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United States District Court, C.D. California.

NORMA GONZALEZ-SCHULTZ, Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, et al., Defendants.

CV 20-6837-RSWL-JCx
|
Filed 11/16/2022

**RULING AND ORDER re: BENCH TRIAL**

HONORABLE RONALD S.W. LEW Senior U.S. District Judge

***1** This action arises out of Plaintiff Norma Gonzalez-Schultz's ("Plaintiff") claim for benefits under a disability insurance policy administered by Defendant Unum Life Insurance Company ("Defendant"). After Plaintiff ceased working as a Mental Health Therapist due to her alleged disability, she pursued short-term and long-term disability claims under the Child & Family Center Disability Policy ("the Policy"), an employee benefits plan governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Defendant granted Plaintiff's short-term and long-term claims[1], but later terminated her long-term disability benefits as of October 27, 2020. Plaintiff appealed the termination, and Defendant affirmed its decision to deny benefits.

Subsequently, Plaintiff filed an action with this Court seeking recovery of long-term disability benefits under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1), (3). Compl. ¶ 32, ECF No. 1. On August 9, 2022, Plaintiff filed a Trial Brief and Defendant filed a Motion for Judgment pursuant to Federal Rule of Civil Procedure 52. Pl.'s Trial Brief ("Pl.'s Brief"), ECF No. 28; Def.'s Mot. for J. ("Def.'s Mot."), ECF No. 30. Then on September 6, 2022, Plaintiff filed a Responding Trial Brief and Defendant filed a Response in Support of its Motion for Judgment and a Request for Judicial Notice. Plf.'s Resp. Brief, ECF No. 34; Def.'s Resp., ECF No. 32; Def.'s Req. for Judicial Notice ("Def.'s RJN"), ECF No. 33. The Court conducted a bench trial on September 27, 2022, at which time the Court entered the Administrative Record, ("AR," ECF No. 29), into evidence. Having received, reviewed, and considered the evidence presented, as well as the Parties' arguments at trial, the Court issues the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)[2], and makes the following ruling: **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Judgment be entered in favor of Plaintiff.

## I. FINDINGS OF FACT

Starting in 2009, Plaintiff worked as a Mental Health Therapist with the Multidisciplinary Assessment Team at the Child & Family Center in Santa Clarita, California. AR at 2727, 3385. In May 2016, Plaintiff stopped working due to her alleged disability. Id. at 559-64.[3] Since then, Plaintiff has not returned to work. See generally id.

### A. Long-Term Disability Policy

***2** Plaintiff is a participant in the Child & Family Center Long-Term Disability Policy[4] administered by Defendant. The Policy provides long-term benefits when a covered person is continuously disabled for the longer of 180 days or when short-term disability payments end. Id. at 281. To receive long-term disability benefits, the covered person must satisfy the Policy's definition of "disabled." Id.

Under the Policy, someone is "disabled" when Defendant determines that they "are limited from performing the material and substantial duties of [their] regular occupation due to [their] sickness or injury," and "have a 20% or more loss in [their] indexed monthly earnings due to the same sickness or injury." Id.

The Policy further provides that after "24 months of payments," the participant is "disabled when [Defendant] determines that due to the same sickness or injury, they are unable to perform the duties of ***any gainful occupation*** for which [they] are reasonably fitted by education, training or experience."[5] Id. Defendant will stop sending payments and terminate the participant's claim when the participant is "no longer disabled under the terms of the [policy]." Id. at 324.

Defendant paid long-term disability benefits from October 2016 to October 2020—a term exceeding 24 months. See id. at 822-26, 1945, 3372. Therefore, the issue before

  

the Court is whether Plaintiff qualifies as disabled from another occupation. See id. at 281. The Policy provides that a participant "will be determined to be disabled from another occupation when [they] are rendered unable to engage with reasonable continuity in another occupation in which [the participant] could reasonably be expected to perform satisfactorily in light of [their] age, education, training, experience, station in life, physical and mental capacity." See id. at 324.

**B. Defendant Grants Plaintiff Short-Term Disability Benefits From May 2016 to October 2016**

On April 18, 2016, Plaintiff sought treatment from her Primary Care Provider, Dr. Daisy Markley, for weakness in her left leg. Id. at 246. Shortly thereafter, neurologist Dr. Doris Cardenas referred Plaintiff for imaging, and on May 17, 2016, Plaintiff received MRIs of her thoracic spine and cervical spine. Id. at 224-27. These MRIs revealed that Plaintiff suffered from disc protrusions and bulges, spondylothesis, and multilevel disc degeneration throughout her spine. Id. Plaintiff proceeded to cease working in May 2016 and continued treatment with Dr. Markley and Dr. Cardenas. Id. at 316.

On August 3, 2016, Plaintiff initiated a claim with Defendant for short-term disability benefits. Id. at 152-65. She identified her treating providers as Dr. Daisy Markley and Dr. Doris Cardenas, and reported her disabling conditions as myelopathy, hyperreflexia, and "weakness of limb." Id. at 154-56. Plaintiff substantiated her claim with medical records, and both treating providers sent Defendant Attending Physician Statements ("APS") supporting Plaintiff's claim. Id. at 199-259, 177-85. Based on these submissions, Defendant granted Plaintiff short-term disability coverage from May 2016 until October 31, 2016. Id. at 313.

