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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID F. SUND,
Plaintiff,

v.

HARTFORD LIFE AND ACCIDENT
INSURANCE CO.,
Defendant.

Case No. 21-cv-05218-JST

**ORDER RE: MOTIONS FOR
JUDGMENT UNDER RULE 52**

Re: ECF Nos. 40, 41

Before the Court are Plaintiff David F. Sund and Defendant Hartford Life and Accident Insurance Co.’s (“Hartford”) cross-motions for judgment under Federal Rule of Civil Procedure 52. ECF Nos. 40, 41. The Court will grant Sund’s motion and deny Hartford’s motion.

I. PROCEDURAL BACKGROUND

In 2021, Sund filed this complaint against Hartford and Amazon.com Services, Inc. Employee Benefit Plan (the “Plan”) pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1132(a)(1)(B), seeking recovery of long-term disability benefits. ECF No. 1. Sund subsequently dismissed the Plan by stipulation. ECF No. 19.

Now before the Court are Sund’s and Hartford’s cross-motions for summary judgment. ECF Nos. 40, 41.

II. JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1331.

III. LEGAL STANDARD

Rule 52 of the Federal Rules of Civil Procedure provides that, “[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its

1 conclusions of law separately.” Fed. R. Civ. P. 52(a)(1). When presented with motions for
 2 judgment under Federal Rule of Civil Procedure 52, “the court conducts what is essentially a
 3 bench trial on the record, evaluating the persuasiveness of conflicting testimony and deciding
 4 which is more likely true.” *Caplan v. CNA Fin. Corp.*, 544 F. Supp. 2d 984, 990 (N.D. Cal. 2008).
 5 “In a Rule 52 motion . . . the court does not determine whether there is an issue of material fact,
 6 but whether the plaintiff is disabled under the policy,” and “is to ‘evaluate the persuasiveness of
 7 conflicting testimony,’ and make findings of fact.” *Wiley v. Cendant Corp. Short Term Disability*
 8 *Plan*, Case No. 09-00423 CRB, 2010 WL 309670, at *6 (N.D. Cal. Jan. 19, 2010) (quoting
 9 *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999)).

10 The parties agree that the standard of review is de novo. ECF No. 25.

11 **IV. FINDINGS OF FACT¹**

12 **A. Sund’s Employment History and Injury**

13 Sund worked as a global commodity manager at Lab126, ECF No. 39-1 at 388, which is
 14 part of the Amazon.com Services, Inc. group of companies (with Lab126, “Amazon”), *id.* at 1184.
 15 The original posted job description for this title listed eleven key competencies: (1) “Bias for
 16 Action: Evaluates acts and communicates in internet time[, is] [d]ecisive, makes timely practical,
 17 effective decisions[,] and “[t]akes initiative without being asked”; (2) “Negotiations: [has the]
 18 [a]bility to influence and negotiate the optimal arrangement for Lab 126 with external suppliers”;
 19 (3) “Cost Savings: [makes a] [c]ontinuous effort to drive cost out of Lab 126’s infrastructure”; (4)
 20 “Persuasive: Demonstrates healthy and productive influencing ability[, g]ains the respect and
 21 confidence of others[, and] [b]uilds constructive and effective relationships”; (5) “Open and
 22 Strong Communications Skills: [has a w]illingness to ask and honestly answer the tough
 23 questions[, t]reat[s] others’ opinions with respect[, f]osters open communications and candid
 24 discussions[, s]hare[s] information that helps other do their job well[, and] [k]eeps other[s] in the
 25 _____

26 ¹ This order makes factual findings and states conclusions of law pursuant to Rule 52 of the
 27 Federal Rules of Civil Procedure. “To the extent that any conclusions of law are inadvertently
 28 labeled as findings of fact (or vice versa), the findings and conclusions shall be considered ‘in
 [their] true light, regardless of the label that the . . . court may have placed on [them].” *Rodriguez*
v. Barrita, Inc., 62 F. Supp. 3d 936, 938 n.1 (N.D. Cal. 2014) (alterations in original) (quoting
Tri-Tron Int’l v. Velto, 525 F.2d 432, 435–36 (9th Cir.1975)).

1 loop”; (6) “Manages System and Processes: [e]ffectively uses systems and processes to measure,
2 monitor, manage, and impact performance[, as well as] [i]mproves processes and builds
3 scalability”; (7) “Self-Starter, proactive, initiates action and diligently looks for break-through
4 practices and continuous improvement opportunities”; (8) “Strong Presentation Skills[,] including
5 the ability to present to senior leadership”; (9) “Financial Analysis Knowledge: [has k]nowledge
6 and application of the principles of financial analysis (e.g., life cost analysis, net present value,
7 profit, value added)”; (10) “Supplier Capabilities: [has k]nowledge of the capabilities of relevant
8 contracted vendors/suppliers/agencies”; and (11) “Vendor Management: “[t]he ability to evaluate
9 and ensure that vendor performance meets or exceeds defined performance standards and adheres
10 to overall company policies and procedures.” *Id.* at 1182–83.

11 The category specific activities within these key competencies were: “Understand[ing] and
12 perform[ing] comparative analysis of bid submissions”; “Lead[ing] sourcing engagements and
13 sourcing teams in conducting of opportunity identification and RFX’s where appropriate”;
14 “Implement[ing] supplier agreements/contracts by working with cross functional stakeholders and
15 suppliers to reach agreement on contract terms and conditions”; “Manag[ing] supplier
16 relationships and be[ing] [the] primary business contact for key suppliers”; “Project
17 [m]anagement,” specifically the “[a]bility to manage complex multiple projects to ensure
18 successful delivery (on time, within budget, meeting agreed upon success criteria) to establish
19 clear goals and accountabilities,” and “the ability to develop project plans, allocate resources,
20 identify potential issues/risks and develop contingency plans”; and “[c]ontracts,” specifically
21 “[k]nowledge of legal terms and conditions related to supplier agreements.” *Id.* at 1183.

22 Sund states that in his role as a global commodity manager he “convert[ed] all
23 manufacturing to fully automated lines from manual lines”; “negotiated contracts”; “created
24 purchasing logistical process for this commodity”; and “managed supplier qualification through
25 time.” *Id.* at 382. He further states that he was required to spend “40-50% of [his] time . . .
26 travelling to customer facilities in Asia, Europe and throughout the United States,” including
27 “approximately 90 days a year in China . . .” *Id.*

28 In August 2018, during a work trip in China, Sund “slipped on wet marble and fell, landing

1 backwards on his low back.”² *Id.* at 1150. During the fall, “he heard a crack sound and had
 2 immediate back pain.” ECF No. 39-1 at 1150. Shortly after the accident, Sund sought treatment
 3 at a local hospital in Shenzhen, China, where x-rays were taken that “showed that he had a lumbar
 4 fracture.” *Id.* Sund was then transferred and admitted to Matilda Hospital in Hong Kong, where
 5 he received a CT scan of his low back and “was diagnosed with L2 compression fracture.” *Id.*
 6 Sund also received “a [Thoracic-Lumbar-Sacral-Orthosis (“TLSO”)] brace and therapy in . . . with
 7 pain medication” before he was discharged and flew back to the United States on September 13,
 8 2018. *Id.*

9 On October 8, 2018, Sund was cleared to return to work with modified duties. When Sund
 10 returned to work, he was working four-hour days. *Id.* at 1217. Sund’s last day worked as a global
 11 commodity manager was February 1, 2019. *Id.* at 74. Sund states that he continued as an Amazon
 12 employee until he was formally terminated in June 2020 after he and human resources searched
 13 for but could not find a position within Amazon that “fit [his] skill set and accommodate[d] [his]
 14 restrictions,” which included the need to “recline at work.” *Id.* at 383.

15 **B. Sund’s Long-Term Disability Plan**

16 Amazon maintains a group long-term disability plan for its employees that is governed by
 17 ERISA. *Id.* at 1304–06. Hartford issued a group insurance policy (“the Policy”) funding the
 18 disability benefits provided by Amazon, which became effective October 1, 2017. *Id.* at 1275–
 19 1310. Sund was covered by the Policy during his employment at Amazon. *Id.*

20 Under the Policy, long-term disability benefits are payable for any employee if they: “1)
 21 become Disabled while insured under The Policy; 2) are Disabled throughout the Elimination
 22 Period; 3) remain Disabled beyond the Elimination Period; and 4) submit Proof of Loss to
 23 [Hartford].” *Id.* at 1292. Here, the elimination period is 180 days was from February 2, 2019
 24

25 ² The exact date of Sund’s injury is not clear from the record, which lists it as August 20, 2018,
 26 August 21, 2018, and August 22, 2018. *E.g., id.* at 176, 380, 388, 394, 396–97, 540, 1150, 1209,
 27 1217. Because the exact date of Sund’s injury is not relevant to the Court’s decision, it need not
 28 make a finding on this issue. *See Vance v. Am. Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir.
 1986) (“One purpose behind Rule 52(a) is to aid the appellate court’s understanding of the basis of
 the trial court’s decision. This purpose is achieved if the district court’s findings are sufficient to
 indicate the factual basis for its ultimate conclusions.”).

