

2019 WL 3243619

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United States District Court, C.D. California.

John Renzi

v.

Aetna Life Insurance Company, et al.

Case No. SACV 18-1041 JVS (JDEx)

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Attorneys and Law Firms

Lisa Bredahl, Deputy Clerk, Attorneys Present for Plaintiffs: Not Present

Not Present, Court Reporter, Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order Regarding ERISA Bench Trial

The Honorable James V. Selna

*1 In this case under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001, *et seq.*, Plaintiff John Renzi (“Renzi”) alleges that Defendant Aetna Life Insurance Company (“Aetna”) improperly denied his claim for Long Term Disability (“LTD”) benefits. Docket No. 1. Both parties have filed opening and responsive briefs. Renzi Opening Br., Docket No. 31; Aetna Opening Br., Docket No. 32; Aetna Responsive Br., Docket No. 39; Renzi Responsive Br., Docket No. 40. Both parties have also submitted proposed findings of fact and conclusions of law. Docket Nos. 42-1, 43-1.

For the following reasons, the Court **overrules** Aetna's decision to terminate Renzi's LTD benefits as of June 28, 2017.

I. BACKGROUND

This case concerns Renzi's claim for LTD benefits under the Anaheim Arena Management, LLC Employee Benefit Plan (“the Plan”). The Plan is

governed by ERISA and sponsored by Anaheim Arena Management, LLC (“Arena”), Renzi's former employer.

Renzi was employed by Arena for over ten years as Director of Operations. Administrative Record (“AR”) 101. His position involved driving or flying to construction sites or projects; walking, climbing and inspecting all aspects of construction; providing executive protection and hands-on security in emergencies; attending and participating in hands-on training activities, and other duties. AR 105.

In October 2010, Renzi stopped working and filed a claim for disability benefits. AR 3443–47. Renzi's claim was approved, and he continued to receive disability benefits under the Plan until June 28, 2017, when Aetna terminated his claim. AR 327–28, 3604–06. This lawsuit reviews Aetna's termination of Renzi's claim.

II. LEGAL STANDARD

In the Ninth Circuit, actions to recover benefits under ERISA are adjudicated by a bench trial under Federal Rule of Civil Procedure Rule 52(a). Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999). Under Rule 52(a), the court can resolve factual issues in favor of either party, and it must “find the facts specially and state its conclusions of law separately.” Fed. R. Civ. P. 52(a).

In a previous Order, the Court granted the parties' stipulation that the standard of review in this case is *de novo*. See Docket Nos. 26, 27. Under the *de novo* standard, the Court independently considers the evidence, finds facts, and determines how the policy applies, just as it would resolve any other breach of contract claim. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112–13 (1989); Krolnik v. Prudential Ins. Co. of Am., 570 F.3d 841, 843 (7th Cir. 2009) (“‘*de novo* review’ is a misleading phrase.... For what Firestone requires is not ‘review’ of any kind; it is an independent decision rather than ‘review’ that Firestone contemplates.... [The] court takes evidence (if there is a dispute about a material fact) and makes an independent decision about how the language of the contract applies to those facts.”).

“In a trial on the record, the court ‘can evaluate the persuasiveness of conflicting testimony and decide which is more likely true.’ ” Armani v. Nw. Mut. Life Ins. Co., 2014 WL 7792524, at *8 (C.D. Cal. Nov. 25, 2014) (quoting Kearney, 175 F.3d at 1095); see also Schramm v. CNA Fin. Corp. Insured Group Benefits Program, 718 F. Supp. 2d 1151, 1162 (N.D. Cal. 2010) (a court reviewing the administrative record “evaluates the persuasiveness of each party’s case, which necessarily entails making reasonable inferences where appropriate”).

*2 The court may consider the administrative record, which are the materials the administrator considered in reaching its benefit determination, and “new evidence may be considered under certain circumstances to enable the full exercise of informed and independent judgment.” Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 943 (9th Cir. 1995). “Plaintiff bears the burden of proof of showing, by a preponderance of the evidence, that he is entitled to the benefits provided by the policy except with regards to matters within the defendants’ control.” Popovich v. Metro. Life Ins. Co., 281 F. Supp. 3d 993, 997 (C.D. Cal. 2017) (citing Estate of Barton v. ADT Sec. Servs. Pension Plan, 820 F.3d 1060, 1066–65 (9th Cir. 2016)).

III. EVIDENCE BEFORE THE COURT

The Court considers the evidence in the administrative record. See Mongeluzo, 46 F.3d at 943. The parties dispute two issues as to the record: (1) Renzi argues that certain videos should be excluded, and (2) Aetna argues that extra-record documentary evidence submitted by Renzi in a Request for Judicial Notice (“RJN”) should be excluded. The Court addresses each issue as follows.

First, Renzi argues that the Court should refuse to consider the videos from YouTube, social media, and the website for Renzi’s drum pedal product because the videos were not downloaded such that they are physically part of the administrative record, *i.e.*, downloaded onto a CD-rom or USB-device. See Renzi Opening Br., Docket No. 31-1 at 2–3, 18. The Court disagrees. The video links are referenced in

Renzi’s file, the investigative report and addendum, and Aetna’s claim notes. *E.g.*, 398–99, 818–37, 852, 992–95. The links in Aetna’s opening brief are also active. See Aetna Opening Br., Docket No. 32 at 18–19 n.14. Furthermore, the administrative record for a benefit claim consists of the materials the claim fiduciary considered in deciding the claim, and on *de novo* review, the Court decides the case from the administrative record as it existed at the time the claim decision was made. See Montour v. Hartford Life & Acc. Ins. Co., 588 F.3d 623, 634 (9th Cir. 2009) (the “administrative record” consists of what “the insurer had when it denied the claim”). It is undisputed and apparent on the face of his reports that Dr. Siegel accessed these videos before reaching his opinions. See AR 852. Moreover, the links were provided by Aetna to Dr. Siegel for him to review before reaching his opinions. See AR 398–99, 838–39. Therefore, the internet-based videos of Renzi referenced in Aetna’s briefing are properly before the Court as part of the administrative record.

