

2020 WL 6374619

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United States District Court, C.D. California.

Joel GROCH, Plaintiff,

v.

DEARBORN NATIONAL LIFE
INSURANCE COMPANY; Entertainment
Industry Flex Plan, Defendant.

Case No. 2:18-cv-06614 CBM (Ex)

|
Signed 10/29/2020

Synopsis

Background: Beneficiary brought action against claims administrator under Employee Retirement Income Security Act (ERISA) to recover long term disability benefits. Beneficiary moved for summary judgment.

Holdings: The District Court, [Consuelo B. Marshall](#), Senior District Judge, held that:

decision by administrator to ignore functional capacity evaluation was objective evidence supporting beneficiary's claim that administrator did not give his claim full and fair review;

vocational analysis by third-party was more credible than vocational reviews conducted by administrator's reviewers;

beneficiary had continuing disability due to lumbar radiculopathy with acute denervation features and cognitive deficits due to treatment with nerve pain medication;

physician's opinion was defective;

another physician's change in opinion was not entitled to any weight;

another physician's review was entitled to little weight;

beneficiary was entitled to maximum payment of benefits from time that it terminated benefits under "your occupation" benefit period to end of "any occupation" benefit period.

Motion granted.

Procedural Posture(s): Review of Administrative Decision; Motion for Summary Judgment.

Attorneys and Law Firms

[Corinne Chandler](#), [Glenn R. Kantor](#), Kantor and Kantor LLP, Northridge, CA, [Susan L. Meter](#), Kantor and Kantor LLP, San Diego, CA, for Plaintiff.

[Thomas B. Orlando](#), Pro Hac Vice, Foran Glennon Palandech Ponzi and Rudloff PC, Chicago, IL, [Diana R. Lotfi](#), Foran Glennon Palandech Ponzi and Rudloff PC, Irvine, CA, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Consuelo B. Marshall, U.S. District Court Judge

*1 The matter before the Court is a bench trial based on the administrative record. The parties filed motions pursuant to [Federal Rule of Civil Procedure 52](#). (Dkt. Nos. 25, 26.) Having reviewed the administrative record and the [Rule 52](#) motions, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. Nature of the Action

1. This is an action for recovery of long term disability benefits under ERISA. The parties have agreed that the Court's review of the propriety of defendant's claim decision should be that of *de novo* [Docket #19, p. 2].

2. Plaintiff's former employer, Entertainment Industry established an ERISA Plan to provide long term disability benefits for employees who met Plan criteria ("The Plan"). Benefits to be paid pursuant to the Plan were funded by an insurance policy issued by Dearborn National Life Insurance Company ("Dearborn").

3. The Plan has two different definitions of disability. During the first two years of disability, one is entitled to benefits if he/she is unable to perform the material duties of his "own occupation." After benefits have been paid for two years, the definition of disability changes. One is entitled to benefits if he/she is unable to perform the material duties of "any

occupation” as defined by the Plan. The pertinent definitions are as follows:

TOTAL DISABILITY or TOTALLY DISABLED means that during the elimination period and the next 24 months of disability you are:

1. unable to perform all of the material and substantial duties of your occupation on a full-time basis because of a disability:

a) caused by injury or sickness;

b) that started while you are insured under this coverage; and

2. after 24 months of benefits have been paid, you are unable to perform with reasonable continuity all of the material and substantial duties of your own or any other occupation for which you are or become reasonably fitted by training, education, experience, age and physical and mental capacity.

4. Dearborn interprets the “any occupation” definition of disability to include an income qualifier. To be a suitable alternative occupation under the “any occupation” criteria, the occupation must pay at least 60% of the employee's prior disability earnings. After evaluation of Plaintiff's disability under “any occupation” criteria, Mr. Groch's benefits were terminated by Dearborn under the “your occupation” criteria.