1 through August 2, 2019. *Id.* at 141. Additionally, twenty-four months is the maximum duration
2 of benefits for employees like Sund who are disabled at age 65. *Id.*

3 The Policy defines “[d]isabled” as follows:

4 Disability or Disabled means You are prevented from performing
5 one or more of the Essential Duties of:
6 1) Your Occupation during the Elimination Period;
7 2) Your Occupation, for the 24 months following the Elimination
8 Period, and as a result Your Current Monthly Earnings are less than
9 80% of Your Indexed Pre-disability Earnings; and
10 3) after that, Any Occupation.

11 *Id.* at 1300. An “Essential Duty” is one that “1) is substantial, not incidental; 2) is fundamental or
12 inherent to the occupation; and 3) cannot be reasonably omitted or changed.” *Id.* The employee’s
13 “ability to work the number of hours in [their] regularly scheduled workweek is an Essential
14 Duty,” but “working more than 30 hours per week is not an Essential Duty.” *Id.* Additionally,
15 “Your Occupation” means “Your Occupation as it is recognized in the general workplace”; it
16 “does not mean the specific job You are performing for a specific employer or at a specific
17 location.” *Id.* at 1303.

18 C. Sund’s Medical Records

19 1. Treatment at Kaiser Permanente

20 Upon returning to the United States, Sund was treated by Dr. Devina Grover and Dr. Thao
21 Pham at Kaiser Permanente. *Id.* at 1209. On September 18, 2018, Sund saw Dr. Grover, who
22 diagnosed him with a “lumbar vertebral traumatic wedge compression fracture” caused by an
23 accidental fall. *Id.* at 1211. Dr. Grover advised Sund that he should: (1) “continue wearing TLSQ
24 brace” at all times; (2) “increas[e] his activity level with [the] brace on,” including by “go[ing] for
25 short walks and . . . performing his daily home activities on [an] as tolerated basis”; and (3) “avoid
26 bending/twisting.” *Id.* Additionally, Dr. Grover and Sund discussed “[p]ain management . . . in
27 detail”; that she “encouraged [him] to wean off the oxycodone”; and “[p]rescribed ibuprofen” and
28 “acetaminophen-codeine.” *Id.* Dr. Grover stated that Sund should be off work until October 1,
2018 and listed his restrictions as “[h]as difficulty changing positions or ambulating without use of
support.” *Id.*

The same day, Sund had x-rays taken of his thoracic spine and lumbar spine. *Id.* The x-

1 ray of the thoracic spine indicated “[b]ack trauma” and the impression was “[m]ild diffuse
2 degenerative change.” *Id.* The x-ray of the lumbar spine indicated “[t]rauma” and the impression
3 was “[c]ompression fracture of L2 not present on the 2015 exam and the age is indeterminate.” *Id.*

4 On September 25, 2018, Dr. Pham saw Sund and diagnosed him with an “L2 vertebral
5 traumatic wedge compression fracture.” *Id.* Dr. Pham noted that Sund “complained [of] mild low
6 back pain at [a] level [of] 3/10”; “[h]as been using Lofstrand crutches and his TLSO brace 24
7 hours/day”; “feels 50-60% improvement”; and was “[t]aking ibuprofen” and “Tylenol No. 3 as
8 needed.” *Id.* Dr. Pham recommended that Sund “start conditioning exercises” and physical
9 therapy two times a week for up to six visits, and prescribed Ambien for Sund. *Id.*

10 An MRI was conducted on Sund’s lumbar spine on October 1, 2018, which “showed 20%
11 compression fracture at L2 with no central canal or foraminal stenosis.” *Id.* at 1151. On October
12 8, 2018, Sund saw Dr. Grover who noted that Sund’s back pain was “reduced” and “intermittent,”
13 and Sund was at a pain level of four out of ten. *Id.* Dr. Grover further noted that Sund had
14 “started doing household tasks like laundry, going for short walks[,] and some office type work
15 from home,” but Sund’s back would “get[] sorer with prolonged walking more than 10-15
16 minutes.” *Id.* Dr. Grover recommended that Sund start physical therapy, “wean off [his] brace
17 gradually[,] and continue increasing [his] level of activity on [an] as tolerated basis.” *Id.* Finally,
18 Dr. Grover permitted Sund to return to work on “modified duty” until October 22, 2018.

19 “Modified duty” included the following restrictions: “No lifting, pushing or pulling. Avoid
20 bending, twisting, climbing. May alternate sit/stand on as tolerated basis. Avoid prolonged
21 standing/walking, maximum 15 minutes per hour.” *Id.*

22 Sund had a physical therapy appointment with Shalaka A. Taware on October 15, 2018.
23 *Id.* at 1212. Taware noted that Sund had pain in his “lumbar spine,” which he rated as eight out of
24 ten. Taware recommended physical therapy two times per week for six weeks. *Id.* Sund
25 participated in physical therapy sessions from October 15, 2018 to October 26, 2018. *Id.*

26 Sund saw Dr. Pham again on October 22, 2018. *Id.* Dr. Pham noted that Sund had four of
27 six physical therapy sessions outside of Kaiser and was “progressively doing well” with the
28 physical therapy; had no complaints of much pain in his lower back; was taking ibuprofen; and

1 was working on modified duty. *Id.* Sund also told Dr. Pham that he would be moving to Oregon
2 for three months on November 9, 2018. *Id.* Dr. Pham continued Sund on modified duty at work
3 until November 8, 2018. *Id.* “Modified duty” included the following restrictions: “No lifting,
4 pushing or pulling of 5 lbs. Avoid bending, twisting, climbing. May alternate sit/stand or as
5 tolerated basis. Avoid prolonged standing/walking, maximum 30 minutes per hour.” *Id.*

6 Sund had his final in-person appointment with Dr. Pham on November 8, 2018. *Id.* Dr.
7 Pham noted that Sund was “ready to leave for Oregon”; had no back pain; completed physical
8 therapy; was taking Advil twice a day as needed; and was “progressively doing well.” *Id.* at
9 1212–13. Dr. Pham further noted that he ordered an x-ray, but Sund “did not have it done,” and
10 additional physical therapy “was authorized for only 2 more” sessions, “which [Sund would]
11 arrange in Canon Beach, O[regon].” *Id.* at 1213. Finally, Dr. Pham stated that Sund could
12 continue modified duty at work until November 30, 2018 with the same restrictions.

13 On November 30, 2018, Sund had a phone appointment with Dr. Pham from Oregon. Dr.
14 Pham wrote that Sund’s “low back [was] stable” and he was “progressively doing well”;
15 “[c]onstant walking bothered [Sund]”; and Sund was “[w]orking light duty.” *Id.* Additionally,
16 could continue working on “modified duty” with the same restrictions until January 3, 2019. *Id.*

17 Sund had his next phone appointment with Dr. Pham on January 3, 2019. Dr. Pham again
18 noted that Sund’s “low back is stable” and that he was “[w]orking light duty,” but also noted that
19 his “symptoms [were] aggravated with prolonged sitting more than 20 min[utes]” and that he was
20 taking three Advil pills per day. *Id.* at 925. Sund was to continue modified duty at work with the
21 same restrictions until January 22, 2019. *Id.* at 1213.

22 Sund had two in person appointments in January 2019. First, on January 21, 2019, Sund
23 had an x-ray taken on his lumbar spine, which indicated Sund had “chronic low back pain.” *Id.* at
24 856. As compared to the September 18, 2018 x-ray, the x-ray showed a “[m]ild [i]ncrease in
25 compression of L2 with sclerosis”; “loss of approximately 25% of the vertebral body heights”;
26 “[m]ild disc narrowing at L5-S1”; [f]acet joint hypertrophy at L4-5 and L5-S1”; and “[a]ortic
27 atherosclerosis.” *Id.* Second, the next day, Sund saw Dr. Pham. Sund told Dr. Pham that he
28 planned to move to Oregon permanently and “[h]e would like to transfer his care to Kaiser Occ

1 Med in Oregon.” *Id.* Dr. Pham noted that Sund’s “low back is stable,” but he had “persistent
2 pain” and his pain level at the time was a of two out of ten. Sund was working “light duty.” *Id.*
3 Dr. Pham also noted that Sund’s “symptoms [were] aggravated with prolonged sitting more than
4 20 min[utes]”; he was “[t]aking 2x Advil in AM and Tylenol in PM”; he was “[l]ying on the exam
5 [table] with discomfort” and had ; “[d]ifficulty . . . get[ting] up from” it; and had “[l]imited
6 AROM of lumbar spine.” *Id.* at 913. Additionally, Dr. Pham observed that that Sund had
7 “[m]uscle strength of five out of five for his “bilateral lower extremities” and his “[s]ensory to
8 light touch” was “normal.” *Id.* Dr. Pham discussed a “ve[r]tebroplasty procedure,” and Sund
9 responded that “[h]e would like to think about it.” *Id.* at 914. Dr. Pham stated that Sund could
10 continue “light duty” and the modified work that he had been doing through February 8, 2019. *Id.*
11 The modified work restrictions also applied at home. *Id.*

12 Sund had a telephone appointment with Dr. Pham on February 8, 2019. *Id.* at 995–1001.
13 Sund stated that he had permanently moved to Canon Beach, Oregon and that he had been
14 unsuccessful in finding a primary treating physician, but he was going to see if his family
15 medicine doctor would take workers’ compensation and treat him for his back pain. *Id.* at 995–96.
16 Dr. Pham wrote that Sund’s “low back is stable,” but it had been “worse with cold weather.” *Id.* at
17 995. He also noted that Sund was taking three Advil pills per day, *id.*, and stated that Sund should
18 continue “modified work” through February 12, 2019, *id.* at 996.