**C. Defendant Grants Plaintiff Long-Term Disability Benefits Beginning November 2016**

***3** On December 27, 2016, Defendant contacted Plaintiff to inform her that her claim had "rolled over" from short-term disability coverage to long-term disability coverage, and that her new claims handler would conduct an evaluation for long-term disability eligibility. Id. at 305. During a phone call the next day, Plaintiff explained to the claims examiner that she suffered atrophy in her left leg, difficulties walking, a herniated disc, hyperreflexia in her knee, and tightness in her chest. Id. at 218, 327.

At the time, Plaintiff was still treating with Dr. Markley and Dr. Cardenas. Id. at 310. She had also begun seeing a neurosurgeon, Dr. Spooler, who recommended surgery for her herniated disc, but suggested trying physical therapy first as a lower-risk option. Id. Plaintiff had worked with physical therapist Eric Spencer twice a week for several months but experienced only temporary relief. Id. Although Plaintiff was able to sit, she had "to stand up and stretch frequently," could not "lift too much," suffered from incontinence requiring her to "be around a bathroom all the time," and expected that she would ultimately have to get surgery. Id. at 311.

Plaintiff described to the claims examiner the physical and cognitive demands of her position as a Mental Health Therapist at Child and Family Center, as well as her educational background and skill set. Id. at 311-12. Plaintiff hoped to return to work by March 1, 2017, but stated that her difficulties with walking, "being in one position," and pain management were potential barriers to returning. Id. at 312. During the phone call, Plaintiff also indicated that she was open to other job considerations. Id. Defendant then gathered Plaintiff's medical records, assessed her claim, and denied her long-term disability benefits on February 13, 2017. Id. at 322-544.

Plaintiff appealed Defendant's decision on August 9, 2017. Id. at 558-68. In support of her appeal, Plaintiff provided updated medical records, including orthopedic surgeon Dr. Todd Moldawer's opinion that Plaintiff suffered from chronic thoracolumbar strain, a herniated disc at T9-10 with cord compression, grade one isthmic spondylolisthesis at L5-S1, and herniated discs at C4-5 and C5-6 with mild cord compression. Id. at 582. After examining Plaintiff in August 2017, Dr. Moldawer noted that Dr. Markley made the "appropriate decision" by placing Plaintiff on disability. Id. Dr. Moldawer advised that Plaintiff was "temporarily disabled from [her] position, and [was] likely to remain so for the next [twelve] months." Id. at 602.

The submitted records revealed that shortly after commencing treatment with Dr. Moldawer, Plaintiff received a thoracic epidural steroid injection on July 11, 2017, and a lumbar transforaminal injection on August 2, 2017. Id. at 715-744. Later, Plaintiff underwent a laminectomy of her thoracic spine at T8 through T10 on September 27, 2017. Id. at 765-77, 805. Based on this additional medical evidence, Defendant found Plaintiff was totally disabled from her occupation and reversed the denial of benefits on November 10, 2017. Id. at 822-26. Since Plaintiff's short-term disability benefits expired

  

on October 31, 2016, Plaintiff's long-term disability coverage began in November 2016, and she was retroactively provided benefits after prevailing on appeal. Id. at 862.

**D. Plaintiff Receives Long-Term Disability Benefits From November 2016 to October 2020**

Plaintiff continued to seek medical treatment and receive long-term disability benefits over the next four years. See id. at 935-1952. Her treatment included a lumbar transforaminal injection on April 2, 2018, and a second surgery—a transforaminal lumbar interbody fusion on June 20, 2018. Id. at 935, 1044.

***4** After surgery, Plaintiff continued to see her providers, including her orthopedic surgeon, neurologist, and pain management doctor. See id. at 1044-1439. Records from Plaintiff's August 2018 visits with orthopedic surgeon, Dr. Moldawer, and with her pain management doctor, Dr. Ray d'Amours, reveal that Plaintiff's condition improved "to the point where the bilateral lower extremity pain [was] essentially gone," and her "low back pain was significantly improved," though she still experienced some "dystethic pain in her left foot." Id. at 1044; 1439.

In November 2018, however, neurologist Dr. Cardenas opined that Plaintiff had "significant neurological exam changes" that had led to "permanent disabilities," rendering Plaintiff "unable to physically continue working." Id. at 1175. Dr. Cardenas also commented that Plaintiff's "persistent pain" and "spasticity" would prevent her from sitting or walking continuously. Id. Later, in December 2018, Dr. Cardenas recommended Plaintiff remain on medical leave until January 1, 2020. Id. at 1216. And on March 25, 2019, Dr. d'Amours noted that Plaintiff was again experiencing constant "distressing pain" in her left lower extremity but that her side effects were "manageable," and she could "perform the essential activities of daily living." Id. at 1425-27.

While disbursing benefits, Defendant continuously requested and received Plaintiffs updated medical records. On March 26, 2019, two of Defendant's on-site physicians reviewed the medical records in their possession and commented that "[t]he rationale for sustained medical leave from a primarily seated occupation until [January 1, 2020] as opined by Dr. Cardenas is not evident from the examinations, diagnostics, level of activity, and intensity of treatment." Id. at 1413. The physicians therefore concluded that Plaintiff "[was] not precluded [September 4, 2018,] forward from performing sustained full-time activities" at the sedentary occupation level. Id. at 1418.

Shortly after this review, in April 2019, Defendant again requested and received Plaintiff's updated medical records, including the March 25, 2019 visit with Dr. d'Amours describing Plaintiff's report of unrelenting pain. Id. at 1448-51. After reviewing these updated reports, Defendant's in-house physicians once again found Plaintiff could perform a full-time sedentary occupation. Id. at 1461-63.