Plaintiff's Pre-Disability Occupation

5. Mr. Groch was employed as a Graphic Artist for 20th Century Fox for over 20 years. At the time of his disability, his monthly earnings were \$12,335. As a Graphic Artist, Mr. Groch was required to sit for extended periods of time and perform significant keyboarding and computer tasks. The occupation also required critical thinking, decision making and high levels of concentration. Because of the repetitive computer functions essential to perform his job, Mr. Groch eventually developed right shoulder impingement and [cervical radiculopathy](#). He saw an orthopedic surgeon, Dr. Maxwell Park, in early 2015 who performed an MRI of his right shoulder and advised Mr. Groch to undergo shoulder impingement surgery.

B. Plaintiff's Disability Claim

*2 6. The problems with plaintiff's spine significantly pre-date his disability claim. The medical records within

the Administrative Record show that in 1990, Mr. Groch had a series of unsuccessful [lumbar epidural injections](#) before lumbar surgery. In 2012, Mr. Groch reported having additional [epidural injections](#) for his low back which helped, but then became inflamed again. Dr. Alex Ling Lin, a physician specializing in Physical Medicine and Rehabilitation, gave Mr. Groch a trigger point injection over L5/S1 with [lidocaine](#) in October 2012. He began physical therapy in early 2013. He had another [lumbar epidural injection](#) in October 2013. In July 2014, he contacted his doctor because his back went out again and asked for another cortisone shot. On July 30, 2014, he had a Block Procedure.

7. In addition to his lumbar problems, Mr. Groch developed impingement and [radiculopathy](#) in his right shoulder due to repetitive computer use. Mr. Groch stopped working on March 30, 2015. He had right shoulder impingement surgery on April 28, 2015. In addition to his shoulder pain, he also had cervical pain with [radiculopathy](#) which had reached the point where he could no longer sit for long periods of time and use the computer. He was prescribed pain and nerve medications that made it impossible for him to think and concentrate long enough to do his job.

8. Mr. Groch filed a claim for long term disability which Dearborn approved effective June 27, 2015, at the Plan maximum of \$5,000 per month. According to Dearborn's August 31, 2015, letter, the approval was based on an assessment dated August 27, 2015, which found impairment from “the diagnosis of [repetitive motion injury](#) ... [cervical radiculopathy](#) [and] right shoulder impingement.” Dearborn determined the date of Plaintiff's disability was April 28, 2015. Plaintiff was under the age of 65 on the date of his disability and therefore entitled to a maximum five years of long term disability benefits under the Plan.

9. During the Summer months of 2015, Mr. Groch continued to treat with his Kaiser physicians. His doctors changed his medications on several different occasions. It was noted that Mr. Groch could not tolerate [gabapentin](#) due to the cognitive side effects of the drug. He had epidural steroid injections and began another round of physical therapy. He developed a weakness in his right leg which caused foot drop.

10. Between August and October 2015, Mr. Groch continued to aggressively treat with the Kaiser physicians. His testing was confirmed to have damaged a nerve root, causing the foot drop. Mr. Groch underwent a [nerve conduction study](#) in October 2015, which also confirmed [lumbar radiculopathy](#).

He was prescribed [Nortriptyline](#) for his nerve pain. Dr. Lin referred Mr. Groch to pain management and he had a neurosurgical consult on November 19, 2015. Another MRI was performed on December 10, 2015, which showed continued progression of his [lumbar degenerative disc disease](#).

11. During the course of his treatment, Mr. Groch's physicians prescribed [Nortriptyline](#), [Cymbalta](#), [Gabapentin/Neurontin](#), [Tizanidine](#), and [Hydrocodone](#); all in an effort to control his pain. The Record shows that these medications caused side-effects of drowsiness, tremors, brain fog, inability to concentrate and memory loss.

12. The side effects of the medications were documented in the contemporaneous medical records contained within the Administrative Record.