19 Sund had another telephone appointment with Dr. Pham on March 13, 2019. *Id.* at 1118–
20 23. The notes from this appointment are identical to those from the February 8, 2019
21 appointment, except for instead of listing “modified work,” they say that Sund should continue
22 “light duty.” *Id.* at 1119.

23 On April 3, 2019, Sund had a telephone appointment with Dr. Pham. *Id.* at 1124–28.
24 Dr. Pham again noted Sund’s difficulty finding a primary treating physician in Oregon and that
25 Sund was no longer working because his employer could not accommodate modified work. *Id.* at
26 1124. Dr. Pham wrote that Sund “had a new MRI and he was not recommended for
27 ve[r]tebralplasty,” but he was “feeling better everyday.” *Id.* And stated that Sund was reaching
28 maximum medical improvement (“MMI”) and should continue “light duty.” *Id.* at 1125.

1 Sund had telephone appointments with Dr. Pham on April 11, 2019 and April 23, 2019
2 where they discussed scheduling an appointment for Sund’s permanent and stationary (“P&S”)
3 report. *Id.* at 1129–42. Dr. Pham again noted that Sund was “[n]ot working due to lack of
4 accom[m]odation from” Amazon. *Id.* at 1129, 1138. The treatment plan was for Sund to continue
5 “light duty.” *Id.* at 1130, 1139.

6 On May 7, 2019, Sund had his P&S report appointment with Dr. Pham. *Id.* at 1143–47.
7 The notes from the appointment stated that Sund has “complaints of constant low back pain” and
8 that he usually has a pain level of two out of ten, but that “changes with pressure and weather.”
9 *Id.* at 1143.

10 Dr. Pham completed his P&S report and return-to-work and voucher report on May 14,
11 2019. *Id.* at 1148–49, 1150–58. On the return-to-work and voucher report, Dr. Pham checked that
12 Sund could “work with restrictions” and listed the following permanent restrictions: “No lifting,
13 pushing or pulling 5lbs. Avoid bending, twisting, climbing. May alternate sit/stand on as
14 tolerated basis. Avoid prolonged standing/walking, maximum 30 minutes per hour.” *Id.* at 1148.
15 The report included boxes for hour limits on things like standing, sitting, and walking, but Dr.
16 Pham did not check any of those boxes. *Id.* Dr. Pham also checked “yes,” in response to the
17 question of “[a]re the [w]ork [d]uties compatible with the activity restrictions set forth in the
18 provided job description.” *Id.*

19 Dr. Pham also prepared a separate P&S report that diagnosed Sund with “L2 vertebral
20 traumatic wedge compression fracture (ICD Code S32.020D)” and “[c]hronic low back pain
21 (G89.29, M54.5).” *Id.* at 1152. In the report, Dr. Pham noted that Sund’s “current symptoms
22 (subjective complaints)” were “constant low back pain at level 2/10 locally on VAS[,] . . . limited
23 low back range of motion,” and “very limited” functional ability because “he cannot sit for more
24 than 30 minutes, lift heavy weight, or prolonged standing and walking for long period.” *Id.* at
25 1151. Dr. Pham observed that during the physical examination, Sund was “uncomfortable”; “lay
26 on the exam bed” at a 30 degree angle; “had a hard time from a lying to sitting position”; and that
27 “[t]here was tenderness at L2 level lumbar spine,” which was worse on the left side. *Id.* at 1151.

28 Additionally, Dr. Pham concluded that Sund had a whole person rating of eight percent

1 pursuant to the American Medical Association (AMA)’s Guides to the Evaluation of Permanent
 2 Impairment (5th edition). *Id.* at 1152. Dr. Pham “place[d] [Sund’s] condition into lumbar
 3 category II,” which provides rates of “between a 5% and 8% impairment of the whole person.” *Id.*
 4 And Dr. Pham chose eight percent because Sund “has moderate ADL dysfunction” and “was not
 5 able to return to regular duty due to his chronic low back pain.” *Id.* Dr. Pham also found that
 6 “100% of the . . . impairment was directly caused by” Sund’s fall in China. *Id.* at 1153.

7 Finally, Dr. Pham stated that Sund would “require permanent work restrictions including
 8 no lifting, pushing, or pulling more than 5 pounds”; need to “[a]void repetitive bending, twisting,
 9 or climbing”; “may alternate sitting and standing as tolerated”; and “[a]void prolonged standing,
 10 walking, or sitting, a maximum of 30 minutes per hour.” *Id.* And under “[f]uture [m]edical
 11 [c]are,” Dr. Pham noted that Sund took 400 milligrams of Advil per day; “should be provided pain
 12 medication if needed”; “should be allowed to renew [his VQ OrthoCare lumbar brace support]
 13 once or twice per year depending on how often he is using it; and “should be provided [physical
 14 therapy] if his pain is exacerbated due to weather changes.” *Id.*

15 2. Treatment with Dr. Jimmy Huebert and Dr. David Siker

16 On March 4, 2019, Sund saw neurologist Dr. Jimmy Huebert, *id.* at 1187–90, who
 17 diagnosed him with an “L2 compression fracture with continued back pain and limitations.” *Id.* at
 18 1188.

19 Huebert noted that Sund had a pain level of two out of ten, “ha[d] been wearing a neoprene
 20 back sleeve which provides only a modicum of improvement,” and that while he has
 21 “incrementally made some improvements,” he is “still fairly limited.” *Id.* at 1187–88. Dr.
 22 Huebert reported the following regarding Sund’s spine:

23 [F]lattened lumbar lordosis, he [was] fairly guarded and
 24 apprehensive with both flexion and extension of his lumbar spine,
 25 rotation and extension [was] slightly more uncomfortable going to
 26 the right than to the left. Compression over the spinous processes in
 27 his mid lumbar region [was] moderately uncomfortable. There
 28 [was] no neural compressive signs. He is fairly guarded with
 Trendelenburg but there [were] no deficits noted.

Id. at 1188. Additionally, Dr. Huebert analyzed the January 2019 x-ray of Sund’s spine, finding

1 that it showed a “[s]ignificant L2 compression fracture,” and while the read out indicated a “loss
2 of approximately 25% of the vertebral body heights,” the loss “appear[ed] to be more.” *Id.* at
3 1187.

4 Dr. Huebert provided Sund (1) “a more supportive lumbar brace” and (2) a “prescription of
5 Miacalcin nasal spray to be taken as directed.” He also noted that he would refer Sund to “an
6 attending physician” at “Rehabilitation Medicine Associates” and “recommend[ed] an evaluation
7 for a possible kyphoplasty.” *Id.* Sund stated that he completed referral forms for diagnostic
8 imaging at Siker Medical and for a consult with a physician at Rehabilitation Medicine Associates.
9 *Id.* at 1189–90.

10 Sund then saw Dr. David Siker for an MRI of his lumbar spine with and without contrast
11 on March 20, 2019. *Id.* at 1215. The indication of the MRI was that there was a “L2 compression
12 fracture” and Sund had “low back pain” with pain and symptoms that “increase[d] with sitting,
13 walking, bending forward, lifting and twisting.” *Id.* The impression was a “[c]ompression
14 fracture deformity on the L2 vertebral body, which [was] likely subacute in age with
15 approximately 45% loss of vertebral body stature and mild 3.5 mm retropulsion” with the
16 following features: (1) “diffuse marrow edema mostly involving upper half, with prominent
17 horizontal fracture cleft”; (2) “[m]ultilevel mild disc bulging and mild-to-moderate facet arthrosis
18 resulting in mild canal narrowing at L3-L4 and L4-L5 without canal stenosis [and] [m]ild
19 narrowing of the lateral recesses at L4-L5”; (3) “[m]ild left L5 and mild bilateral L4 foraminal
20 narrowing without nerve root encroachment”; and (4) “[s]mall left L1 foraminal/extraforarninal
21 disc herniation without definite nerve root encroachment.” *Id.*

22 Sund stated that Dr. Huebert and Dr. Siker “asked why [he] did not have Vertebrae Plasty
23 Surgery when [he] was injured,” and he “explained that the Hong Kong doctors and Kaiser
24 recommended that [he] wait.” *Id.* at 381. He also stated that “Dr. Hubert [sic] and Dr. Siker
25 respectively agreed that it was too late to have [that] procedure done.” Sund explained that he did
26 not continue care with either doctor because “[n]o doctor in Oregon would see [him] because” of
27 his “ongoing CA OSHA case,” so he went to his “personal physician Dr. Anita [sic] Richardson
28 and asked to be referred to a specialist.” *Id.*

4. Qualified Medical Evaluation by Dr. Ramon Jimenez

On October 25, 2019, Dr. Ramon Jimenez conducted a Qualified Medical Evaluation of Sund, which involved a physical examination of Sund and review of his medical records. *Id.* at 1208–20. Sund’s complaints during the evaluation were that “[h]e has pain to his low back” which is present most of the time.” *Id.* at 1209. Sund “rate[d] the pain at a level of about 3 to 4,” but also stated that it “increase[d] to a level of 6 if he is sitting or standing for too long,” which was “usually . . . after about 20 minutes.” *Id.* Dr. Jimenez diagnosed Sund with a compression fracture of his L2. *Id.* at 1217. In report’s discussion section, Dr. Jimenez concluded that as of October 25, 2019, Sund had “reached the point of” MMI because the “concurrent or concomitant evidence of degenerative arthrosis of the lower segments could lend to persistent signs and symptoms.” *Id.* at 1205.