Defendant defines "Sedentary Work" as "[m]ostly seated," but may "involve walking or standing for brief periods of time." Id. at 587. Sedentary work could also involve "[e]xerting up to 10 lbs of force occasionally ... and/or negligible amount of force frequently ... to lift, carry, push, pull, or otherwise move objects, including the human body." Id. The duties of sedentary occupations "would allow for changes in position for brief periods of time throughout the day." Id. at 1088.

Importantly, earlier, on November 3, 2018, the Social Security Administration ("SSA") determined that Plaintiff became disabled on May 1, 2016, and was entitled to Social Security Disability Insurance benefits. Id. at 1122-29. On December 12, 2018, Defendant informed Plaintiff that, if appropriate, Defendant would "apply significant weight" to the SSA's determination, meaning that the "[SSA's] judgment that [Plaintiff was] disabled at the time of the award will weigh heavily in [Plaintiff's] favor as [Defendant made] ongoing disability determinations" under the LTD policy. Id. at 1202.

Consequently, in April 2019, Defendant considered whether it had "given [the SSA's] decision to award disability benefits significant weight." Id. at 1464. Defendant believed that the SSA "did not have post-op records which document[ed] an improvement in [Plaintiff's] condition," and used the "vocational rule of approaching advanced age and did not consider other vocational options," while Defendant's eligibility evaluation did consider other occupations. Id. Defendant therefore concluded that regardless of the 2018 SSA decision, Plaintiff did not qualify as fully disabled under the Policy. Id. Yet despite these findings, Defendant continued paying Plaintiff long-term disability benefits.

**E. Defendant Terminates Long-Term Disability Benefits in October 2020**

***5** After Defendant's April 2019 determination that Plaintiff could perform a sedentary occupation, Defendant continued

to gather Plaintiff's updated medical records and monitor the status of her conditions. See generally id. at 1464-1945. On February 10, 2020, Dr. Cardenas once again reported that Plaintiff was "permanently disabled" and would continue to be disabled for at least another year. Id. at 1528-29. Then in July 2020, Plaintiff sent Defendant a disability status update listing her prescription medications (Gabapentin prescribed by her neurologist and Duloxetine and Tizanidine prescribed by her pain management doctor) and her current treating providers (neurologist Dr. Doris Cardenas, pain management specialist Dr. Ray H. d'Amours, and podiatrist Dr. Justin J. Franson). Id. at 1540-41.

Plaintiff reported to Defendant that she suffered constant pain in her legs, feet, and toes, and had poor balance and coordination that caused frequent falls. Id. at 1548, 1569. Plaintiff had suspended physical therapy due to COVID-19 and planned to continue treatment in the future. Id. While Dr. d'Amours recommended spinal cord stimulation, Dr. Cardenas advised against the procedure due to its invasiveness and risk of damage. Id. Plaintiff therefore had not pursued the treatment but was aware it was an option. Id. Finally, Plaintiff stated she had "problems with reading and concentration," and that her medications exacerbated these issues. Id. at 1641, 1662.

On August 18, 2020, Defendant interviewed Plaintiff for a status update. Id. at 1760-64. During the thirty-five-minute interview, Plaintiff stated it was difficult to sit, changed positions while sitting, and on a couple of occasions, stood up for a few seconds and then sat down, sighing in discomfort. Id. at 1761. Plaintiff told the interviewer that she was permanently restricted from working as she was unable to stand, walk, and drive. Id. at 1762. She explained that she could only walk short distances at a time since she tired easily, and that she walked slowly to avoid falling. Id. She also noticed a decline in her cognitive skills, including "a lack of focus and concentration, word-finding abilities, and poor memory" that made reading difficult. Id. at 1762-63. When listing her daily activities, Plaintiff noted that her only exercise consisted of "a short walk with her cane or walker that lasts up to [five] minutes" and that she could not "assist with cooking or cleaning due to [her] chronic pain and fatigue." Id. at 1763. Finally, Plaintiff stated she had no plans to return to work or education due to her physical and cognitive restrictions. Id. at 1762-64.

Shortly after this interview, on August 25, 2020, Plaintiff's podiatrist, Dr. Justin Franson, reported to Defendant that Plaintiff could not perform sedentary level work "[d]ue to nerve damage" in her left leg. Id. at 1792. He opined that Plaintiff had "[p]oor balance and gait," was "stiff," and experienced "a significant amount of discomfort." Id. On the same date, Defendant inquired as to whether the SSA had re-assessed Plaintiff's claim and discovered it likely had not. Id. at 1976.

After reviewing the relevant records in October 2020, Defendant noted in its records that although the SSA awarded Plaintiff benefits in November 2018, the "currently available records contain much more recent information which reflects improvement/stability in [Plaintiff's] multiple comorbid conditions." Id. at 1883.

Defendant proceeded to request additional medical records, including an updated note from Dr. Franson stating that Plaintiff's foot "should be able to tolerate mostly sitting," but that Dr. Franson could only opine as to Plaintiff's foot and ankle. Id. at 1898. Dr. Cardenas's records regarding Plaintiff's neurological condition, however, maintained that Plaintiff "still ha[d] significant weakness/spasticity from [ ] thoracic myelopathy." Id. at 1906. Defendant's claim status notes highlight that Plaintiff did not pursue spinal cord stimulation and had not followed up with Dr. Moldawer since 2018 or Dr. d'Amours since 2019. Id. at 1913. These notes also emphasize Dr. Franson's report that Plaintiff's gait and stability were improved with use of orthotics. Id. at 1942.