Second, Renzi requests that the Court take judicial notice of two documents undisputedly outside the administrative record which were published by the American Academy of Orthopaedic Surgeons (“AAOS”). RJN, Docket No. 33. The documents are entitled “Spine Basics” and “Spinal Fusion,” and both are publicly available on the internet. *Id.* Aetna objected to Renzi’s RJN on the grounds that the AAOS content is not “necessary,” as is required for the Court to go outside the record in performing a *de novo* review. Obj., Docket No. 40.

Materials outside of the administrative record can be considered “only when circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision.” Mongeluzo, 46 F.3d at 944 (quotation marks and citation omitted). These circumstances include claims where: (1) “consideration of complex medical questions or issues regarding the credibility of medical experts” is necessary; (2) there was “limited administrative review procedures with little or no evidentiary record”; (3) “interpretation of the terms of the plan rather than specific historical facts” are warranted; (4) “the court is concerned about impartiality”; (5) the claims “would have been insurance contract claims prior to ERISA”; and (6)

“there is additional evidence that the claimant could not have presented in the administrative process. Opeta v. Nw. Airlines Pension Plan, 484 F.3d 1211, 1217 (9th Cir. 2007) (quoting Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1027 (4th Cir. 1993)); see also Popovich, 281 F. Supp. 3d at 998.

*3 Here, the AAOS materials are sufficiently “necessary” to the Court’s adjudication of the instant dispute. In essence, the documents describe the basics of spinal anatomy and the process of spinal fusion. Therefore, they give context to the Court’s understanding of Renzi’s medical history, which is relevant to Aetna’s claim decision. Moreover, such educational materials would not have been submitted as part of the administrative record because medical professionals would not need them, unlike the Court. Therefore, the Court is satisfied that Renzi “could not have presented [AAOS materials] in the administrative process.” Opeta, 484 F.2d at 1217. In addition, the Court perceives no prejudice to Aetna resulting from consideration of the AAOS educational materials. Therefore, Renzi’s RJN is granted.

IV. FINDINGS OF FACT

A. The Plan

The Plan pays a monthly benefit for a “period of disability” caused by disease or injury, subject to the Plan’s terms and conditions. AR 53. The Plan states that a participant meets the test for “total disability” for the first 24 months of disability benefits if, as a result of disease or injury, the participant is “unable to perform with reasonable continuity the substantial and material acts necessary to pursue” the participant’s “own occupation.” Id. (emphasis added). A “Period of Disability” starts on the first day the participant is disabled “as a direct result of a significant change” in physical or mental condition that occurred while the participant was covered by the Plan, and ends on the earlier of, inter alia, the date the participant no longer is disabled or fails to give proof of current disability.” Id.

After benefits for total disability have been payable for 24 months, the test for “total disability” under the Plan changes. At that point, a participant is eligible for further benefits only if, due to disease or injury, he or she is “not able to engage with reasonable

continuity in any occupation in which [he or she] could reasonably be expected to perform satisfactorily” in light of age, education, training, experience, station in life, and physical and mental capacity, in the relevant labor market area. Id. (emphasis added). Benefits for disability due to a mental health or psychiatric condition are limited to a maximum of 24 months. AR 54.

B. Renzi’s Medical History

Renzi’s medical history is extensive. In March 2003, Dr. Robert Klapper (“Dr. Klapper”) performed a bilateral hip replacement on Renzi due to osteoarthritis in both of his hips. AR 2332. In 2007, due to severe osteolysis in his left hip, Dr. Klapper performed a surgical revision of the left hip replacement. AR 2336. In late 2008, due to similar issues, Dr. Klapper performed a surgical revision of Renzi’s right hip replacement. AR 2334.

In November 2010, Orthopaedic Surgeon Dr. Brian Perri (“Dr. Perri”) diagnosed Renzi with degenerative disk disease with compression of the nerve space from C3–C6, and recommended surgery. AR 3417. At the same time, Renzi was also experiencing problems with his lower back, and his pain management specialist Dr. Roy Nini (“Dr. Nini”) performed injections in his lumbar spine to manage the pain. AR 3426–28.

On January 6, 2011, Dr. Perri performed surgery on Renzi’s cervical spine. AR 1460–61. Dr. Perri performed a discectomy with spinal cord decompression at C3–4, C4–5, and C5–6. He also performed a three-level fusion from C3 extending down to C6, using titanium plate screws to fix the vertebrae in place. AR 1461. After the surgery, Renzi received additional spinal injections from Dr. Nini for pain in his thoracic spine. AR 1458, 1656–57, 1729–32, 3400.

On March 30, 2011, Renzi had a consult with Dr. Perri for pain, and Dr. Perri determined that the primary cause of Renzi’s pain was diffuse idiopathic skeletal hyperostosis (“DISH”), a bony hardening of the ligaments in areas where they attach to the spine. AR 1653. On April 28, 2011, Dr. Perri completed a major surgery on Renzi’s spine. AR 1644–45. The surgery included bilateral fusion, with instrumentation, i.e., hardware to hold the fusion in place, over

the following vertebrae: C4–7, T1–12, and L1–2. Considering that the C3–4 region had already been fused in January 2011, this was an 18-level fusion encompassing Renzi's entire spine from C3 in the cervical spine to L2 in the lumbar spine.

***4** On May 11, 2011, Dr. Perri reported that one of the screws used to fix Renzi's fusion in place had worked loose, and performed another surgery to replace it, as well as a number of other screws. AR 1613–14.

On November 5, 2012, Dr. Perri evaluated Renzi again, and reported that Renzi was still suffering from constant, “fairly disabling” pain. AR 3040, 3046. CT scans showed that Renzi's DISH had progressed through his lumbar spine. AR 3046. Therefore, Dr. Perri performed another surgery, this time in two stages: one on November 14, 2012, to extend the fusion up to C2–3, and another two days later to extend the fusion down through the entire lumbar spine, from L3 to S1. AR 3123, 3127. As a result, Renzi's entire spine was fused except for the single level between C1 and C2. In addition, Renzi suffered respiratory and cardiac arrest during the L3 to S1 fusion surgery, was resuscitated after approximately five minutes, and subsequently underwent a left heart catheterization and left and right angiography. AR 3201, 3132.

After the surgery, Renzi continued to see Dr. Nini for pain management and spinal injections. AR 2621–24. From March 6, 2013 to October 2013, Renzi saw Dr. Nini a dozen times for spinal injections. AR 2597–2621.