Dr. Jimenez concluded that the “[s]ubjective factors of disability are [c]onstant and [m]oderate, increasing to [i]ntermittent and [m]oderate/[s]evere,” and the “[o]bjective findings are . . . localized tenderness.” *Id.* at 1218. He also concluded that he “would place [Sund] into DRE lumbar Category III with a resultant whole person impairment of 13%.”³ *Id.* at 1219.

Dr. Jimenez placed the following restrictions on Sund’s ability to work: “He should do no bending, stooping or lifting greater than ten pounds, and no prolonged walking, standing, sitting or climbing.” *Id.* He stated that “supplemental job displacement benefits might be applicable if his disability and work preclusions are not accommodated.” *Id.* at 1218. Additionally, he recommended the following future treatment: (1) “see[ing] his primary treating physician”; (2) “undergo[ing] an MRI and TC-99 bone scan to document the status of healing; (3) “wean[ing] him from the lumbosacral support”; and (4) “gym membership at a facility with a pool and Jacuzzi” to

³ Dr. Jimenez’s initial report also stated that it was also his “opinion that the 13% whole person impairment d[id] not accurately reflect his true impairment as to activities of daily living as enumerated above,” and “[t]herefore, [he] . . . utilize[d] the en banc decision of *Almaraz-Guzman* and place[d] him into DRE lumbar Category IV with a 23% whole person impairment.” *Id.* at 1219. However, in a supplemental response, Dr. Jimenez clarified that he “placed [Sund] into DRE Lumbar Category III, with a resultant Whole Person Impairment of 13% . . . because [he] believe[d] the compression fracture was greater than 25% . . . [and] [t]he compression fracture was 25%-50% of one vertebral body, which would place him under that DRE Lumbar Category III (10%-13% WPI).” *Id.* at 1209.

1 allow for water exercise. *Id.* at 1218–19.

2 **5. Stephen Giles**

3 Sund saw Stephen G. Giles, PA-C, a neurosurgery physician assistant for a lumbar spine
4 consult on May 1, 2020. *Id.* at 666–82. Giles noted the following about Sund: at the time of the
5 appointment: he had two out of ten level lower back pain that he described as “dull and aching”;
6 the pain “affects the right buttocks at time[s]”; Sund had “a single episode of shooting [left] lower
7 extremity pain in December 2019 that resulted in a fall and [right] foot fracture”; “[o]xycodone is
8 not routine but pm for pain flares”; and his “back pain is made worse by sitting, bending, walking
9 and standing,” but it improves with “lying down and sometimes . . . with walking as well.” *Id.* at
10 668. Giles conducted a physical exam of Sund’s musculoskeletal system and found that his gait
11 was “[n]ormal” because he “ambulate[d] on heels and toes and he was “able to tandem walk”; his
12 tone was “[n]ormal . . . in upper and lower extremities”; his “[s]ensation [was] grossly intact to
13 light touch BLEs”; and his Romberg test was normal. *Id.* at 670.

14 Giles’s assessment was that Sund had a healed “L2 compression fracture,” *id.* at 671, with
15 approximately 50% height loss and “mild tightness at the L4-5 level where the nerves exit the
16 spine-[left] greater than right,” *id.* at 676; “[c]hronic lower back pain,” *id.* at 671; and “[l]umbar
17 spondylosis,” *id.* Giles referred to Sund physical therapy and for x-rays that show the lumbar
18 spine’s flexion and extension. *Id.*

19 **6. Physical Therapy in 2020**

20 Sund had ten physical therapy sessions between May 14, 2020 and June 30, 2020. *Id.* at
21 426–538, 699–722, 727–73. During Sund’s initial visit on May 14, the physical therapist noted
22 that Sund had “major limitation in lumbar flexion, extension, and bilateral side bending, and
23 moderate limitation in bilateral rotation”; “a positive SLR and slump test”; “weakness in his back
24 and hip extensors and hypersensitivity to palpation of the lumbar vertebrae”; and “kyphotic”
25 posture. *Id.* at 701. Sund set two goals: (1) “increased lumbar mobility in all planes at least 10
26 deg[rees], *id.*, and (2) to “be able to walk more than 1 mile on the beach without exacerbation of
27 symptoms,” *id.* at 702. The aggravating factors for his pain were “sitting, walking on uneven
28 ground, bending forward, lifting, [and] making bed”, and the easing factor was “lying down.” *Id.*

1 at 704. The physical therapist also stated that after Sund fell down two steps, he “can walk only
2 for a short while before he has to lie down to stop pain,” and “can sit only 10 min before pain
3 causes him to stand up and then lie down for 20 min.” *Id.* However, “[p]rior to fall he was
4 independent with mild to moderated chronic back pain; but walking 2-5 miles on the beach
5 daily.”⁴ *Id.*

6 Sund had subsequent sessions on May 18, 20, and 27, where he “[p]rogress[ed] as
7 expected.” *Id.* at 730, 748, 766. On May 18, Sund reported that his lower back pain was at a zero
8 out of ten, *id.* at 730; on May 20, his back “fe[lt] good,” *id.* at 748; and on May 27, he “report[ed]
9 that his back and foot [were] improving.” *Id.* at 766.

10 Sund had three additional sessions in June. First, on June 2, Sund had no pain, but
11 complained that he was “stiff.” *Id.* at 430. Second, on June 4, Sund reported that he went on a
12 two mile walk on the beach, *id.* at 449, and the physical therapist noted that in exercises, Sund was
13 more “limited . . . by ankle pain than back pain,” *id.* at 452. Third, on June 11, Sund stated that he
14 thought “he overdid with exercises last session as his foot swelled up for a couple of days and was
15 unable to walk.” *Id.* at 468.

16 On June 23, Sund had an appointment to assess his progress. The notes stated that after
17 physical therapy, “[t]he quality of [Sund’s] gait has improved though he still presents with [right]
18 foot pain and stiffness.” *Id.* at 486. Sund reported that he felt that his walking had improved, but
19 he still had “significant stiffness with prolonged sitting for [more] than 20 minutes or so,
20 globally.” *Id.* Sund met his goal of “increas[ing] lumbar mobility in all planes at least 10
21 deg[rees],” but had not yet met his goal of “walk[ing] more than 1 mile on the beach without
22 exacerbation of symptoms.” *Id.* Sund also added a new goal of “be[ing] able to sit for longer than
23 30 minutes in order to participate in work duties.” *Id.* At the time of the appointment, Sund stated
24 that he was “limited to 5-10 minutes sitting tolerance due to low back.” *Id.*

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⁴ In his opposition to Hartford’s trial brief, Sund argues that his ability to walk 2-5 miles on the beach refers to his ability prior to the accident in 2018. ECF No. 42 at 19 n.3. However, the only fall referred to in the physical therapist’s notes is one after the accident where he broke his foot. ECF No. 39-1 at 704. Accordingly, the Court finds that Sund could regularly walk two to five miles on the beach before December 2019.

1 Finally, Sund had two additional sessions at the end of June. During his June 25 session,
 2 the physical therapist noted that Sund’s “back pain improved with continual movement
 3 through[out] the day rather than focusing one time on exercises[.]” *Id.* at 516. But during his June
 4 30 session, Sund stated that he had “increased back pain over the past 2 weeks,” which “he
 5 attributes” to his dog pulling on the leash more when he walked the dog. *Id.* at 529.

6 7. Physical Capacity Evaluation with Erin Magaw

7 On August 26, 2020, physical therapist Erin Magaw conducted a Physical Capacity
 8 Evaluation of Sund. *Id.* at 543–71. Magaw wrote that “Sund gave a reliable, valid effort during
 9 testing, with 25 consistency measures yielding a reliability score of 47 out of 50 (94%)[,] . . .
 10 demonstrated patterns of movement and physiological responses were consistent with maximal
 11 effort[, and] . . . [t]here was consistency between the test results and the referral diagnosis.” *Id.* at
 12 543. Magaw concluded that “Sund’s acceptable Occasional Lifting capabilities are at the
 13 Sedentary Physical Demand Category,” which mean that he was limited to lifting 10 pounds for
 14 floor to knuckle, knuckle to shoulder, and shoulder to overhead lifts, but could lift in 12.5 pounds
 15 in a two-hand carry. *Id.*

16 Additionally, Magaw opined on Sund’s work abilities. First, Sund “demonstrated
 17 sufficient strength to perform the following activities:” (1) in the “heavy” category: pushing,
 18 pulling; (2) in the “light” category: mid lift; and (3) in the “sedentary” category: high lift, low lift,
 19 full lift, carrying, and overall strength. *Id.* The heavy category is 51-100 pounds; the light
 20 category is 11-20 pounds; and the sedentary category is 1-10 pounds. *Id.* at 551.