***6** Ultimately, based on the available medical records, one of Defendant's reviewing physicians stated that Plaintiff's "noted treatment plan of medications and period follow-up [appointments] ... can typically be provided concurrently while performing full-time sedentary demand level activities." Id. at 1913-14. Defendant referred Plaintiff's case to an outside medical professional, who reviewed the records and the reviewing physician's report and concurred that Plaintiff could perform a sedentary occupation. Id. at 1920-25. Defendant then considered Plaintiff's education, work experience, and earnings in her role as a Mental Health Therapist and determined that positions as a "Claims Examiner" or an "Employment Recruiter" were suitable alternative sedentary occupations. Id. at 1947. Based on these assessments, Defendant terminated Plaintiff's long-term disability benefits on October 27, 2020. Id. at 1945-55.

**F. Plaintiff Submits a Functional Capacity Evaluation**

Plaintiff then contested Defendant's decision to terminate her long-term disability benefits and submitted records

supporting her position. Included in those records was a Functional Capacity Evaluation ("FCE") of Plaintiff administrated by doctor of physical therapy, Dr. Ramone De Los Reyes, on November 23, 2020. Id. at 1969. Dr. Reyes reported that Plaintiff "[did] not meet the sitting requirements for a sedentary occupation[,] which requires an ability to sit [two] hours continually and up to [six] hours total per day." Id. Dr. Reyes further stated that "[t]hese factors, when coupled with [Plaintiff's] limitations for fingering and typing, and pain from repetitive reaching, would make it unrealistic that she would be able to function reliably in a work environment," and Plaintiff was "unable to work at any occupational level at [that] time." Id.

More specifically, the FCE revealed that Plaintiff suffered from "profound weakness and decreased neuromuscular control [of] the left lower extremity," left foot drop, decreased "trunk strength/endurance," moderate to severe fatigue levels, and decreased range of motion. Id. at 1972. During the evaluation, Plaintiff also reported using a cane for short distances outdoors. Id. Dr. Reyes noted that Plaintiff exhibited cognitive limitations, including limited short-term memory, fatigue, and "drawing a blank" while thinking. Id. at 1973.

Plaintiff submitted records from other treating providers as well. She returned to Dr. Cardenas for treatment on November 16, 2020, where Dr. Cardenas examined Plaintiff and found "significant spasticity" and "lack of significant recovery." Id. at 1993. On January 29, 2021, Dr. Doris Cardenas sent Defendant medical records with a note stating she did "not believe [Defendant's findings were] an accurate description" of Plaintiff's condition given her spasticity and chronic pain. Id. at 1967. In support of her opinion, Dr. Cardenas noted that Plaintiff was "unable to work as a combination of medications and surgery has not led to significant recovery." Id. at 1993. Contrary to Dr. Reyes's findings, however, Dr. Cardenas opined that Plaintiff's "recent and remote memory" and "[c]oncentration" are "intact." Id. at 1996.

After review of Dr. Cardenas's November 16, 2020 notes and Dr. Reyes's FCE, Defendant once again concluded that Plaintiff was not precluded from performing sedentary activities in February 2021. Id. at 2003. Indeed, Defendant still maintained that Plaintiff's "noted treatment plan of medications and periodic follow-up [appointments] ... can typically be provided concurrently while performing full-time sedentary demand level activities." Id. at 2008. Around the same time, Defendants referred Plaintiff's case to a medical review company, which provided a report outlining the Designated Medical Officer's ("DMO") opinion of Plaintiff's ability to perform a sedentary occupation. Id. at 2013. The DMO noted that Dr. Reyes opined Plaintiff would not be capable of sedentary function, but that this opinion conflicted with Dr. Franson's impression that Plaintiff could perform a sedentary occupation. Id. at 2015. The DMO did not note, however, that Dr. Franson had specified his opinion was limited to only Plaintiff's foot and ankle. See id. at 1898. The DMO also commented that Plaintiff's gross cognition remained normal despite her reported fatigue, and that she had not received additional neuroimaging, neurophysiologic testing, or followed up with pain management. Id. at 2015. Therefore, the DMO agreed with Defendant that there was "insufficient evidence to assert that [Plaintiff] lacks the ability to function in a full time [sedentary] occupation." Id.

***7** On February 22, 2021, Defendant contacted Plaintiff to inform her that its review of Dr. Cardenas's records and the FCE did not change its decision to terminate benefits. Id. at 2022-24.

**G. Plaintiff Appeals**

Plaintiff formally appealed Defendant's decision on April 24, 2021. Id. at 2027-2125. On appeal, Plaintiff argued that Defendant "clearly weighed the opinions of its own physician review[er]s who have never spoke[n] to nor examined her over the opinions of her treating physicians" and that "there has been no significant improvement" in Plaintiff's "disabling condition." Id. at 3373. In support of her appeal, Plaintiff provided her January 2021 Dr. Cardenas medical records as well as a new April 7, 2021 letter from Dr. Cardenas commenting that Plaintiff "remains permanently disabled" and describing Plaintiff's symptomology. Id. at 2148-67. Plaintiff also included her November 2020 FCE report from Dr. Reyes, the January 2021 Occupational Analysis conducted by Linda Hayes, and letters written by Plaintiff and her husband describing how Plaintiff's physical condition impacts their lives. Id. at 2167-2206.