C. Dearborn Continued to Approve Plaintiff's Disability Claim

13. While paying benefits, Dearborn had the file reviewed on numerous occasions. Each time, during the "own occupation" period, it continued to approve Plaintiff's claim. Beginning in August 2015, Dearborn had a clinical assessment performed which asked: "Do the medical records support functional loss for the diagnosis of [repetitive motion injury](#) and/or [cervical radiculopathy](#), right shoulder impingement?" The response was "Yes, for [right] shoulder ... surgery...." The clinician also indicated that if Mr. Groch had ongoing chronic complaints after September 2015, she recommended "teaming" due to "claim particulars and elements of self reported symptoms...." (*Id.*)

*3 14. In November 2015, Dearborn requested updated medical records and on December 4, 2015, performed another assessment including review of the new records. The records included testing in the form of an EMG, Thoracic MRI and Cervical MRI. Dearborn noted that "EMG was positive for left L5 acute denervation." It further noted "[he] may have [arachnoiditis](#) due to epidural ... and will have repeat MRI." Finally, the records indicated Mr. Groch was seen for left foot drop. (*Id.*)

15. On February 9, 2016, Dearborn followed up on medical records for Mr. Groch's MRIs and CTs. Based on its review, Dearborn continued to support approval of the claim noting "a Work Status Report from Kaiser: diagnosis include: [lumbar disc degeneration](#), [lumbar radiculopathy](#) and [prostate cancer](#)"

and states he would need to be off work through August 2, 2016, and that Dearborn would follow up in four months. (*Id.*)

16. On March 2, 2016, Dearborn again reviewed and continued to approve the claim based on Mr. Groch's treatment for "acute/chronic low back pain and treatment of [prostate cancer](#)." On March 10, 2016, it was noted Mr. Groch would have [surgery for prostate cancer](#) and Dearborn would follow up in another four months. On March 24, 2016, Dearborn continued to support the claim based on updated medical records from Kaiser Permanente and Dr. Lin which noted "3/23/16: [Intervertebral Disc Degeneration](#) of the lumber region, [Radiculopathy](#) of the lumber region and [malignant neoplasm of prostate](#). [Mr. Groch] underwent a laparoscopic [radical prostatectomy](#) on 3/17/16. Meds include: Hydrocodone-Acetaminophen, [Nortriptyline](#), [Atenolol](#), [Atorvastatin](#), Topical [Clonidine](#), [Methimazole](#), [Omeprazole](#) and [Methimazole](#)."

17. The next assessment was performed on July 19, 2016, where Dearborn continued to approve the claim based on a work status report from Plaintiff's Physical Medicine and Rehabilitation Specialist, Dr. Lin. In this Report, Dr. Lin stated that Mr. Groch would be out of work through January 5, 2017. Dr. Lin again certified disability based on Mr. Groch's treatment for acute/chronic low back pain and [prostate cancer](#).

18. On or about August 3, 2016, Dearborn, received additional medical information from the office of Plaintiff's Pain Management Specialist, Dr. Shi, indicating he reviewed an updated [MRI of the lumbar spine](#), which showed multi-level [lumbar degenerative disc disease](#) and that Dr. Shi suspected additional bulging disc with impingement of the nerve root in the lumbar region. Dr. Shi's assessment stated: "[lumbar disc degeneration](#), [peripheral neuropathy](#), [myofascial pain syndrome](#) and history of [prostate cancer](#). [Norco](#) was increased and [Mr. Groch was] started on [Tizanidine](#)." (*Id.*) "[Attending Physician Statement] from ... Dr. Lin notes [intervertebral disc degeneration](#), lumbar region, other [cervical disc degeneration](#), [sic] [polyneuropathy](#)." (*Id.*) His estimated return to work date was January 6, 2017. (*Id.*) Based on these medical records, Dearborn continued to support Mr. Groch was unable to perform his job.

19. On December 12, 2016, Dearborn once again continued to approve the claim on the basis of "treatment for acute/chronic low back pain and treatment of [prostate cancer](#)."

D. In February 2017, Dearborn Conducted Another Review. As a Result, Dearborn Advised Plaintiff That His Benefits Were Approved for the Remainder of the “Own Occupation” Period.