21 Second, Sund was “able to perform the following activities:” (1) reaching immediately in
 22 front of him to the right and left and bi-manual handling on a constant basis; (2) walking, reaching
 23 overhead in front of him to the right and left, handling left, fingering right and left on a frequent
 24 basis; and (3) sitting, standing, and bending on an occasional basis. *Id.* at 543. Sund “did not
 25 demonstrate the ability to . . . [c]rouch[.]” or “[k]neel[.]” *Id.* at 544. Additionally, while Sund was
 26 walking during the evaluation, he “report[ed] increased low back pain” and “[m]aintained [his] left
 27 hand against left lumbar region for self relief.” *Id.* at 549, 565. On a constant basis means 67%-
 28 100% of the day; on a frequent basis means 34-66% of the workday; and on an occasional basis

1 means 0-33% of the workday. *Id.* at 551.

2 **D. Sund’s Initial Disability Claims**

3 Sund was approved for short-term disability benefits through Amazon from February 2,
4 2019 through August 2, 2019. *Id.* at 169. On May 31, 2019, Hartford started a long-term
5 disability claim for Sund, which he submitted on July 17, 2019. *Id.* at 71, 828–32. Sund
6 supported his claim with medical records from Kaiser Permanente and Dr. Huebert, as well as Dr.
7 Jimenez’s report. In reviewing Sund’s claim, Hartford also considered the “Senior OEM Business
8 Manager” job description received from Amazon and the occupational analysis completed by
9 vocational rehabilitation clinical case manager Amoreena Burton. Burton concluded Sund’s
10 position was the equivalent of a “Direct, Research and Development (DOT Code: 189.117-014) as
11 defined and classified in the Dictionary of Occupational Titles, 1991 edition.” *Id.* at 40. This is a
12 sedentary occupation, which means it is one that involves “[e]xerting up to 10 pounds of force
13 occasionally and/or negligible amount of force frequently to lift carry, push, pull, or otherwise
14 move objects, including the human body” and “involves sitting most of the time, but may involve
15 walking or standing for brief periods of time.” *Id.*

16 Hartford denied Sund’s long-term disability claim on June 1, 2020. *Id.* at 140. Hartford
17 concluded that Sund’s position was sedentary, and therefore, he was not disabled because his only
18 workplace restrictions were “[n]o bending, stooping[,] or lifting greater than 10lbs” and “[n]o
19 prolonged walking, standing, sitting[,] or climbing.” *Id.* at 142.

20 **E. Sund’s Appeal**

21 Sund submitted a timely written appeal of Hartford’s denial on November 24, 2020. *Id.* at
22 572–95. Sund submitted the following additional evidence in support of his appeal: (1) updated
23 medical records, with records from Giles, Dr. Richardson, and Sund’s physical therapy sessions,
24 *id.* at 599–774; (2) a statement from Dr. Richardson, *id.* at 540–41; (3) Sund’s physical capacity
25 evaluation with Magaw, *id.* at 543–71; (4) statements from Sund and his family, *id.* at 380–85; and
26 (5) a rebuttal occupational analysis from Linda Hayes, *id.* at 387.

27 In her October 2020 statement, Dr. Richardson stated that Sund has been her patient since
28 June 2019, and that after his accident in 2018, “he has been unable to return to his full function”

1 and “has had minimal improvement with physical therapy.” *Id.* at 540. Dr. Richardson explained
2 that Sund “is unable to bend, walk[,] or sit for a prolonged period,” and that specifically he
3 “requires lying prone to rest if he does any of these activities longer than 20 minutes.” *Id.*
4 Further, “[h]e has difficulty lifting any objects > 5.” *Id.* Dr. Richardson concluded that “[b]ased
5 on [her] knowledge, training, experience[,] and [her] clinical treatment of . . . Sund as well as [her]
6 review and analysis of his medical history, it is [her] professional opinion that . . . Sund is totally
7 disabled and unable to perform the substantial and material duties of his own occupation,” and he
8 has been totally disabled since February 2019. *Id.* at 541.

9 Sund’s July 2020 statement described the accident, the treatment he received after the
10 accident, and the impact the accident has had on his daily life. *Id.* at 380–83. Sund also described
11 his December 2019 accident where he fell down “2 stair steps in [his] home because [his] back
12 spasmed and . . . [he] twisted [his] right foot and broke three middle metatarsal bones.” *Id.* at 381.
13 Sund explained that he cannot engage in activities that he enjoyed before the accident like biking,
14 hiking, playing basketball and tennis, fishing, riding in boats, playing with his grandchildren,
15 making his bed, and doing “any household chores that require bending, lifting, or twisting.” *Id.* at
16 382. Sund also stated that “[d]ue to the accident and resulting injuries, [he has] not been able to
17 perform [his] occupational duties, including but not limited to:” (1) “[t]ravel to customer facilities
18 in Asia or United States” and “[t]our[ing] factory or equipment build status for existing orders”
19 while traveling because “[he has to] recline fully for 10-15 minutes per hour and need[ed] to be
20 able to sit or stand the remaining time in an ergonomic chair,” which was not possible on the 21
21 hour flights to Asia or even on the three to six hour flights required for domestic work travel; and
22 (2) “[n]egotiate contracts” because that required having “in person meetings” and he could not
23 “work at Amazon’s San Jose or Sunnyvale offices because [he] cannot carry [his] work backpack
24 the distance from [his] car to the office, and is unable to sit more than roughly 30 minutes without
25 reclining, which is not feasible as all meetings are 1+ hours in length.” *Id.* at 383.

26 Sund’s aunt and children also submitted statements written in July 2020 regarding’s
27 Sund’s condition. *Id.* at 384–85. Sund’s aunt, Jeanette Stevens, stated that Sund came to live with
28 her because she “had maids and a maintenance employee that could assist him with the everyday

1 lifting and work activities he needed to do on a daily basis[.]” *Id.* at 384. “In exchange he helps
2 [her] read, answer phones, and cooks [their] meals.” *Id.* Stevens also stated that Sund can walk
3 on the beach, but only for “30-50 minutes per day,” and that Sund’s “back has improved a bit
4 since” he moved to Oregon “until he fell down 2 stairs because of a back pain spasm.” *Id.*
5 Stevens described that Sund “is up and about from 7 AM to 3 PM and during this time he sits,
6 stands, or reclines every 20 minutes or so depending on back pain and activity being done.” *Id.*
7 Sund’s children wrote that the accident had “adversely impact[ed]” their dad’s quality of life. *Id.*
8 at 385. They explained that their “dad was an active person who enjoyed outdoor activities as well
9 as kept busy inside the house that required flexibility and mobility (he helped raise 3 kids), but his
10 work accident in China has greatly hindered his ability to lift, carry, bend, and just move around
11 like he used to[.]” *Id.*

12 Hayes’s occupational analysis was based on her review of Sund’s medical records, resume,
13 Amazon’s job description, and a worker’s compensation report. *Id.* at 388. Hayes concluded that
14 Sund’s “job[] f[e]ll within the light strength category and requires standing and walking most of
15 the day.” *Id.* at 391. Hayes further concluded that Sund “does not meet the physical capability for
16 a light strength occupation / job and is not capable of performing even a sedentary job as per the
17 restrictions placed on him by his treating physicians and confirmed by the” physical capacity
18 evaluation. *Id.* at 391–92.

19 In evaluating this appeal, Hartford hired Dr. Sarah White to conduct an “independent
20 medical review” of Sund’s file. Dr. White reviewed Sund’s medical records, but did not have a
21 “peer to peer physician teleconference” with any of Sund’s treating physicians and never
22 physically examined Sund. *Id.* at 110. On December 21, 2020, Dr. White issued a report,
23 concluding that “Sund “suffers from a combination of” a “healed lumbar L2 compression fracture
24 . . . , lumbar spondylosis, and healed right foot 1st, 2nd, and 3rd metatarsal fractures, . . . which
25 supported functional impairment and restrictions/limitations on his activities, as of 2/2/19 to
26 present.” *Id.* at 113. Dr. White stated that Sund could “sustain [the following] full time activities
27 throughout an 8 hour day [and 40 hour work week] . . . as of 2/2/19 to present”: (1) “lifting,
28 carrying, pushing, and pulling up to 20 pounds occasionally” using both upper extremities,” *id.* at

1 115; (2) lifting, carrying, pushing, and pulling up to 10 pounds frequently using both upper
2 extremities,” *id.*; (3) “reaching with the right or left upper extremity above the shoulder, above the
3 waist, at waist/desk level, or below the waist,” *id.*; (4) “fingering, gripping, grasping, handling,
4 feeling, typing, keyboarding, or manipulating with the right or left upper extremity,” *id.* at 113–14;
5 (5) sitting; (6) standing or walking “for 1 hour continuously for a total of 6 hours per day,” *id.* at
6 114; (7) “occasionally kneel[ing], crouch[ing], climb[ing] stairs, bend[ing] at the waist, and
7 balanc[ing],” *id.*; and (8) frequently driving, *id.* Additionally, “[t]he medical evidence provided
8 does not support a need for . . . Sund to lay down throughout the day” and to have “[e]ndurance
9 restrictions.” *Id.* These work “restrictions and limitations” were “permanent, as of 2/2/19 to
10 present and on-going due to the chronic nature of his conditions.” *Id.*

11 Additionally, Dr. White concluded that Sund’s “self-reported symptoms, fatigue and the
12 self-reported inability to work” and Dr. Richardson’s “opinion concerning . . . Sund’s physical
13 functionality” were “inconsistent with the clinical findings of normal strength, normal sensation,
14 no focal neurologic deficits, normal cranial nerves, normal heel walk, normal toe walk, normal
15 tandem walk, normal tone, symmetric reflexes, and negative Romberg.” *Id.* at 114–15. She
16 further concluded that Dr. Richardson’s opinion was “inconsistent with the findings on the”
17 physical capacity evaluation. *Id.* at 115.