Dr. Cardenas's April 7, 2021 letter stated that she "completely disagrees" with Defendant's determination that Plaintiff is not disabled. Id. at 2396. She elaborated that Plaintiff takes several medications daily of which fatigue, drowsiness, and dizziness are common limiting side effects. Id. She also explained that Plaintiff's gait abnormalities were consistently noted in medical records and that Plaintiff occasionally used a cane or walker. Id. Dr. Cardenas opined that Plaintiff suffered "chronic lower back pain radiating to her lower left extremities resulting in lower weakness that her persisted for

  

more than a year and makes her a fall risk." Id. She further noted that Plaintiff "continues to experience pain, discomfort, and weakness aggravated by prolonged sitting, standing and/or walking despite medications and surgical intervention." Id. Dr. Cardenas concurred with the results of Plaintiff's FCE and concluded by repeating that Plaintiff "has been and remains totally disabled." Id. at 2396-70.

Shortly after providing documents, Plaintiff supplied additional records from Dr. Cardenas, Dr. Fogel and pain management provider Dr Tony Lo. Id. at 2281-95. Plaintiff saw Dr. Cardenas again in March 2021. Dr. Cardenas once again reviewed Plaintiff's symptomology and noted that Plaintiff cannot work due to lack of significant recovery. Id. at 2379-91.

An April 2021 visit with Dr. Lo for pain management revealed that Plaintiff's sacroiliitis, left foot drop, and thoracic myelopathy made her a candidate for a sacroiliac joint injection. Id. at 2417-18. Dr. Lo also made note of Plaintiff's symptoms, medical history, and current medications. Id. at 2417-21.

During a May 10, 2021 visit with Dr. Fogel, Plaintiff a reported that she was experiencing pain in her left buttocks and hip that went down to her feet, her arms and hands felts stiff, she had difficulty sleeping, and she felt like her memory was getting worse. Id. at 2422-26. Dr. Fogel then reported that Plaintiff's "major symptom is pain" and that she suffered from asymmetric muscle tone in her lower extremities as well as a mildly abnormal gait. Id. at 2284-85. Dr. Fogel also noted that Plaintiff's "[a]ttention[,] concentration[,] and memory are intact," and reviewed Plaintiff's symptoms. Id. at 2422-26. He concluded that while many of Plaintiff's symptoms are attributable to her spinal issues, it is possible that she has an underlying gait disorder or other biomechanical predisposition. Id. at 2285. Therefore, Dr. Fogel recommended that Plaintiff receive genomic sequencing to evaluate an underlying genetic cause for her condition, and to seek physical and occupational therapy for gait/balance training, core strengthening and cardiovascular conditioning, evaluation for use of an assist device, assistance with activities of daily living, a home evaluation for safety, development of a daily home exercise regimen, and a follow-up appointment. Id.

***8** In late May 2021, Plaintiff sought chiropractic treatment from Dr. Kevin Kelly. Id. at 3359. Dr. Kelly's notes show Plaintiff reported symptoms consistent with those she reported to Dr. Lo and Dr. Fogel. Id. at 3361. In addition, Plaintiff sent Defendant physical therapy records, which Defendant received on July 12, 2021, at which point the forty-five-day window for reviewing Plaintiff's appeal began. Id. at 3367.

While Defendant's vocational specialist determined that Plaintiff has the "necessary skills to perform alternative, sedentary occupations," Plaintiff's vocational expert, Ms. Hayes, reviewed Plaintiff's medical records and FCE and reached the opposite conclusion. Id. at 2405. Indeed, Ms. Hayes's felt that "[b]ased on the totality of the facts reviewed in this case this consultant has concluded that [Plaintiff] does not have the capacity to sustain routine work activity with continuity" and therefore "is unable to compete for or sustain employment in any capacity at this time." Id. at 2407.

Defendant also had access to records of Plaintiff's prior treatment dating as far back as 2016, as well as records of previous claim reviews. See generally id. at 2429-3365.

**H. Defendant Denies Plaintiff's Appeal**

On appeal, Defendant's reviewing physician, Dr. Arnold Rossi, assessed Plaintiff's FCE and other medical records. See id. at 3372-91. When analyzing Plaintiff's records, Dr. Rossi noted that although Dr. Cardenas opined that Plaintiff was disabled from a sedentary occupation due to significant weakness and spasticity, her records show "4-5/5 strength in all lower extremity muscle groups and a gait which is still slightly wide based." Id. at 3374. Further, Dr. Rossi claims that there "is no mention of ambulatory aids," without establishing whether he is referencing Dr. Cardenas's records specifically, or the entirety of Plaintiff's records. Id. Regardless, Dr. Cardenas's April 7, 2021 letter specified that Plaintiff had used ambulatory aids, as did other records. Id. at 2148-67, 2396; see, e.g., id. at 915, 924, 1044, 1090, 1104, 1181. Nonetheless, Dr. Rossi concluded that "[t]hese findings on examination in summary document mild degree of weakness and spasticity that are consistent with the ability to meet ... [sedentary] physical demands." Id.

Dr. Rossi also commented that Dr. Reyes's FCE finding that Plaintiff had a "decreased tolerance for sitting" was based on Plaintiff's reports of pain. Id. Dr. Rossi then concluded that Dr. Reyes's opinion was "not consistent with the opinions and the results of physical assessments of other providers," without explaining why. Id.

  

When considering Dr. Lo's reports, Dr. Rossi emphasized that although Dr. Lo described Plaintiff's gait as "abnormal with left foot drop," Dr. Lo did not describe spasticity or a wide based gait and that a foot drop would "not be an expected finding with the left ankle dorsiflexion graded 4+/5" that Plaintiff had. Id. Dr. Rossi further noted that Plaintiff complained of pain, had no tenderness over her paraspinal muscles, had tenderness over her left sacroiliac joint, and was advised to undergo a sacroiliac injection. Id. Dr. Rossi also contended that the grading of Plaintiff's left ankle dorsiflexion "implies the ability to dorsiflex the ankle not only against gravity but also against resistance to a degree approaching normal strength." Id. Finally, Dr. Rossi commented that although Plaintiff sought pain management treatment with Dr. Lo, she had not seen Dr. d'Amours for pain management since December 2019 and did not pursue spinal cord stimulation per his recommendation. Id.