20. As of May 2016, Mr. Groch asked Dr. Lin, a Physical Medicine Specialist, if he should continue to “periodically” check in with Dr. Lin since he had switched treaters, to the Pain Management Specialist, Dr. Shi. Dr. Lin advised him to continue treating with Dr. Shi as Dr. Lin's treatment had “not been effective.” Thereafter, in December 2016, without notifying Mr. Groch, Dearborn faxed an APS directly to Kaiser and asked that it be completed by either Dr. Lin or Dr. Shi. Dr. Lin completed the form, but reported that he was unable to assess disability because he had not treated Mr. Groch since February 2016.

*4 21. During the claim process, Dearborn did not give the Lamb/Lin APS any probative value (which possibly explains why it was not mentioned in the termination decision). On January 13, 2017, Mr. Groch advised Dearborn that it was unfair for Dr. Lin to opine on his disability when Dr. Lin had not treated Mr. Groch for one year. In response, Dearborn advised Mr. Groch to have a physician from the Kaiser Pain Management Department provide a list of restrictions and limitations.

22. On February 15, 2017, another clinical review was conducted by Dearborn Nurse Margie Thompson RN-BC, BSN, CCM, who reviewed Dr. Zoghi's APS Statement and found that it was consistent with the medical records. Nurse Thompson also recommended continued disability based on Mr. Groch's lumbar back pain.

23. Subsequent to Nurse Thompson's review, the claim representative advised Mr. Groch that his claim had been approved through the “own occupation” period:

2/17/17 - CE [claims examiner] rtpc [returned telephone call] to EE @ 2:57pm. CE reached EE's VM 3:01:31 PM and left message advising claim has been approved for next few months. CE advised a benefit was released a couple of days ago. CE advised she would plan to touch base with EE next week for a quick update.

This message was repeated later the same day. On February 20, 2017, Mr. Groch was advised that the “claim had been reviewed by our clinical department and is approved to June.”

24. The “teaming” meeting (recommended in previous claim communications), was then conducted on March 1, 2017. It was attended by the Claims Examiner, Team Leader, Clinical Case Manager and the Vocational Representative. The claim notes documenting this meeting state that it was recommended that the claim be sent to “Dr. V” for comment and reasonable restrictions. It was noted that the gainful rate, which is relevant in an “any occupation” determination was \$28.85 per hour. (*Id.*) On the same day, the claim was referred for a vocational referral.

E. The File Was Reviewed by Dearborn's In House Physician, Dr. Miguel Velazquez

26. Dearborn had the file reviewed by in house physician Dr. Miguel Velazquez, Board Certified in Family Medicine & Neuromusculoskeletal Medicine. Dr. Velazquez agreed with the diagnoses provided by Mr. Groch's treating physicians, finding Mr. Groch had **cervical spondylosis** and **degenerative disc disease** with mild canal and foraminal stenosis. He also noted Mr. Groch's long-standing history of lumbar degenerative disease with previous surgery, and new lumbar symptoms with a recent development of foot drop. (*Id.*) Dr. Velazquez concluded that Mr. Groch could lift and carry up to 20 pounds occasionally and 10 pounds frequently, sit during an 8-hour day with short periods of rest and changing of positions with no prolonged standing or walking and frequently grasp and perform fine manipulation.

27. Based on Dr. Velazquez's findings, Dearborn orally notified Mr. Groch on March 9, 2017 that a physician concluded Mr. Groch could perform his job. However, on March 31, 2017, Dearborn told Mr. Groch that his claim had **not** been denied. Nevertheless, Dearborn did not pay any benefits to Mr. Groch during the time period of February 27, 2017 to June 27, 2017 (when it finally denied his claim).

F. Dearborn Conducted a Vocational Review for the “Change in Definition” Review. It Determined that There are No “Gainful Occupations” Suitable for Plaintiff.