18 The end of Dr. White’s report contained eleven questions for Sund’s attending physician,
19 to which Dr. Richardson responded on January 29, 2021. *Id.* at 348–51. Dr. Richardson did “not
20 agree with” Dr. White’s report “because it does not address . . . Sund’s pain that is caused” by
21 lifting, carrying, pushing, pulling, standing, walking, and sitting. *Id.* at 349. She explained that
22 while Sund “can lift, carry, push[[]], and pull up to 20 lbs. occasionally and 10 lbs. frequently and
23 using both his upper extremities . . . [,] this causes increased exacerbation of his back pain
24 requiring him to lay down for at least 20 min[utes] to recover.” *Id.* Additionally, she stated Sund
25 “can[not] stand or walk for 1 hr. continuously (6 hrs. total),” rather he “was able to walk up to 45
26 min[utes] prior to his foot fracture but he would then need to lie down for an hour to recuperate
27 from his back pain.” *Id.* And Sund “can occasionally kneel, crouch, climb stairs, and drive but
28 [he] has difficulty bending at [the] waist without pain or need for assistance.” *Id.* Dr. Richardson

1 opined that for Sund “[t]o do these activities without pain[,] he would need to take a substantial
2 amount of pain medication that would cause cognitive impairment and sedation.” *Id.* Dr.
3 Richardson also reiterated that it was her opinion that “Sund is totally disabled and unable to
4 perform the substantial and material duties of his own occupation,” and “has been and remains
5 totally disabled since February 2019.” *Id.* at 350.

6 On February 11, 2021, Sund also responded to Dr. White’s analysis, arguing that it was
7 “not reliable, as she omitted evidence supportive of . . . Sund’s claim.” *Id.* at 234. Hartford
8 responded to Sund and Dr. Richardson with an updated report by Dr. White dated February 25,
9 2021. *Id.* at 100–04. Dr. White stated that Sund and Dr. Richardson’s responses did “not change
10 [her] opinion.” *Id.* at 103. Dr. White explained that the normal “measurable findings carry far
11 more clinical weight than nonmeasurable findings” like Sund’s “self-reported nonmeasurable
12 pain.” *Id.*

13 Sund responded to Dr. White’s second report on April 23, 2021, arguing that Dr. White’s
14 conclusions contradict those of the other physicians who treated Sund and attaching a new
15 statement from Dr. Richardson. *Id.* at 198–200, 205. In response to Dr. White’s opinion that
16 “Sund’s self-reported complaints of pain and tenderness are non-measurable and conflict with
17 clinical findings,” *id.* at 205, Dr. Richardson stated that she had “personally treated . . . Sund and
18 [has] no reason to disbelieve his self-reported complaints of pain and tenderness,” and that his
19 “self-reported complaints are clinically supported by his medical records,” the physical capacity
20 evaluation, and the qualified medical examination. *Id.* She also stood “by the statement that
21 [Sund] has been and remains totally disabled since February 2019.” *Id.*

22 Dr. White wrote a subsequent report on April 30, 2021 in response to Dr. Richardson’s
23 statement. *Id.* at 90–95. Dr. White stated that she disagreed with Dr. Richardson’s opinion
24 regarding “Sund’s physical functionality” because as she had stated in her previous reports, it was
25 “inconsistent with the clinical findings of normal strength, normal sensation, no focal neurologic
26 deficits, normal cranial nerves, normal heel walk, normal toe walk, normal tandem walk, normal
27 tone, symmetric reflexes, and negative Romberg,” as well as the physical capacity evaluation. *Id.*
28 at 93. On May 25, 2021, Sund responded to this report, again arguing that it was incorrect, *id.* at

1 175–80, and that “Dr. White’s opinions regarding . . . Sund’s disability should not be given
2 deference over the opinions of the physicians who have actually examined . . . Sund,” *id.* at 179.

3 Hartford denied Sund’s appeal on June 11, 2021, *id.* at 73–79, concluding that “Sund
4 maintained the functional capacity to consistently perform full-time work with restrictions and
5 limitations described” by Dr. White, *id.* at 78. Accordingly, Hartford concluded that Sund “was
6 not [d]isabled from his . . . sedentary [o]ccupation throughout and beyond the [e]limination
7 [p]eriod as required by the Policy[.]” *Id.*

8 **V. REQUEST FOR JUDICIAL NOTICE AND EVIDENTIARY OBJECTIONS**

9 Sund requests that the Court take judicial notice of the Dictionary of Occupational Titles’
10 (“DOT”) description of a “Director, Research and Development”; (2) “Appendix C to the DOT”;
11 and (3) the DOT’s descriptions of three occupations, “Purchasing Agent,” “Contract Specialist,”
12 and “Buyer.” ECF No. 40-1 ¶¶ 6, 8–9. Hartford does not dispute that the DOT documents are
13 judicially noticeable, but objects to this evidence because it is not in the administrative record and
14 “[e]xtrinsic evidence should only be considered under limited circumstances” which are not
15 present here. ECF No. 41 at 25.

16 “Under de novo review, the district court” considers only “evidence in the administrative
17 record and ‘other evidence as might be admissible under the restrictive rule of *Mongeluzo* [*v.*
18 *Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938 (9th Cir.1995)].” *Opeta v. Nw.*
19 *Airlines Pension Plan for Cont. Emps.*, 484 F.3d 1211, 1217 (9th Cir. 2007) (quoting *Kearney*,
20 175 F.3d at 1094). Under that approach, the district court can consider extrinsic evidence “only
21 under certain limited circumstances,” and “only when circumstances clearly establish that
22 additional evidence is necessary to conduct an adequate de novo review of the benefit decision.”
23 *Id.* (quoting *Mongeluzo* 46 F.3d at 944) (emphasis omitted).

24 Some district courts have applied the framework outlined in *Mongeluzo* and *Opeta* when
25 determining whether to consider portions of the DOT not in the administrative record. *E.g.*,
26 *Harlow v. Metro. Life Ins. Co.*, No. EDCV 17-2091 JGB (SPx), 2019 WL 1894752, at *3 (C.D.
27 Cal. Mar. 11, 2019) (denying a request to take judicial notice of DOT job title because none of the
28 “exceptional circumstances” enumerated in *Opeta* and *Mongeluzo* were present and it was not

1 necessary to consider “this additional job title . . . to conduct an adequate de novo review of the
 2 benefits decision”). This Court, however, is not persuaded by that approach. “The DOT has been
 3 ‘recognized as a widely used and reasonable reference for administrators and courts to use under
 4 ERISA’ in order to conduct a vocational analysis.” *Popovich v. Metro. Life Ins. Co.*, 281 F. Supp.
 5 3d 993, 1006 (C.D. Cal. 2017) (quoting *Ramos v. United of Omaha Life Ins. Co.*, No. 12-cv-
 6 03761-JST, 2013 WL 4343413, at *5 (N.D. Cal. Aug. 13, 2013)); *see also Sandoval v. Reliance*
 7 *Standard Life Ins. Co.*, No. 2:20-cv-03061-SVW-KS, 2021 WL 1523910, at *9 (C.D. Cal. Mar. 5,
 8 2021), *appeal dismissed*, No. 21-55366, 2021 WL 3028082 (9th Cir. June 25, 2021) (“[T]he
 9 Dictionary of Occupational Titles[] [is] a source on which courts regularly rely in ERISA cases.”);
 10 *Dionida v. Reliance Standard Life Ins. Co.*, 50 F. Supp. 2d 934, 940 n.4 (N.D. Cal. 1999) (“Given
 11 the amount of research and analysis that has gone into grouping similar jobs and defining the
 12 occupational titles, and the length of time the D.O.T. has been widely used, it is reasonable for
 13 plan administrators, and courts, to use it for determining a claimant’s ‘regular occupation.’”).
 14 Additionally, because consideration of the DOT “concerns a legal issue, not a factual one . . . [,]
 15 consideration of [it] would be different than a de novo judicial review of factual matters such as
 16 medical evidence.” *Perez-Jones v. Liberty Life Assurance Co. of Bos.*, No. LA CV11-09518 JAK
 17 (AJWx), 2013 WL 12126747, at *7 (C.D. Cal. Apr. 30, 2013) (considering a severance agreement
 18 not in the administrative record because it did “not interfere with the administrator’s prior factual
 19 analysis with respect to medical evidence”). Accordingly, the Court concludes that it may
 20 consider DOT excerpts that are not in the administrative record, and it is not required to apply the
 21 framework outlined in *Opeta* and *Mongeluzo* before considering them.⁵

22 In sum, the Court agrees with Sund that it may consider the DOT, and overrules Hartford’s
 23 objections. However, because the Court considers only Appendix C of the DOT in its conclusions
 24 of law, it grants in part Sund’s request for judicial notice of Appendix C, and denies in part as
 25 moot Sund’s request for judicial notice of the DOT’s descriptions of “Director, Research and
 26

27 ⁵ Even if the Court were to apply *Opeta* and *Mongeluzo*, it would conclude that the “circumstances
 28 clearly establish that” consideration of Appendix C of the DOT “is necessary to conduct an
 adequate de novo review of the benefit decision.” *Opeta*, 484 F.3d at 1217 (emphasis omitted).