***9** Next, Dr. Rossi discussed Dr. Fogel's records. Id. at 3375. He summarized Dr. Fogel's findings, including that Plaintiff had decreased muscle bulk in her left foot and calf, increased tone with passive movement, normal muscle strength, and intact sensation. Id. Dr. Fogel described Plaintiff's casual gait as "unsteady" but did not appear to be spastic. Id. Dr. Rossi emphasized that Dr. Fogel did not document weakness or spasticity. He also noted that "[i]nterestingly, [Dr. Fogel] found [Plaintiff's] upper extremity findings . . less easily attributable to her known spinal issues and surgeries," and that Dr. Fogel "stated that a functional component could not be fully excluded based on examination." Id.

Ultimately, Dr. Rossi found that the records "establish with a reasonable degree of medical certainty that" Plaintiff was not disabled under the terms of the Policy. Id. Defendant therefore affirmed its decision to terminate long-term benefits, and Plaintiff then commenced this action seeking reinstatement of her long-term benefits. Id. at 3381-91; see generally Compl.

## II. CONCLUSIONS OF LAW

### A. Judicial Notice

A court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Matters of public record may be judicially noticed, but disputed facts contained therein may not. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018). "[A]ccuracy is only part of the inquiry under Rule 201(b)." Id. "A court must also consider—and identify—which fact or facts it is noticing from" the documents. Id.

It is common "for courts to 'take judicial notice of factual information found on the world wide web.' " Turner v. Samsung Telcoms. Am., LLC, No. CV 13-00629-MWF (VBKx), 2014 WL 11456606, at *3-4 (C.D. Cal. Nov. 4, 2013) (quoting O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007)). Furthermore, this Court may judicially notice publicly accessible websites. Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1204 (N.D. Cal. 2014); Aguiar v. MySpace LLC, No. CV-14-05520(SJO) (PJWX), 2017 WL 1856229, at *9 n.6 (C.D. Cal. May 5, 2017) (judicially noticing website screen shots).

Defendant requests this Court take judicial notice of Table 3.6 of the 2020 Annual Disability Statistics Compendium prepared by the University of New Hampshire, Institute on Disability. Def.'s RJN; Id., Ex. 1, ECF No. 33-1. Table 3.6 notes the number of employees working with assistive devices and impaired limbs as provided by the U.S. Census Bureau. Id. Def.'s RJN. This Compendium is publicly available on its website.[6] Since the compendium is a publicly accessible website, it is properly subject to judicial notice and the Court **GRANTS** Defendant's Request for Judicial Notice.[7]

### B. Standard of Review and Burden of Proof

The parties have stipulated that Defendant's termination of Plaintiff's benefits is subject to *de novo* review. Under a *de novo* standard of review, "[t]he court simply proceeds to evaluate whether the plan administrator correctly or incorrectly denied benefits." Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 963 (9th Cir. 2006). Therefore, this Court need only determine "if the claimant adequately established that he or she is disabled under the terms of the plan" without "giv[ing] deference to the claim administrator's decision." Muniz v. Amec Const. Mgmt., Inc., 623 F.3d 1290, 1295-96 (9th Cir. 2010).

***10** Plaintiff bears the burden of establishing by a preponderance of the evidence that she was entitled to benefits. Armani v. Nw. Mut. Life Ins. Co., 840 F.3d 1159,1163 (9th Cir. 2016); Muniz, 623 F.3d at 1294-95. To do so, Plaintiff must show it is "more likely than not" she was disabled under the terms of the Policy during the relevant

claim period. Brown v. Unum Life Ins. Co. of Am., 356 F. Supp. 3d 949, 963 (C.D. Cal. 2019); Porco v. Prudential Ins. Co. of Am., 682 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010); see also Muniz v. Amec Constr. Mgmt., Inc., 623 F.3d 1290, 1294-95 (9th Cir. 2010) (under de novo review, once plaintiffs have proven they are disabled the burden does not shift to defendants to justify termination of benefits).

Where *de novo* review applies, absent exceptional circumstances, the Court should consider "only the evidence that was before the plan administrator at the time of determination." Opeta v. Nw. Airlines Pension Plan for Cont. Emps., 484 F.3d 1211, 1217 (9th Cir. 2007). Thus, this Court's review is limited to the Administrative Record.

**C. Plaintiff Has Shown by a Preponderance of the Evidence That She is Entitled to Long-Term Disability Benefits**

Plaintiff has provided evidence showing it is more likely than not that she is disabled under the terms of the Policy. In assessing medical evidence *de novo*, "the Court is not required to accept the conclusion of any particular treatment provider or medical file review." Brown, 356 F. Supp. 3d at 963-64. Courts have recognized an "apparent tension" between treating physicians, who "may tend to favor an opinion of 'disabled' in a close case," and physicians routinely hired by plan administrators, who "may tend to favor an opinion of 'not disabled' in the same case." Id. at 964; Black & Decker Disability Plan v. Nord, 538 U.S. 822, 832 (2003). It is therefore crucial for the Court to carefully assess and weigh all medical evidence. Brown, 356 F. Supp. 3d at 964.