In October 2014, Renzi experienced severe lower back pain and a notable “pop” after a bending and lifting movement. AR 1241. Scans showed that the cause was the rupture of one of the titanium rods holding Renzi's spine together. *Id.* Therefore, on October 14, 2014, Dr. Perri performed a sixth surgical procedure on Renzi to revise the fusion by removing and replacing the broken rod and adding two more rods to aid stability. AR 1238–41.

Renzi has also had medical problems beyond his spinal issues. Renzi has been diagnosed with anemia, sleep apnea, type 2 diabetes, plantar fascia in both feet, and paresthesia in his hands and feet. AR 2573, 2795, 2471, 2475. Renzi has also been diagnosed

with two psychiatric conditions: post traumatic stress disorder (“PTSD”) and depressive disorder NOS, or “not otherwise specified.” AR 678. Dr. Hina Sidhu (“Dr. Sidhu”) treated Renzi for these conditions and prescribed him medications over the years. As of 2017, Renzi was taking Adderall, Ambien, and Cymbalta. AR 666.

C. Disability Claim

On October 19, 2010, at 52 years old, Renzi filed a claim for Short Term Disability (“STD”) with Aetna under the Plan. AR 3443–47. On March 2, 2011, Aetna advised Renzi that he was nearing exhaustion of his STD benefits, and that he would be evaluated for Long Term Disability (“LTD”). AR 3453. After an internal review, Aetna approved Renzi's claim under the Plan based on medical evidence of lumbar radiculitis, neuropathic pain, lumbar spondylosis, lumbar facet syndrome, ulnar neuropathy and cervical stenosis, anterior arthrodesis with discectomy, and spinal surgeries related to DISH syndrome. AR 101, 481. Renzi then received benefits for the 24-month “own occupation” period, from April 17, 2011 to April 16, 2013. AR 101, 3484, 3551.¹

***5** On April 17, 2013, the applicable test for continued benefits changed from the “own occupation” standard to the “any reasonable occupation” standard set forth above. AR 36, 3551. On April 30, 2013, Aetna approved LTD benefits under the “any reasonable occupation” definition of disability. AR 3551. Benefits continued to be paid, and Renzi's treating physicians consistently reported that Renzi did not have the ability to work more than two hours per day. *See, e.g.*, AR 265, 776, 1198, 1267. The status quo remained for some time: Renzi would consult with Dr. Nini on a monthly basis for pain medication and spinal injections, AR 2464–2607, Aetna would periodically ask Renzi for statements from a treating physician attesting to his continued disability, *e.g.* AR 1262, which Dr. Nini or Dr. Perri would typically provide, *e.g.* AR 1265–68, and Aetna would review the doctors' statements and the medical records to assess Renzi's continued disability. *E.g.*, AR 265.

D. Aetna's Investigation and Termination of Renzi's Claim

In March 2017, during a claim review, Aetna noted that public social media posts showed that Renzi “appears to [be] involved with Aftermarket Percussion Products, Inc., and [is] the inventor of the Renzi Stomp Louder,” a drum pedal. AR 283, 287. Aetna ordered a background investigation. AR 290.

According to the investigation, Renzi invented a “foot pedestal designed to be used by drummers,” a product which he labeled “The Renzi,” in 2012, and started a business to sell it in 2016. AR 984–85, 1026. Renzi stated in an interview that he was planning on “rolling [The Renzi] out in the Summer of 2016.” AR 1006. Aetna also observed a YouTube video showing Renzi standing to promote his product without ambulatory devices despite his reportedly severe mobility issues. AR 852, 993.

Renzi is a passionate drummer, which is one of his listed pre-disability activities. AR 1757. At some point, Renzi began drumming again, and told his doctors as much. For example, in September 2015, Renzi told Dr. Nini that he suffered a strain “after playing drums and felt like he broke some hardware.” AR 2548. In a February 2017 “Claim Questionnaire,” Aetna asked Renzi about his activities, and “drumming” was one of the activities he listed in response. AR 875.

Renzi stated on Facebook that he designed his drum pedal product “in order to get [him] back behind the drum kit” despite his disability, and that The Renzi “maximiz[es] body stability in support of longer sustainable play and reduce[s] the number of injuries and physical issues [drummers] have [had] to endure over the last 40 years.” AR 1004. Renzi never received any salary or profit from his invention. AR 3011.

On May 22, 2017, Aetna’s investigator called Renzi “discrete[ly]” to confirm whether his business remained active, and Renzi stated that it was, and that he would be driving to Nashville, Tennessee from Southern California to meet potential investors at a “drummers['] luncheon.” AR 997, 1015. Renzi stated that he would be leaving on May 28, 2017, and returning on June 16, 2017. AR 1015. The distance from Southern California to Nashville is about 2,000 miles.

The investigative report also discussed that Renzi had participated in the 2016 Winter National Association of Music Merchants (“NAMM”) conference, where he unveiled The Renzi, and the January 2017 NAMM conference, where he had a booth to showcase the product. AR 283, 984, 1006, 1045–46. Renzi also traveled to Las Vegas twice to promote the product in mid-2016. AR 1009. And in 2017, Renzi attended the 2017 Winter NAMM conference to showcase the retail model of The Renzi and allow the public to test it. AR 1003, 1010–11.

Aetna then decided to set up covert video surveillance on Renzi during his trip to Nashville for the drummers’ luncheon Aetna learned about during the covert call. See AR 3672–75 (CDs of surveillance video). Aetna arranged for the surveillance to take place on June 7 and 8, 2017. The video footage and related narrative report showed:

- *6 • Renzi helping to load and unload a vehicle, including lifting an object from the trunk and setting it down on the ground. AR 3672, June 7, 2017 at 10:20 a.m.; see also AR 925–28, 936.
- Renzi lifting a case or bag with one hand and pulling the hatch of a vehicle’s trunk down with the other. AR 3672, June 7, 2017, 10:20 a.m.; see also AR 926, 936.
- Renzi sitting, standing, bending at the waist, partially squatting, and using his hands, arms, legs, and body to gesture. AR 3672, 12:26 p.m. – 12:43 p.m.; see also AR 925–30, 936.
- Renzi walking from a parking lot to and from a restaurant without assistive devices while carrying items in both hands without exhibiting pain behaviors. See AR 3672, 3673, June 7, 2017 at 10:22 a.m., 4:03 p.m. and 7:22 p.m.; see also AR 929–30, 937.
- Renzi bending into his car to move items around, and picking up items from the ground and placing them into his vehicle. AR 3673, 3675, June 7, 2017 at 4:07 p.m. and 8:07 p.m.; see also AR 929–30, 937–38.
- Renzi pulling a two-wheel luggage dolly with boxes and a bag. AR 3675, June 7, 2017, at 8:08 p.m.; see also AR 299, 931, 938.

