forth by 9 statute, regulation, or case law to determine when someone is poor enough to earn IFP 10 status.” Escobedo, 787 F.3d at 1235.

11 Consequently, courts must evaluate IFP requests on a case-by-case basis. See id. at 12 1235–36 (declining to implement a general benchmark of “twenty percent of monthly 13 household income”); see also Cal. Men's Colony v. Rowland, 939 F.2d 854, 858 (9th Cir. 14 1991) (requiring that district courts evaluate indigency based upon available facts and by 15 exercise of their “sound discretion”), rev'd on other grounds, 506 U.S. 194 16 (1993); Venable v. Meyers, 500 F.2d 1215, 1216 (9th Cir.

1974). An adequate affidavit 17 should also state supporting facts “with some particularity, definiteness and 18 certainty,” United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981) (citing Jefferson 19 v. United States, 277 F.2d 723, 725 (9th Cir. 1960)), so that the Court does not grant IFP 20 to an applicant who is “financially able, in whole or in material part, to pull his own 21 oar.” Temple v. Ellerthorpe, 586 F. Supp. 848, 850 (D.R.I.

1984); see also Alvarez v. 22 Berryhill, No. 18-cv-2133 W (BGS), 2018 WL 6265021, at *1 (S.D. Cal. Oct. 1, 2018) 23 (noting that courts often reject IFP applications when applicants “can pay the filing fee 24 with acceptable sacrifice to other expenses”). 25 Here, Plaintiff has failed to show economic hardship or indigence. Plaintiff has no 26 current income, but has almost \$8,000.00 dollars, between checking and savings 27 accounts, as well as about \$340,000.00 dollars from the sale of his house.

ECF No. 3 at 28 1-2. Plaintiff has indicated he does not make money elsewhere, nor receive benefits, has 1 two dependents, and his expenses amount to about \$1,100.00 a month. Id. at 4–5. 2

Despite this, Plaintiff has not adequately demonstrated financial difficulties.

Although Plaintiff states he needs to use his money to “spend[]... savings to buy a home and 4 repair,” that is not sufficient to show he meets the requirements for IFP status under 28 U.S.C. § 1915(a). Thus, the Court finds Plaintiff can pay the filing fee of \$400.00 with 6 reasonable financial sacrifices. See *Jaime B. v. Saul*, No. 19-CV-02431-JLB, 2020 WL 7 1169671, at *2 (S.D.

Cal. Mar. 10, 2020) (denying IFP status where a plaintiff was 8 capable of paying “with acceptable sacrifices to other expenses and savings.”) 9 III. Motion to Appoint Counsel under 28 U.S.C. § 1915(e)(1) 10 There is no absolute constitutional guarantee to counsel in civil cases. *Hedges v. 11 Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994). Whether or not to appoint 12 counsel, under 28 U.S.C. § 1915(e)(1), is within “the sound discretion of the trial court 13 and is granted only in exceptional circumstances.” *Agyeman v. Corr.*

Corp. of Am., 390 14 F.3d 1101, 1103 (9th Cir. 2004). In determining whether exceptional circumstances 15 exist, the court considers “the likelihood of success on the merits as well as the ability of 16 the petitioner to articulate his claims pro se in light of the complexity of the legal issues 17 involved.” *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983); *Harrington v. Scribner*, 18 785 F.3d 1299, 1309 (9th Cir.

2015). Neither element, by itself, is determinative. 19 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). 20 Under 28 U.S.C. 1915(e)(1), a civil litigant may request counsel upon a showing 21 they are unable to afford one.

However, a civil litigant plaintiff who seeks appointment 22 of counsel must first make a reasonably diligent effort to obtain counsel before the court 23 may exercise its discretion under § 1915(e)(1). *Bailey v. Lawford*, 835 F. Supp. 550, 552 24 (S.D. Cal. 1993). Only after that effort to secure counsel will a court consider whether 25 exceptional circumstances exist to warrant a request for appointment.

Id. The party 26 requesting counsel bears the burden of showing exceptional circumstances exist. *Dupre 27 v. City of San Diego*, No. 22CV169-JO-AGS, 2022 WL 3639288, at *1 (S.D. Cal. Aug. 28 23, 2022) (citing *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009)). 1 Although Plaintiff has stated he cannot afford counsel, they have failed to 2 demonstrate exceptional circumstances exist that warrant the appointment of counsel.

3 || First, Plaintiff has made no showing that he is likely to succeed on the merits of his 4 ||claims. As discussed above, the Court is dismissing his Complaint with leave to amend 5 ||under § 1915(e). 6 Further, Plaintiff bears the burden of showing reasonable diligence in trying to 7 locate an attorney. Plaintiff's motion for appointment for counsel lacks any information 8 ||regarding any attempts by him to secure counsel.

ECF No. 2 (fields indicating attorneys 9 || contacted left blank by Plaintiff). Because Plaintiff has not shown an effort to recruit an 10 || attorney, he has not shown the Court should exercise its discretion to appoint counsel 11 |under § 1915(e)(1). 12 IV. Conclusion 13 For these reasons, the Court DISMISSES the complaint with leave to amend, if 14 amended within 60 days of this order, DENIES the motion to proceed IFP, and DENIES 15 || without prejudice the motion for appointment of counsel.

If Plaintiff files an amended 16 |}complaint, Plaintiff must also pay the filing fee in order to pursue his case. 17 IT IS SO ORDERED. 18 Dated: March 2, 2023 19 Mie. Lo mm 0 Hon. Nita L. Stormes United States Magistrate Judge 22 23 24 25 26 27 28