Indeed, the Court should "accord[ ] [opinions] whatever weight they merit." Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1109 n.8 (9th Cir. 2003) (citing Black & Decker, 538 U.S. at 832.). For example, the Court does not accord special deference to the opinion of treating physicians based solely on their status as treating physicians. Id. But, in exercising its discretion, the Court may give greater weight to a treating physician's opinion where it is clear the physician has had a greater opportunity to observe a patient than a physician retained by the plan administrator who conducts a file review. See Black & Decker, 538 U.S. at 832-34.

Defendant's inquiry on appeal centered on Plaintiff's ability to perform the acts required by a sedentary occupation, so whether Plaintiff is "disabled" must be measured by her functional capacity as compared to the expected physical demands of a sedentary occupation. Accordingly, reasoned assessments of what Plaintiff can and cannot do are given greater weight than are mere statements of medical diagnosis. See, e.g., Brown, 356 F. Supp. 3d at 964; Shaw v. Life Ins. Co., 144 F. Supp. 3d 1114, 1129 (C.D. Cal. 2015); Holifield v. Unum Life Ins. Co., 640 F. Supp. 2d 1224, 1237-38 (C.D. Cal. 2009). Similarly, descriptions of symptomology are more helpful for determining Plaintiff's functional capacity than are mere diagnoses. See Brown, 356 F. Supp. 3d at 964; Muniz, 623 F.3d at 1296.

***11** As described above, Defendant defines the demands of "Sedentary Level Work" as "[m]ostly sitting, may involve standing or walking for brief periods of time," and "[l]ifting, carrying, pushing, pulling up to 10 pounds occasionally." AR at 1688. Such a position would "allow for positional changes for brief periods of time throughout the day." Id. Importantly, the Ninth Circuit has established that a person who "cannot sit for more than four hours in an eight-hour workday cannot perform 'sedentary' work." Armani, 840 F.3d at 1163; see also Connors v. Connecticut General Life Ins. Co., 272 F.3d 127, 136 n.5 (2d Cir. 2001) (holding that the "ability to sit for a total of four hours does not generally satisfy the standard for sedentary work."); Brooking v. Hartford Life & Accident Ins. Co., 167 Fed. App'x. 544, 548-49 (6th Cir. 2006) (holding that a plaintiff who could only sit for two hours and forty minutes of an eight-hour day could not perform a sedentary occupation).

Here, Plaintiff has met her burden of showing it is more likely than not she is disabled from a sedentary occupation. Plaintiff has undergone two major surgeries, has consistently reported many of the same symptoms, and her treating providers, including Dr. Cardenas and Dr. Reyes, have found that Plaintiff is disabled. See, e.g., AR at 765-77, 805, 935, 1044, 1969, 2396. Plaintiff's treatment history and consistent reports of pain and difficulties walking and sitting for long periods support finding that her condition precludes sedentary work. See e.g., id. at 312, 1175, 1425-27, 1448-51, 1548, 1763, 1967, 1969.

Defendant concedes that Plaintiff does face physical limitations, but argues that nonetheless, the physical demands of a sedentary occupation are "a very low threshold" that Plaintiff can meet. Trial Tr. 18:7-21:7. But Defendant bases this argument on the opinions of its medical experts who conducted only file reviews of Plaintiff's condition. See generally AR. Meanwhile, Plaintiff's long-time treating

neurologist Dr. Cardenas has repeatedly physically examined Plaintiff over the course of at least four years, recorded Plaintiff's symptoms, and has always maintained the opinion that Plaintiff's condition precludes sedentary work. See, e.g., id. at 1175, 1906, 1993. Moreover, Dr. Reyes physically examined Plaintiff for her FCE and concluded that she is unable to sit for more than two hours daily and is therefore disabled—a conclusion that comports with controlling case law.[8] See id. at 1969-73; see also Armani, 840 F.3d at 1163 (holding that inability to sit for more than four hours of an eight-hour day constitutes a disability).

In the same vein, Defendant argues that Plaintiff can perform a sedentary occupation because she has improved and stabilized. Trial Tr. at 18:7-21:7 (referencing AR at 1697, 1705, 1713); Def.'s Trial Brief at 9, 18-20. But in the same records that Defendant cites, Plaintiff complains that she "struggles with stiffness and pain and discomfort of her lower extremity," that her "leg does feel spastic and she does tend to drag it," and that although she did not have "any worsening of symptoms ... [s]he still has the sensation of tingling and pain and stiffness in her legs." AR at 1697, 1705, 1713.

***12** While it appears that Defendant is correct that Plaintiff's condition stabilized, the stability of her symptoms does not negate their purported impact on her ability to sit and walk as required by a sedentary occupation. Further, Defendant attempts to undermine Dr. Cardenas's medical opinion by citing to a case in which Dr. Cardenas's opinion was not accorded weight, but then refers to Dr. Cardenas's records to argue that Plaintiff's condition has improved enough to perform a sedentary occupation. Def.'s Resp. at 1; Def.'s Trial Brief at 1, 19; Trial Tr. at 23:4-24:11. As discussed, Dr. Cardenas has consistently found Plaintiff disabled, and the fact that Dr. Cardenas noted Plaintiff's improvements as other providers did supports finding that Dr. Cardenas's opinion is rooted in Plaintiff's actual physical progress and should be accorded weight in this instance. See AR at 1697, 1705, 1713, 1044, 1439. And while Dr. Cardenas's notes to Defendant commenting that Plaintiff is disabled do not extensively elaborate on Plaintiff's condition, years of treatment records detailing Plaintiff's symptoms lend support to Dr. Cardenas's ultimate determination. See id. at 1216, 1528-29; see, e.g., id. at 1175, 1906, 1993.