- Renzi repeatedly leaning into the back of his vehicle, bending over at the waist while lifting items, and carrying an item from the passenger seat to the rear cargo area. AR 3675, June 8, 2017, at 2:11 p.m. and 2:17 p.m.; see also AR 932, 939.
- Renzi walking without assistive devices on another occasion without exhibiting pain behaviors, and carrying a bag from his vehicle into a hotel lobby. AR 3675, June 8, 2017 at 2:50 p.m. and 4:17 p.m.; see also AR 934, 939.

The Court notes that throughout the video surveillance, Renzi moved in a cautious, slow, and deliberate manner. He never swivelled or twisted his neck or back, and always seemed careful not to make any abrupt movements. However, as Renzi's counsel concedes, Renzi did not make any physical displays of pain, e.g., a grimace or another observable manifestation of pain, even while walking without assistive devices. See Renzi Opening Br., Docket No. 31 at 15. Of course, this does not prove that Renzi was in fact pain-free, particularly given Renzi's physicians' reports of his stoic reaction to pain and the medications Renzi was prescribed to manage the pain. E.g., AR 845.

Dr. Nini had opined that Renzi could never pull, bend or twist, and was limited to sitting and walking not more than 2.5 hours. AR 776, 1198. Similarly, Renzi reported to Aetna that his mobility was severely restricted, and that he needs assistive devices to walk any further than the perimeter of his home. AR 2792. Therefore, in light of the apparent inconsistencies revealed by Aetna's investigation and the surveillance results, and to give Renzi an opportunity to provide updated information in support of continued benefits, on June 9, 2017, Aetna wrote to Renzi informing him that Aetna would be conducting a telephonic interview to discuss his current activities of daily living, and also requested updated medical and functional information. AR 3569. On June 20, 2017, Aetna's claim consultant discussed Renzi's claim with an Aetna internal medical director, who reviewed the surveillance footage and opined that Renzi's exhibited physical capabilities, such as driving to Nashville, unloading his car, standing and walking, and meeting with various individuals for more than eight hours, show light duty functional capacity. AR 314, 316, 328.

*7 On June 26, 2017, a Vocational Rehabilitation Consultant completed a "transferable skills assessment" of Renzi at Aetna's request. AR 314, 319–24, 900–03. The consultant determined that Renzi's work history allowed him to develop skills in areas such as security management; development, implantation and management of Personal Security Officer program; training; logistics for security travel; construction and maintenance of several homes and corresponding project management duties; and, human resource functions. AR 900. The consultant also noted that Renzi is well-educated, having completed a Master of Science degree in Criminal Justice, some Ph.D. studies, and several law enforcement and firearm trainings. Id.

Taking into account Renzi's education and experience, the vocational consultant identified two alternative occupations: Program Manager (sedentary physical demand level) and Director, Law Enforcement (light physical demand level). AR 902–03. The consultant's report described that a Program Manager oversees programs to ensure that "implementation and prescribed activities are carried out in accordance with specified objectives; planning and development methods and procedures for implementing programs, directing and coordinating program activities, and executing control over personnel responsible for specific functions or phases of programs." AR 902. The consultant reported that a Director, Law Enforcement, is expected to "administer state law enforcement programs; planning and organizing programs for units of local and state agencies concerned with law enforcement, criminal justice, corrections, juvenile delinquency, and rehabilitation; developing and coordinating training program for staff and law enforcement personnel; promoting community acceptance of crime and delinquency programs through news and other media; and coordinating reporting activities of local and state cooperating agencies." AR 903. The consultant concluded that Renzi's experience and education exceeded the criteria for these occupations, which both provide an hourly wage of \$104 and are found "within a reasonable distance in light of Plaintiff's commuting practices of his community and equivalent to travel times and distance that he would have traveled previously." AR 902–03, 911. Aetna also determined that both

occupations meet the criteria for Renzi's functional limitations, and are consistent with his station in life, and therefore are "reasonable" under the Plan. AR 335.

On June 27, 2017, Aetna determined that Renzi no longer satisfied the Plan's "any reasonable occupation" test for total disability because the record developed between March and June 2017 showed substantial improvement in Renzi's functional capacity which was not reflected in his doctors' previous reports. In light of this functionality and the availability of high-wage reasonable alternative occupations, Aetna terminated Renzi's LTD benefits. AR 327–28, 3604–06. Aetna notified Renzi by telephone, AR 239, and then by letter, 3604–06. The termination letter stated: "In an effort to clarify your functional capabilities, a physician review which included a review of your medical records and observed activity [*i.e.*, the video and the investigator's report] was completed. The physician review determined that the totality of the evidence in your file supported your recovery is sufficient for you to have the ability to perform full time light duty work as defined by the U.S. Department of Labor." AR 3605.

E. Appeal

Renzi appealed the termination of his claim on July 20, 2017, and submitted additional medical records and letters from his treating physicians to support his claim. AR 2790–99. Renzi submitted a letter from Dr. Perri stating that Renzi is "unable to stand, sit, walk, travel/drive for prolonged periods of time" due to pain, and that Renzi "states he can only do 'short bursts of activity from time to time' because he cannot work long, consecutive hours in any given day without rest." AR 2360. Renzi's primary care physician, Dr. Kirk Chang ("Dr. Chang"), also wrote in a letter that Renzi is "totally disabled" because of chronic severe pain and insomnia requiring daily medication, diabetes mellitus, and hypertension. AR 2349. Dr. Chang also concluded that Renzi was capable of "short bursts of activity," but not any full time sedentary or light duty work. *Id.* Dr. Nini and Dr. Perri also submitted statements attesting to Renzi's complete and permanent disability. AR 866–69, 872.