1 Development,” “Purchasing Agent,” “Contract Specialist,” and “Buyer.”

2 **VI. CONCLUSIONS OF LAW**

3 The parties seek opposing judgments: Sund requests a judgment “overturn[ing] Hartford’s
4 denial” of his long-term disability benefits claim and [o]rdering it to pay . . . Sund benefits over
5 the 24-month Policy period,” ECF No. 40 at 30, and Hartford requests a judgment upholding its
6 decision to deny Sund’s long-term disability benefits claim, ECF No. 41 at 26. The parties dispute
7 whether Sund’s occupation should be classified as “sedentary” or “light,” as well as whether Sund
8 has proven by a preponderance of the evidence that he is disabled from performing a sedentary or
9 light occupation. ECF Nos. 40 at 22–30, 41 at 16–26, 42 at 7–25, 43 at 5–17

10 “ERISA was enacted ‘to promote the interests of employees and their beneficiaries in
11 employee benefit plans,’ and ‘to protect contractually defined benefits.’” *Firestone Tire & Rubber*
12 *Co. v. Bruch*, 489 U.S. 101, 113 (1989) (internal citations omitted). ERISA “permits a person
13 denied benefits under an employee benefit plan to challenge that denial in federal court.” *Metro.*
14 *Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008). “ERISA’s civil-enforcement provision . . .
15 allows a claimant ‘to recover benefits due to him under the terms of his plan [and] to enforce his
16 rights under the terms of the plan.’” *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th
17 Cir. 2010) (quoting 29 U.S.C. § 1132(a)(1)(B)).

18 “[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo*
19 standard unless the benefit plan gives the administrator or fiduciary discretionary authority to
20 determine eligibility for benefits or to construe the terms of the plan.” *Firestone*, 489 U.S. at 115.
21 The parties agree that *de novo* review is appropriate here. ECF No. 25.

22 Under *de novo* review, “the court simply proceeds to evaluate whether the plan
23 administrator correctly or incorrectly denied benefits,” with no deference given to the
24 administrator’s decision. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006)
25 (en banc). “[W]hen the court reviews a plan administrator’s decision under the *de novo* standard
26 of review, the burden of proof is placed on the claimant.” *Muniz*, 623 F.3d at 1294. “[T]he
27 claimant has the burden of proving by a preponderance of the evidence that he was disabled under
28 the terms of the plan.” *Armani v. Nw. Mut. Life Ins. Co.*, 840 F.3d 1159, 1162–63 (9th Cir. 2016).

1 Sund can recover the benefits denied to him under the Policy only if he shows that he was
 2 “prevented from performing one or more of the [e]ssential [d]uties of . . . [his] [o]ccupation”
 3 between February 2, 2019 and August 2, 2019. ECF No. 39-1 at 1300. The Court concludes that
 4 Sund has met his burden proving that under the Policy he is disabled and that he cannot perform
 5 either a sedentary or light occupation.⁶

6 First, the DOT defines “sedentary work” as:

7 Exerting up to 10 pounds of force occasionally (Occasionally:
 8 activity or condition exists up to 1/3 of the time) and/or a negligible
 9 amount of force frequently (Frequently: activity or condition exists
 10 from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise
 11 move objects, including the human body. Sedentary work involves
 sitting most of the time, but may involve walking or standing for
 brief periods of time. Jobs are sedentary if walking and standing are
 required only occasionally and all other sedentary criteria are met.

12 U.S. Dep’t of Labor, *Dictionary of Occupational Titles*, App’x C, available at
 13 <https://perma.cc/A67M-4CF2> (last visited Aug. 11, 2023). The Ninth Circuit has held that “an
 14 employee who cannot sit for more than four hours in an eight-hour workday cannot perform
 15 ‘sedentary’ work that requires ‘sitting most of the time.’” *Armani*, 840 F.3d at 1163. In *Armani*,
 16 “[t]he administrative record available to the district court plainly showed that, . . . every physician
 17 and chiropractor who treated Armani determined that he could not sit for more than four hours a
 18 day.” *Id.* Accordingly, the Ninth Circuit held that “the district court erred in denying [the
 19 plaintiff] his long[-]term disability benefits under the Plan.” *Id.* at 1164.

20 Here, the consensus of Sund’s treating doctors and physical therapists is his L2
 21 compression fracture prevents him from sitting for prolonged periods of time. Between October
 22 2018 and May 2019, Dr. Pham and Dr. Grover stated that at work, Sund “[m]ay alternate sit/stand
 23 on as tolerated basis,” *id.* at 914, 996, 1212–16, which Sund stated was around 20 or 30 minutes
 24 before his symptoms were aggravated, *id.* at 913, 925, 1151, 1209. Additionally, later in his P&S
 25 report, Dr. Pham concluded that Sund would “require permanent work restrictions including,” that
 26 he must “alternate between sitting and standing as tolerated,” and also must “[a]void prolonged
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28 ⁶ Because Sund has met his burden regardless of whether his position is sedentary or light, the Court does not resolve that dispute.

1 standing, walking, or sitting, a maximum of 30 minutes per hour.” ECF No. 39-1 at 1153. Dr.
2 Jimenez stated that Sund needed “[d]isability/work preclusions” that included “no prolonged
3 walking, standing, sitting or climbing.” *Id.* at 1218. Magaw concluded that Sund could only sit,
4 stand, and bend “[o]n an occasional basis,” *id.* at 543, which means from 0 to 33% of the workday,
5 *id.* at 551. Finally, Sund’s treating physician, Dr. Richardson, stated that Sund “has been and
6 remains totally disabled since February 2019” and cannot “perform the substantial and material
7 duties of his own occupation.”⁷ *Id.* at 350, 541.

8 While Sund’s doctors did not place a time limitation on his ability to sit like those in
9 *Armani*, Magaw concluded that Sund cannot sit for more than one third of the day, a lesser period
10 of time than the one found disabling in *Armani*. Dr. Pham also stated that Sund could not sit for
11 longer than 30 minutes per hour, which necessarily means that Sund, like the plaintiff in *Armani*,
12 cannot sit for more than half of the day. Accordingly, Sund has established that he cannot perform
13 a sedentary occupation because it requires “sitting most of the time.” *Armani*, 840 F.3d at 1163
14 (noting that “the logical conclusion [when] an employee . . . is unable to sit for more than half of
15 the workday” is that the employee “cannot consistently perform an occupation that requires sitting
16 for ‘most of the time’”); *see also Williamson v. Aetna Life Ins. Co.*, No. 2:17-cv-02653-RFB-
17 CWH, 2019 WL 1446957, at *5 (D. Nev. Mar. 31, 2019) (“Because sedentary work requires
18 ‘sitting most of the time,’” a conclusion that the plaintiff “could perform full-time sedentary work”
19 was “inconsistent with [the] analysis that Plaintiff must alternate sitting and standing twice to
20 three times every 20-30 minutes”); *Reetz v. Hartford Life & Accident Ins. Co.*, 294 F. Supp. 3d
21 1068, 1084–85 (W.D. Wash. 2018) (holding that the plaintiff could not perform a sedentary level
22 occupation because of her treating doctor’s conclusion that the plaintiff “can sit for only 30
23 minutes at a time for a total of less than six hours a day”); *Schramm v. CNA Financial Corp.*

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⁷ While Dr. Jimenez, Magaw, and Dr. Richardson’s reports were completed after the elimination
period, the Court still considers them because they assess Sund’s physical capacity in light of his
lower back pain caused by his L2 compression fracture and the reports’ conclusions are based on
symptoms and findings reported during the elimination period. *See Fontana v. Guardian Life Ins.*,
No. C 08-01231 CRB, 2009 WL 73743, at *4 (N.D. Cal. Jan. 12, 2009) (“Medical reports made
after the period of disability may or may not be relevant to determine if a beneficiary was disabled
at an earlier date, but they are not irrelevant solely because of their date.”).

1 *Insured Grp. Benefits Program*, 718 F. Supp. 2d 1151, 1163 (N.D. Cal. 2010) (concluding that
2 because the plaintiff “could not sit for more than three-and-a-half hours, and for no more than one
3 hour at a time . . . [i]t is not likely, . . . that Plaintiff could complete her duties in . . . sedentary
4 occupations while either standing or walking for the balance of her day”).

5 Second, the DOT defines “light work” as:

6 Exerting up to 20 pounds of force occasionally, and/or up to 10
7 pounds of force frequently, and/or a negligible amount of force
8 constantly (Constantly: activity or condition exists 2/3 or more of
9 the time) to move objects. Physical demand requirements are in
10 excess of those for Sedentary Work. Even though the weight lifted
11 may be only a negligible amount, a job should be rated Light Work:
12 (1) when it requires walking or standing to a significant degree; or
13 (2) when it requires sitting most of the time but entails pushing
14 and/or pulling of arm or leg controls; and/or (3) when the job
15 requires working at a production rate pace entailing the constant
16 pushing and/or pulling of materials even though the weight of those
17 materials is negligible. NOTE: The constant stress and strain of
18 maintaining a production rate pace, especially in an industrial
19 setting, can be and is physically demanding of a worker even though
20 the amount of force exerted is negligible.