28. In March 2017, a vocational review was performed by Dearborn's Sean Caron (a Vocational Rehabilitation Consultant and Certified Rehabilitation Counselor), which

contradicted not only Mr. Groch's treating physicians, but also that of Dearborn's own prior assessments. Mr. Caron concluded there were no gainful, alternative occupations suitable for Mr. Groch:

***5 Occupation Alternatives:** Based on the available information, no occupations can be identified at this time that would pay a gainful wage of \$28.85/hour. While Mr. Groch possesses skills that could transfer to other occupations, it is difficult to identify ones that would pay enough.

Conclusion: No occupations were identified. The primary reason for the lack of vocational options is due to his gainful wage of \$28.85/hour (emphasis added).

G. Dearborn Sent Mr. Groch for an IME and Retroactively Terminated Mr. Groch's Claim.

29. From March 17, 2017 to June 27, 2017, Dearborn did not notify Mr. Groch that it was terminating his benefits. Dearborn did not provide Plaintiff with appeal rights in connection with its apparent “adverse benefit determination.” Nor, did it pay the benefits to which Mr. Groch was entitled during this time period. Plaintiff wrote to Dearborn on multiple occasions, protesting this unfair treatment. Dearborn did not respond to Mr. Groch's entreaties.

30. Rather, on April 25, 2017, Dearborn arranged for an “independent” medical examination with Dr. Magued Fadly. Mr. Groch attended the exam and Dr. Fadly wrote his initial report the same day. Dr. Fadly's assessment, after a brief 26 minutes examination, was that Mr. Groch has [peripheral neuropathy](#). However, in his opinion, Mr. Groch's [peripheral neuropathy](#) would not limit his ability in either gross or fine manipulation. Dr. Fadly's initial report stated that Mr. Groch “presented” with mental restrictions from taking [Neurontin](#) but that this was outside his scope of practice and he would defer to psychiatry to assess objectively. In completing the Physical Abilities Form, Dr. Fadly stated that Mr. Groch's nerve medication ([Neurontin](#)) would impair Mr. Groch's “ability to work.”

31. Finally, Dr. Fadly's report stated that there was “No [nerve root compression](#).” However, the medical records show the October 23, 2015 [nerve conduction study](#) found abnormal findings: “These abnormal electrodiagnostic studies provide evidence for a left L5 [radiculopathy](#) with acute denervation features” (October 23, 2015 EMG test).

32. According to the un rebutted Statement of Mr. Groch, Dr. Fadly only examined him for 26 minutes, did not touch his lower extremities and according to his office staff, did not have Mr. Groch's medical records. Mr. Groch's comments were forwarded to Dr. Fadly for comment. Dr. Fadly responded by stating that Mr. Groch might have felt “underexamined” because of the less time-consuming nature of his forensic exam. Dr. Fadly stated that his front desk may have been unaware of his records review and should not have been discussing this subject with Mr. Groch. Dr. Fadly did not address the issue of not examining Mr. Groch's lumbar region and lower extremities.

33. Dearborn noted that Dr. Fadly's original Report documented impairing medication side effects. It decided to “request additional details” to “clarify” Dr. Fadly's findings.

34. On or about June 21, 2017, Dearborn received a faxed revision of the May 8, 2017 IME Report. Despite his previous statement that he was not qualified to opine on the [mental impairment](#) from [Neurontin](#), Dr. Fadly wrote “[i]f there are mental restrictions secondary to [Neurontin](#) use, these are subclinical and irrelevant in an occupational setting.”

***6** 35. On June 27, 2017, Dearborn finally notified Plaintiff that his benefits were terminated, effective February 27, 2017. The letter stated that after a full review of the claim it had found Mr. Groch was able to perform the material duties of his own occupation as a Graphic Artist as of February 27, 2017. The letter contained appeal rights.

36. Dearborn stated that the decision was based on the assessment of Dr. Velazquez and the examination by Dr. Fadly. In addressing the side effects from [Neurontin](#), Dearborn found “there is no documentation of these reported mental restrictions that would support your inability to perform your own occupation.”