Defendant also focuses on Dr. Franson's comment that Plaintiff's foot could tolerate a sedentary occupation and that orthotics improved her walking but failed to address that he explicitly stated that he could only opine as to the condition of Plaintiff's foot. See id. at 1898, 3375. Plaintiff has never contended that the sole cause of her disability is her foot, and therefore Dr. Franson's comment is not dispositive as to whether she can work a sedentary occupation. Dr. Rossi also comments that Dr. Franson did not find Plaintiff's gait spastic while Dr. Cardenas did, but Dr. Franson did find that Plaintiff's gait showed some weakness with "dorsiflexion of the left foot" and "hypersensitivity in the left foot/ankle area." Id. at 1898, 3375. Moreover, Dr. Rossi argues that the FCE where Dr. Reyes stated that Plaintiff is unable to participate in sedentary work is "inconsistent" with other records but fails to explain how. Id. at 3374. Dr. Rossi also disputes Dr. Lo's findings that Plaintiff's gait is "abnormal with left foot drop," but even if this asserted inconsistency were true, it does not diminish the numerous records from various providers establishing that Plaintiff did experience significant pain and impairment of use of her left leg. Id.; see, e.g., id. at 1448-51, 1963, 1972, 2284-85.

As discussed, Defendant's physicians never conducted an in-person examination of Plaintiff. Therefore, the opinions of Defendant's medical professionals are not based on personal knowledge and observations, but rather on a review of paper records, and thus they need not be accorded the same weight as the opinions of Plaintiff's treating physicians. See generally AR; see also Black & Decker, 538 U.S. at 832 (holding that deference to a treating provider might "yield a more accurate disability determination" than a court's assessment of medical evidence and that a treating provider may have "a greater opportunity to know and observe the patient" as compared to consultants of a plan). Meanwhile, Plaintiff has provided extensive medical records from her providers, including Dr. Cardenas, Dr. Reyes, Dr. Lo, and Dr. Fogel, describing Plaintiff's symptomology and its impact on her abilities. See, e.g., 1175, 1906, 1967-73, 1993, 2281-95; see also Brown, 356 F. Supp. 3d at 964 (finding that descriptions of symptomology and reasoned assessments of functional ability merit more weight that statements of diagnosis); Muniz, 623 F.3d at 1296 (recognizing the relevant issue before the district court on *de novo* review was whether the evidence could confirm that the plaintiff's "symptoms rose to the level of total disability such that he was 'unable to perform' ... essential [job] duties") (citation omitted). These extensive records ultimately show that Plaintiff's physical inabilities are severe enough to prevent her from performing the duties of a sedentary occupation.

Therefore, Plaintiff has provided sufficient evidence to show it is more likely than not she is disabled from

  

performing a sedentary occupation. Plaintiff's stabilized condition and some minor inconsistencies in her provider's medical opinions are inadequate to disprove that Plaintiff has met her burden here.

## III. CONCLUSION

***13** Plaintiff has met her burden of showing it is more likely than not she is disabled from performing a sedentary occupation. Therefore, it is **HEREBY ORDERED, ADJUDGED, AND DECREED** that judgment be entered in favor of Plaintiff.

**IT IS SO ORDERED.**

### All Citations

Slip Copy, 2022 WL 17839054

Footnotes

1 Defendant denied Plaintiff's initial long-term disability claim and then granted her benefits on appeal. Plaintiff continuously received those benefits until October 2020. See generally AR at 322-826.

2 Defendant filed a Motion for Judgment Pursuant to Federal Rule of Civil Procedure 52 in lieu of a trial brief. Under Rule 52, in "an action tried on the facts without a jury" the Court "must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). The Court conducted trial and decided this Action in adherence to Rule 52.

3 Throughout this Order, the Court cites to the Page ID numbers provided at the top of each page of the Administrative Record.

4 Defendant issued Long-Term Disability Group Policy Number 597717 002 to Plaintiff's employer, Child & Family Center, on November 1, 2004, and subsequently amended the Policy on April 1, 2012. AR at 174-78. Throughout this Order, the Court refers only to the amended Policy in effect at the time of the Plaintiff's alleged disability.

5 A "gainful occupation" is "an occupation that is or can be expected to provide [the participant] with an income at least equal to 60% of [their] indexed monthly earnings within 12 months of [their] return to work." AR at 294. Neither party disputes that Defendant's suggested sedentary occupations of "Claims Examiner" and "Employment Recruiter" constitute gainful occupations. Id. at 1947.

6 https://disabilitycompendium.org/compendium/2020-annual-disability-statistics-compendium?page=8#:~:text=Table

7 At trial, Defendant requested the Court take judicial notice of Plaintiff's Marriage and Family Therapist license issued by the California Board of Behavioral Sciences. Trial Tr. at 6:18-10:14; see Trial Ex. 2. The Court found that the license was properly subject to judicial notice and **GRANTED** Defendant's request.

8 In Plaintiff's FCE, Dr. Reyes contends Plaintiff suffers from cognitive and typing impediments that further limit her ability to perform a sedentary occupation. AR at 1969. Defendant contends that the conflicting reports about Plaintiff's cognitive status indicate these alleged conditions do not limit Plaintiff's ability to work. Def.'s Trial Brief at 1, 20, 23. Because Plaintiff has sufficiently alleged that her conditions render her unable to sit for more than two hours daily and unable to walk at the level required of sedentary work, the Court need not address whether these other alleged impediments weigh toward finding Plaintiff is disabled.

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