21 U.S. Dep’t of Labor, *Dictionary of Occupational Titles*, App’x C, available at
22 <https://perma.cc/A67M-4CF2>. Here, the conclusions of Sund’s treating doctors and physical
23 therapists establish that he cannot perform light work. Dr. Pham concluded that Sund cannot lift,
24 push, or pull objects weighing more than five pounds, *id.* at 1153; Dr. Richardson concluded that
25 Sund “has difficulty lifting any object” that weighs more than five pounds, *id.* at 540; and Dr.
26 Jimenez concluded that Sund cannot lift objects greater than ten pounds, *id.* at 1218. Dr. Jimenez,
27 Dr. Richardson, and Dr. Pham have also concluded that Sund should not stand or walk for
28 prolonged periods of time. *Id.* at 540, 1153, 1218. And Dr. Pham stated that Sund should limit
standing and walking to thirty minutes per hour. *Id.* at 1153. While Magaw concluded that Sund
could walk between 34 and 66% of the day and can push and pull objects between 51 and 100
pounds, Magaw also concluded that Sund’s overall strength category was “[s]edentary,” *id.* at 545.
Accordingly, the weight of the medical evidence demonstrates that Sund’s physical abilities since
his injury prevent him from performing light work.

Hartford’s arguments to the contrary are unavailing. First, Hartford argues that Sund is
not disabled because the medical records show that Sund’s condition “improve[d]”; he had “low

1 levels of pain”; he was physically active; he did not regularly take pain medication; “he had
2 sporadic and infrequent visits with his doctors”; and “failed to follow through with referrals,”
3 including those for consultations on vertebroplasty or kyphoplasty procedures. ECF No. 43 at 6–
4 7.

5 A complete review of the medical records, however, tells a different story. Sund had
6 consistent medical treatment from September 2018 through at least August 2020. Sund has
7 explained that any gaps in his medical treatment were because of his ongoing California workers’
8 compensation case or because his doctors stated that he was not a candidate for treatment. *E.g.*,
9 ECF No. 39-1 at . Moreover, Hartford has not provided any evidence that following up on certain
10 referrals or procedures would have improved Sund’s condition such that he would not have been
11 disabled.

12 Additionally, while at times Sund did report minimal or a lack of back pain and he did not
13 regularly take pain medication, he also consistently reported that he had back pain that was
14 exacerbated when he performed his occupational duties like standing and sitting for prolonged
15 periods. *E.g., id.* at 704, 925, 1209. From these facts, the Court concludes that instances of
16 minimal pain or lack of pain medication were attributable to the fact that Sund was not
17 consistently performing activities that exacerbated his pain. Accordingly, the Court does not
18 conclude that instances where Sund had minimal pain or did not take pain medication “constitute[]
19 proof positive that [h]e was not in chronic pain.” *Stratton v. Life Ins. Co. of N. Am.*, 589 F. Supp.
20 3d 1145, 1181 (S.D. Cal. 2022).

21 Finally, while there is some evidence that Sund could walk for several miles at a time,
22 there is also evidence that this walking was done at the encouragement of his treating doctors,
23 ECF No. 39-1 at 608, and that the walking exacerbated his pain, *id.* at 549. Thus, the Court does
24 not conclude that this evidence “mandate[s] a finding that Plaintiff was not disabled.” *Stratton*,
25 589 F. Supp. 3d at 1182 (collecting cases and holding that the plaintiff was incorrectly denied
26 benefits despite the plaintiff’s reports of minimal pain, as well as her ability to drive, use her
27 computer, “walk up to 3 miles per day, do yoga and Pilates, cook, shop, garden, and do laundry
28 and other household and personal tasks”).

1 Second, Hartford argues that Sund’s continued part-time employment at Amazon for four
2 hours per day demonstrates that he is not disabled. ECF No. 41 at 17. However, under the Policy,
3 the ability to work for 30 hours per week is an essential duty. ECF No. 39-1 at 1300. Thus, Sund
4 was actually unable to perform an essential duty during this period. More importantly, while Sund
5 did work for Amazon for four months after the accident, Amazon could not accommodate Sund’s
6 required work modifications, which supports that Sund was disabled.⁸

7 Third, Hartford argues Dr. Richardson’s “disability support letters do not withstand
8 scrutiny” because she did not start treating Sund until June 2019; “[t]here is no indication that Dr.
9 Richardson . . . reviewed Sund’s Kaiser records or considered the restrictions and limitations from
10 Drs. Pham or Jimenez”; and she “did not treat Sund for a back condition when he started his
11 internal medicine.” ECF No. 43 at 11. This misstates the record. Dr. Richardson did treat for his
12 back pain, ECF No. 39-1 at 606, 1263–66, and she stated that her conclusions were based on her
13 “clinical treatment of . . . Sund as well as [her] review and analysis of his medical history[,]” *id.* at
14 541. The Court credits Dr. Richardson’s conclusions because they consistent with those from the
15 rest of Sund’s treating doctors.

16 Finally, Hartford argues Dr. White’s conclusion that Sund can perform the essential duties
17 of both sedentary and light occupations demonstrates that he was not disabled. ECF No. 41 at 20–
18 21. Dr. White never physically examined Sund and only conducted a paper review of his medical
19 records. ECF No. 39-1 at 109–110. “Although [Hartford] is not required to ask its physicians to
20 conduct an in-person examination, the Ninth Circuit has viewed ‘pure paper’ reviews with some
21 skepticism.” *Popovich v. Metro. Life Ins. Co.*, 281 F. Supp. 3d 993, 1004–05 (C.D. Cal. 2017);
22 *see also Gonzalez-Schultz v. Unum Life Ins. Co. of Am.*, No. CV 20-6837-RSWL-JCX, 2022 WL
23 17839054, at *10 (C.D. Cal. Nov. 16, 2022) (“[I]n exercising its discretion, the Court may give
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25 ⁸ Hartford also points to the fact that Dr. Pham stated that Sund had worked and could continue to
26 “work a modified duty job” with “restrictions and limitations consistent with light duty work” as
27 evidence that he can perform a light work occupation. ECF No. 43 at 8. But Dr. Pham was not
28 using the term “light work” as it is defined by the DOT because the restrictions he placed on
Sund’s ability to work are inconsistent with the ability to perform a light occupation. Indeed,
pursuant to the modifications required by Dr. Pham, Sund would be unable to exert ten and 20
pounds of force and could not walk, stand, or sit to a significant degree as required to perform
light work. *Compare* ECF No. 39-1 at 1135 *with* ECF No. 40-1 at 15.

1 greater weight to a treating physician’s opinion where it is clear the physician has had a greater
2 opportunity to observe a patient than a physician retained by the plan administrator who conducts
3 a file review.”). Here, Sund’s treating physicians have had a substantially greater opportunity to
4 observe Sund. Additionally, Dr. White was the only doctor to conclude that Sund has no sitting
5 restrictions and can “lift[], carry[], push[], [or] pull[] up to 20 pounds occasionally.” ECF No. 39-
6 1 at 115. Dr. White’s conclusions are also primarily based upon the fact that Sund’s medical
7 records demonstrate that he has “normal strength, normal sensation, no focal neurologic deficits,
8 normal cranial nerves, normal heel walk, normal toe walk, normal tandem walk, normal tone,
9 symmetric reflexes, and negative Romberg.” *Id.* However, these normal findings “are not
10 determinative in this case” because they “do[] not materially counter the fact” that “the severity of
11 the pain resulting from” Sund’s compression fracture “itself causes disabling pain that prevents
12 [him] from performing [his] job duties.” *Stratton*, 589 F. Supp. 3d at 1182 (quoting *Fagan v. Life*
13 *Ins. Co. of N. Am.*, No. C 09-2658 PJH, 2010 WL 3293702, at *11 (N.D. Cal. Aug. 19, 2010)).
14 Accordingly, the Court concludes that Dr. White’s opinions should be afforded less weight than
15 those of Sund’s treating doctors and they are insufficient to demonstrate that Sund has failed to
16 establish that he is disabled.

17 In sum, the Court concludes that Sund has proven by a preponderance of the evidence that
18 he was disabled under the terms of the Policy and was wrongfully denied long-term disability
19 benefits.

20 CONCLUSION

21 For the foregoing reasons, Sund’s motion for judgment is granted, and Hartford’s motion
22 for judgment is denied. Sund shall provide a proposed form of judgment to Hartford within five
23 court days of the date of this order. Within five court days thereafter, Hartford shall either sign the
24 proposed judgment, indicating its agreement only as to form, or provide written objections to the
25 form of judgment. Within five court days of receiving Hartford’s response, Sund shall file either
26 (1) an approved form of judgment or (2) a proposed form of judgment, a copy of Hartford’s

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1 objections, and a written response to the objections. The objections and response may not exceed
2 three pages each.

3 **IT IS SO ORDERED.**

4 Dated: August 11, 2023

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6 JON S. TIGAR
United States District Judge

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United States District Court
Northern District of California