*8 Renzi also stated in his appeal that he had seen a psychiatrist since 2015 for "[PTSD], Depression, etc." AR 2791. Notably, Renzi also stated:

The ONLY exercise I can manage is walking ... and I NEED to use a cane or my walker whenever I walk further than around the perimeter of my home and if/when I travel by vehicle away from my home, I always have my cane in my car ... I ALWAYS USE my Disability Products and Adaptive Living Aids DAILY"

AR 2792 (first two ellipses in original). Renzi also wrote, "Due to my functional restrictions, I can do 'short bursts of activity' from time to time; however, I cannot stand, ... sit, ... or do anything in consecutive hours in any given day without a change of position, stretching, and/or full rest or sleep...." AR 2794. Renzi's records also show that he takes Norco for foot and back pain and uses a CPAP machine for sleep apnea. AR 369, 2799.

Aetna's appeal staff reached out to Renzi to discuss his appeal as part of the review. During an August 15, 2017 telephone call, Renzi displayed frustration with the review process, and questioned whether his materials were being reviewed. AR 388–89. He did the same during August 17, 2017 and October 31, 2017 phone calls. AR 391–92, 500.

Aetna went to a vendor, ARCS, seeking a peer review from a physician specializing in Occupational Medicine. AR 398–99. In response, Aetna received the report of Dr. Jerome Siegel ("Dr. Siegel") on September 5, 2017. AR 838–56. To prepare his report, Dr. Siegel analyzed Renzi's medical records and reviewed the surveillance footage and promotional videos identified during Aetna's background investigation. *See id.*

Dr. Siegel's report pointed out that in Renzi's "Drum Talk TV interview," Renzi stands and speaks for 13 of the 15 minute video, and is seen flexing and extending his right foot as part of drumming action with his product. AR 852. Dr. Siegel commented that, although

Renzi previously claimed he was totally impaired, the video indicated that Renzi “took a bad situation for himself and was able to bounce back and recover to the point of being able to draw up the drum product description, engineer the product, and be able to play the drums.” Id.

Dr. Siegel also initiated peer-to-peer consultations with Renzi's treating physicians. Dr. Chang remained firm in his opinion, stating that Renzi “could not return to any type of work” because of his pain. AR 843. Dr. Chang also stated that he sees Renzi once or twice a year, and primarily manages his hypertension and diabetes, which are under control with medication. AR 842. Dr. Siegel also conducted a peer-to-peer consultation with Dr. Perri, who also remained firm that Renzi was too badly injured to return to any type of work, even if sedentary and part-time. AR 845. In Dr. Siegel's discussions with both doctors, they each stated that they did not believe Renzi did much driving, and had not seen the surveillance footage or promotional videos from YouTube and social media. AR 842–45. Still, both Dr. Chang and Dr. Perri maintained that seeing those videos would not affect their opinions about Renzi's condition. Id. Dr. Siegel also attempted to initiate a consultation with Dr. Nini, but could not reach him. AR 843.

*9 In total, Dr. Siegel reviewed Renzi's medical records, Renzi's appeal letter, a letter from Dr. Chang, multiple video links to YouTube and other social media marketing videos, and engaged in peer-to-peer discussions with two treating physicians. Dr. Siegel concluded that the “observational data ... [is] inconsistent with [Renzi's] stated incapacities and level of impairment,” and that Renzi's “reported activity level to his physicians does not correlate with his actual activity level,” as reflected in the videos. AR 846, 850. Specifically, Dr. Siegel opined:

The physical restrictions and physical limitations provided by his treating physicians including Dr. Kirk Chang 07/20/17, Dr. Brian Perri 07/01/17 and Dr. Roy Nini 07/14/17 appear to be overly restrictive and not consistent with observations from video clips, YouTube videos, and claimant's ability to travel and market his drumming product. The physical restrictions and physical limitations are not supported by observable physical examination and recent diagnostic testing. His physicians indicate

that he is incapable of any work activity but clearly observations from video clips and YouTube videos contradict these findings....

There are multiple inconsistencies between what the claimant self reports in his appeal to what is viewed on the videos. The claimant also states in recorded interviews and marketing information for his Renzi drumming product that he has been able to teach and instruct drums to music students and use his Renzi product to the play the drums and better use his feet. Yet, he also complains of chronic foot problems and indicates that he always carries a cane with him and in his car. He is seen able to stand, walk, and sit for extended periods of time in the multiple video clips. This contradicts multiple attending physician statements indicating that the claimant has no physical capacity for work.

AR 850–51. Dr. Siegel also reported that Renzi did not exhibit any visible pain behaviors in the surveillance footage or promotional videos, and that he was observed sitting comfortably, carrying bags, loading/unloading, bending, and walking without the use of an assistance device. AR 851.

Therefore, based on Renzi's observed improved functionality, Dr. Siegel opined that Renzi was capable of sitting for 30–45 minutes at a time up to six hours total in an eight-hour day, standing for and walking for 30–45 minutes at a time for a total of four to six hours in an eight-hour day, lifting up to 20 pounds occasionally and lifting up to 10 pounds frequently. AR 854. He also opined that Renzi “requires the ability to alternate between sitting and standing and walking at will throughout the work day,” and that “[a] 3-5 minute stretch break each hour and frequent position changes at will throughout the day are recommended given his history of chronic neck pain and chronic low back pain complaints.” Id. He further opined that due to Renzi's neck problems, he should avoid repetitive overhead reaching or repetitive flexion/extension of his head, and should limit his neck turning and rotation. Id.

Because he was unable to speak with Dr. Nini, Dr. Siegel provided Dr. Nini with his report and invited him to comment. AR 3622. In response, Dr. Nini submitted a letter on September 20, 2017, stating that the videos provided little information about Renzi's

ability to maintain full time employment. AR 817. Dr. Nini opined:

I am in disagreement with the reviewer's findings. Whether he is able to sit for an extended period of time, stand upright, answer questions and speak clearly is not indicative of his ability to maintain gainful employment.

***10** Id. Dr. Nini noted that the videos do not speak to Renzi's level of incapacity, and that Renzi's efforts on his drum pedal "do not generate any income and are simply hobbies the patient utilizes to satisfy his mental and social health." Id.

Dr. Siegel wrote a responsive supplemental report on October 6, 2017. AR 802–07. Dr. Siegel opined that "Dr. Nini has not supported his opinions with any type of objective information or direct corroboration of the claimant's witnessed functional abilities or inabilities." AR 807. Dr. Siegel also noted that Dr. Nini did not address the issues of Renzi's capabilities (for instance his ability to play the drums and market his product despite chronic pain), the lack of observed pain behaviors in the videos, or his extensive travel. AR 802–07.

In November 2017, Renzi provided additional medical records including new physical therapy notes, which Aetna forwarded to Dr. Siegel for review. AR 477, 1774. In a second addendum report dated December 27, 2017, Dr. Siegel noted that the new information did not alter his prior conclusions. AR 651–57.

Renzi also submitted additional materials regarding his treatment by Dr. Sidhu for PTSD and depression, which was diagnosed on April 15, 2015, and for which Renzi was prescribed Adderall, Ambien, Cymbalta, and Xanax. AR 3003–09. Therefore, on August 2, 2017, Aetna requested an internal collaboration between its clinical consultants and Behavior Health Unit to evaluate Renzi's history of PTSD and depression to determine whether there was sufficient mental health information provided by Renzi to refer

the claim for a behavioral health assessment. AR 360, 365. The consultant opined that there was insufficient documentation for such an assessment, and that Renzi "currently demonstrates capacity for sustained sedentary-light activity" based on the available information. AR 365, 368.

Several months later, Aetna received additional records from Dr. Sidhu. 2175–2246. Therefore, Aetna requested a psychology peer-review, which was completed on December 22, 2017, by Clinical Psychologist Dr. Richard Day, Ph.D. ("Dr. Day"). Dr. Day noted that Renzi was receiving care for PTSD and depression, but that there was no documentation of alleged symptoms or clinical insight. AR 661–62. In fact, Renzi reported that his anxiety was well-managed and that he enjoyed his trip to Nashville. AR 662. Renzi's 2017 mental status examinations describe Renzi as calm, cooperative, and having a blunt affect and congruent mood, linear and goal-directed thought content, and fair judgment and insight. AR 661–62. After reviewing the records, Dr. Day opined that they do not support functional impairment from a mental health perspective as of June 28, 2017, when Renzi's claim was terminated. AR 661.

Aetna also requested a further vocational assessment to evaluate Renzi's ability to perform the alternative occupations within his supported restrictions and limitations, as identified in Dr. Siegel's reports. AR 422–23, 478, 636–39. On October 4, 2017, the vocational consultant reviewed the restrictions and limitations, and opined that the prior occupations identified – Program Manager and Director, Law Enforcement – were viable occupations for Renzi. AR 422–23.

***11** Aetna requested a further vocational review because the strength level of the Director, Law Enforcement job is light and not sedentary, and the review went forward on January 11, 2018. AR 636–38, 645. The consultant evaluated the closest Dictionary of Occupational Titles ("DOT") code associated with Renzi's job at the time he began receiving LTD benefits, which the consultant determined was the DOT for "Chief Guard." AR 473. The Chief Guard position is light duty strength and includes security aspects of Renzi's prior occupations. AR 637. Based on Renzi's work history and known capabilities,

the consultant's review of occupations in the Chief Guard category identified the same two occupations discussed in the initial vocational analysis – Program Manager (sedentary strength level) and Director, Law Enforcement (light strength level). AR 637–38.

On January 22, 2018, Aetna upheld its initial decision to terminate Renzi's LTD claim. AR 3664–68. Aetna's decision letter outlined many of the facts stated above, and determined in sum that the record supported that Renzi was capable of performing reasonable alternative occupations, and thus no longer satisfied the Plan's definition of “total disability,” and failed to qualify for LTD benefits as of June 28, 2017. *Id.* On June 13, 2018, Renzi filed this lawsuit seeking review of Aetna's decision to terminate his claim. Docket No. 1.

V. DISCUSSION AND CONCLUSIONS OF LAW

As noted previously, the parties have stipulated that the Court apply the *de novo* standard of review to Aetna's claim denial. Docket Nos. 26, 27. On *de novo* review, the Court must decide whether the claim decision was correct under the terms of the Plan based on the administrative record as it existed when the decision was made. *See Kearney*, 185 F.3d at 1090 (“[T]he record that was before the administrator furnishes the primary basis for review.”). It is at all times a plaintiff's burden to support and prove his claim. *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 63 F. Supp. 2d 1145, 1157 (C.D. Cal. 1999), *aff'd*, 380 F.3d 869 (9th Cir. 2004).

The Court finds that Aetna incorrectly terminated Renzi's LTD benefits because Renzi has shown that he is “totally disabled” under the terms of the Plan. Therefore, for the reasons explained below, Aetna's claim denial is overruled.

On *de novo* review, the Court must “evaluate the persuasiveness of conflicting testimony and decide which is more likely true.” *Kearney*, 175 F.3d at 1095. “[A] true medical diagnosis does not by itself establish disability.” *Jordan*, 370 F.3d at 880. “Rather, a claimant must prove tha[t] his impairment is disabling, using objective and subjective medical evidence in the record.” *Popovich*, 281 F. Supp. 3d

at 1003 (citing *Seleine v. Fluor Corp. Long-Term Disability Plan*, 598 F. Supp. 2d 1090, 1101–02 (C.D. Cal. 2009)). There is no presumption in favor of a claimant's treating physician. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) (“[I]f a consultant engaged by a plan may have an ‘incentive’ to make a finding of ‘not disabled,’ so a treating physician, in a close case, may favor a finding of ‘disabled,’ ... [therefore] courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician.”). Although there is no clear binding guidance on resolving such conflicts, one court in this District has held that the “credibility of physicians' opinions turns not only on whether they report subjective complaints or objective medical evidence of disability, but on (1) the extent of the patient's treatment history, (2) the doctor's specialization or lack thereof, and (3) how much detail the doctor provides supporting his or her conclusions.” *Shaw v. Life Ins. Co. of N. Am.*, 144 F. Supp. 3d 1114, 1129 (C.D. Cal. 2012).

Here, the Court must rule on the conflict between the conflicting opinions and reports of Renzi's treating physicians, Drs. Perri, Nini, and Chang, and Aetna's file-review physician, Dr. Siegel. Renzi's medical history is not in dispute. Rather, the parties dispute whether Renzi has recovered sufficiently to work sedentary or light physical-demand level occupations.

*12 For instance, Dr. Perri opined:

Please note patient has not made significant improvements in his health because of continuous functional restrictions. Patient unable to stand, sit, walk, travel/drive for prolonged periods of time as these activities aggravate patients symptoms of recurrent cervical, thoracic and lumbar spine pain.... Patient cannot perform any occupation, part-time or full-time, which qualifies as “light duty” or “light physical demand.” Patient states he can only do “short bursts of activity from time to time” because he cannot work long, consecutive hours in any given day without rest.

AR 2360.

Dr. Chang similarly opined that Renzi “suffers from significant spine issues which despite multiple surgeries has left him totally disabled,” and that the

disability would “likely remain permanent.” AR 2349. Dr. Chang further expressed concerns about Renzi's capacity to work based on the effects of various medications he is prescribed, including hydrocortisone for pain, zolpidem for insomnia, adderrall to combat excessive daytime fatigue and sleepiness, as well as treatment for diabetes mellitus and hypertension. Id. Dr. Chang also noted Renzi's ability to engage in limited periods of activity:

However accurate or inaccurate any investigations into Mr. Renzi's functional status may be, while he could with some effort engage in short bursts of activity, it is my medical opinion that Mr. Renzi is incapable of working, with any reasonable reliability, any part time or full time sedentary, light duty or ‘other’ classification of occupation.

Id. Drs. Nini and Perri also submitted Attending Physician Statements, AR 869, 866, and Capabilities and Limitation Worksheets, AR 867, 872, all of which attested to Mr. Renzi's complete and permanent disability.

After Dr. Siegel issued his initial report, Dr. Nini responded by agreeing with Dr. Chang that Renzi is capable only of limited periods of activity, stating

I am in disagreement with the reviewer's findings. Whether he is able to sit for an extended period of time, stand upright, answer questions and speak clearly is not indicative of his ability to maintain gainful employment.

AR 817. He also noted that the internet-based videos referenced by Dr. Siegel do not show Renzi's level of pain nor his level of incapacity. Id.

On the other hand, Dr. Siegel opined that Renzi's observed functional capacity was inconsistent with the reports of Renzi's treating physicians. Dr. Siegel stated:

There are multiple video links, YouTube videos, marketing videos, and social media information that directly contradicts the claimant's level of physical impairment and provides observational data that is inconsistent with his stated incapacities and level of impairment.

AR 846. In essence, Dr. Siegel's reports rely on the videos over and above any other evidence in the record. Dr. Siegel's report answers twelve questions related to Renzi's functionality, and Dr. Siegel responds to each question by referring to the video evidence. See AR 846–56. For instance, Dr. Siegel states that Dr. Chang must be overstating “self-reported side effects from medications” because “[t]he video links and YouTube videos do not support that the claimant has any observable side effects or adverse drug reactions....” AR 855. He provides the same response to a question as to whether Renzi is impaired from sedentary activity. Id.

***13** The Court has reason to view Dr. Siegel's report with a measure of skepticism as compared to the reports of Renzi's treating physicians because Dr. Siegel conducted a pure-paper file review of Renzi's claim without any personal examination of the claimant. In Montour v. Hartford Life & Acc. Ins. Co., 588 F.3d 623, 634 (9th Cir. 2009), the Ninth Circuit held the insurer's decision to conduct a “pure paper” review rather than to have the claimant examined “raises questions about the thoroughness and accuracy of the benefits determination.” Similarly, in Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666 (9th Cir. 2011), the Court found it significant that, like here, every physician who had actually examined the claimant found he was disabled, and only the insurer's paper file reviewers believed otherwise:

Every one of them concluded, often in dramatic language, that Salomaa was totally disabled by his physical condition. Not a single physician who actually examined Salomaa concluded otherwise. The only documents with an “M.D.” on the signature line concluding that he was not disabled were by the physicians the insurance company paid to review his file.

Salomaa, 642 F.3d at 676; see also Jebian v. Hewlett-Packard Co. Empl. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1109 n.8 (9th Cir. 2003) (quotation omitted) (“On de novo review, a district court may, in conducting its independent evaluation of the evidence in the administrative record, take cognizance of the fact (if it is a fact in the particular case) that a given treating physician has a greater opportunity to know and observe the patient than a physician retained by the plan administrator.”); Hoover v. Provident Life & Acc. Ins. Co., 290 F.3d 801, 809 (6th Cir. 2002) (“The evidence presented in the administrative record did not support the denial of benefits when only Provident’s physicians, who had not examined Hoover, disagreed with the treating physicians.”); Popovich, 281 F. Supp. 3d at 1004–05 (“Although MetLife is not required to ask its physicians to conduct an in-person examination, the Ninth Circuit has viewed ‘pure paper’ reviews with some skepticism.”).

Here, Drs. Perri, Nini, and Chang have examined and treated Renzi for years. On the other hand, Dr. Siegel’s comparatively limited review included Renzi’s medical history, the investigative reports, and the video evidence, but no personal examination of Renzi’s condition. Therefore, the Court credits Renzi’s treating physicians’ well-founded opinions of Renzi’s condition and capacity for long-term, continuous work over Dr. Siegel’s review.

Furthermore, upon review of the video surveillance, the videos do not conclusively demonstrate Renzi’s capacity to engage in sustained work, week after

week, even in a sedentary occupation. In total, the surveillance covers only two days of activity. AR 3672–75. The first day, Renzi is observed on video for less than three hours in total. Id. The second day, Renzi is observed on video for about 34 minutes in total. Id. Renzi and his physicians have consistently maintained that he is capable of “short bursts of activity.” AR 2794, 2349. Therefore, Renzi’s activity during the two days of the music conference in Nashville when Aetna knew he would be engaging in high levels of activity is not necessarily indicative of Renzi’s capacity for full time work on a continuous basis.

Moreover, the internet-based videos of Renzi promoting his drumming product are not inconsistent with Renzi’s stated functionality. The videos consist of two interviews of Renzi and an advertisement for his product.² In one interview, Renzi stands and talks for about 10 minutes of a 15 minute video, and in the other, he stands for about five minutes. And in the advertisement, Renzi speaks about his product while sitting for less than a minute. The videos simply do not demonstrate any capacity for full time work.

***14** The Court recognizes that the aspect of the record weighing most heavily in Aetna’s favor is Renzi’s ability to travel by car from Southern California to Nashville, engage in the activity described above while in Nashville, and then immediately drive back to California. This fact is problematic particularly in light of Renzi and his physicians’ statements that he only has the ability to sit without moving for 15 minutes. See AR 1775–78. However, at the hearing, Renzi plausibly argued that he took the trip by driving for short periods and pulling over periodically to rest, stand up, and/or shift. Furthermore, Renzi stated that it took him 6 days to travel to Nashville, and therefore it is plausible that he broke his road-trip up in this manner to accommodate his pain. Moreover, the two-week time period it took for Renzi to go to the conference and return home could still be considered a “short burst” of activity as compared to the impact of continuous, forty-hour work weeks. Finally, Renzi’s stated passion for drumming makes it more likely that he would endure significant pain to make such a trip. In sum, particularly in light of his extensive medical history and the overwhelming support of his treating physicians, Renzi’s trip to Nashville does not in and

of itself persuade the Court that Renzi is not “totally disabled” under the terms of the Plan.

Furthermore, Aetna does not address the aspects of Renzi's disability outside his physical limitations, particularly, his undisputed insomnia. The combination of Renzi's pain, medications, mobility restrictions, PTSD, and the C-Pap machine he uses for his sleep apnea make it impossible for him to sleep more than two hours at a time. AR 2349, 2794. This inability to obtain a restful night's sleep, in turn, has a significant negative impact on Renzi's ability to function during the day. *Id.* For instance, Dr. Chang testifies that Renzi takes a version of Ambien at night to deal with chronic insomnia, which required the addition of the amphetamine-based stimulant Adderrall “in order to keep [Renzi] to face the day with a minimal amount of alertness.” AR 2349. Moreover, counter to the opinion of Dr. Siegel, AR 848, the surveillance videos and investigative reports do nothing to counter this evidence; the fact that Renzi was alert for two days during a music conference does not demonstrate his level of alertness on a consistent, day-to-day basis.

Aetna does not dispute that Renzi has previously been functionally impaired from working, and that he has a long history of serious medical problems, but argues that medical history alone is insufficient to establish eligibility for benefits. Aetna is correct that a particular diagnosis or combination of diagnoses does not alone establish eligibility for benefits under the Plan; there must be proof that the medical conditions currently cause functional impairments. See *Jordan*, 370 F.3d at 880; *Pralutsky v. Metropolitan Life Ins. Co.*, 435 F.3d 833, 840–41 (8th Cir. 2006); *Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 409 (7th Cir. 2006) (pointing out distinction between diagnosis of serious heart condition and an actual, functional inability to work). Therefore, Renzi's prior injuries, diagnoses, and procedures are not sufficient alone to prove that he is currently unable to work in a reasonable alternative sedentary occupation under the terms of the Plan. However, Aetna does not address the fact that Renzi does not rely solely on his medical history; he relies on the opinions and reports of his treating physicians, who in turn have personally examined Renzi repeatedly for years.

In sum, Renzi met his burden of proving that he was entitled to LTD benefits as of the date his claim was terminated because he has shown that he was “totally disabled” under the terms of the Plan at that time, *i.e.*, that he could not work with reasonable continuity in any reasonable alternative occupation. *Jordan*, 63 F. Supp. 2d 1145 at 1157. Specifically, the Court finds that Aetna over-relied on surveillance video in determining Renzi's functionality. Courts in the Ninth Circuit have criticized claim denials in similar circumstances. See, e.g., *Montour*, 588 F.3d at 633 (“[T]hat Plaintiff could perform sedentary activities in bursts spread out over four days does not indicate that he [] is capable of sustaining activity in a full-time occupation.”); *Young v. United of Omaha Life Ins. Co.*, 165 F. Supp. 3d 984, 987 (E.D. Wash. 2016) (video showing claimant going to appointments, getting lunch, and walking her dog “does not demonstrate [the] ability to work full-time in [the claimant's] regular occupation”); *Bertelsen v. Hartford Life Ins. Co.*, 1 F. Supp. 3d 1060, 1073 (E.D. Cal. 2014) (“[T]he Court also notes the inordinate amount of weight Defendant placed on the surveillance information. The Ninth Circuit has admonished district courts not to overly rely on surveillance video, particularly where the restrictions are consistent with the video surveillance.”); *Smith v. Hartford Life & Accident*, No. C 11-03495 LB, 2013 U.S. Dist. LEXIS 13868, at *68–69 (N.D. Cal. 2013) (“[T]he Ninth Circuit [has] expressed skepticism when presented with opinions from medical doctors who relied heavily on video surveillance that showed a claimant engaging in discrete activities for short periods of time, especially where the claimant was limited from performing those or similar activities for prolonged periods of time.”).

*15 Accordingly, Aetna incorrectly decided to terminate Renzi's LTD benefits as of June 28, 2017. Aetna's decision is overruled.

VI. CONCLUSION

For the foregoing reasons, the Court **overrules** Aetna's decision to terminate Renzi's LTD benefits as of June 28, 2017. The Court orders Aetna to pay Renzi's LTD benefits owed under the terms of the Plan from June 28, 2017 to the present, together with prejudgment interest on each payment. Renzi's LTD benefits shall continue

so long as he continues to remain “totally disabled”
under the terms of the Plan.

Initials of Preparer lmb

IT IS SO ORDERED.

All Citations

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Slip Copy, 2019 WL 3243619

Footnotes

- 1 As Director of Operations, Renzi earned \$206,153.00 per year. AR 1764. His monthly benefit was 60%, subject to a \$10,000 maximum, minus applicable offsets. AR 61, 100. His adjusted earnings were \$180,633.25. AR 293.
- 2 See www.youtube.com/watch?v=wez4h0X14wl; www.youtube.com/watch?v=qEdZy2dEGII;
www.facebook.com/DrumTalkTV/videos/1427536083991718/.

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