37. Seven months later, Dearborn denied Plaintiff's Waiver of Premium claim for his life insurance. In this decision, Dearborn acknowledged that Plaintiff could not perform his own occupation.

H. Mr. Groch Appealed and Submitted Evidence Establishing His Disability

39. Mr. Groch retained counsel and through his attorneys appealed the termination of his benefits. The evidence submitted in Mr. Groch's appeal included, but was not limited to the following:

A. Functional Capacity Examination

On January 3, 2018, Mr. Groch participated in a full-day functional capacity evaluation (“FCE”) consisting of both a morning and afternoon sessions to better reflect the rigors of a workday. The FCE examiner found that Mr. Groch gave maximum effort and could only sit, stand and walk on an occasional basis, i.e., less than 4 hours in a day.

B. Vocational Analysis

Mr. Groch also provided Dearborn with a comprehensive Vocational Analysis by Senior Vocational Consultant Linda Hayes, M.Ed., CRC, ARP dated March 8, 2018. Ms. Hayes’ report was based on consideration of all the evidence. Among other things, Ms. Hayes found that (1) Dearborn’s vocational analysis did not address how long Mr. Groch could sit in an eight-hour day, but the FCE clearly measured a sitting tolerance of 45 minutes [up to a total of 4 hours per day]; (2) A graphic artist is required to use their hands on a constant basis for computer usage and design. However, the treating physician provided fine manipulation restrictions of “never”; (3) Mr. Groch is 62 years old. He has not worked for 3 years. He has not updated his computer or CAD skills in 3 years. Employers spend a significant amount of money training new employees. Mr. Groch would likely not be employable as he is very close to retirement age and employers desire longevity in their employees. Additionally, his required restrictions and required “breaks” would decrease and slow down his productivity and decrease his desirability as a suitable candidate for a position; (4) Mr. Groch has already been deemed disabled from his own occupation as a graphic artist. His condition has not improved in 3 years, if anything, it has deteriorated. Therefore, it is unrealistic to expect him to be able to perform his own occupation and, most importantly, (5) Mr. Groch takes pain medication – Nerontin [sic] – that interferes with his concentration. His occupation requires a very high level of cognitive functioning and focus. As a result of his medication, errors would likely ensure that would be very detrimental to his employers’ organization.

Ms. Hayes concluded: “For all of these reasons, it is the opinion of this consultant that Mr. Groch is unemployable in his own or any occupation at this time and is not likely to return to gainful employment.” (*Id.*).

I. Dearborn Upheld Its Decision on Appeal

*7 40. On June 7, 2018, Dearborn upheld its denial of Mr. Groch’s claim based on a physician review performed by Dr. Philip Marion retained by the Defendant. Dr. Marion is a well-known reviewer often retained by the insurance industry. The Record includes a 2006 deposition of Dr. Marion. Therein, he testified that as of 2005, he earned \$60,000 to \$70,000 annually from one medical reviewing vendor alone (Elite/NMR). As of that date, he had been providing reviews for Elite/NMR for 3 or 4 years. As of the date of his deposition, Dr. Marion also performed disability medical reviews for third party vendors MCMC, IPRO and Reed Review. He conducted approximately 100 disability reviews a year for one company, Elite. When pressed, Dr. Marion could not recall ever providing a forensic medical review for an individual disability claimant. Plaintiff’s counsel has stated that she has identified close to 50 reported cases where Dr. Marion has provided disability assessments for insurance carriers.

41. Dr. Marion’s Report further stated that Mr. Groch’s conditions from *April 28, 2015* were of “uncertain etiology” and well out of proportion to any specific findings. The Court gives little weight to this portion of Dr. Marion’s Report. First, Dearborn had approved Mr. Groch’s claim from March 2015 through February 2017 based on its own review of the medical records and findings by its clinical staff. It was consistently determined that Mr. Groch could not perform his job. Second, Dr. Marion did not address how or why he believed Mr. Groch’s pain could be out of proportion to any specific findings if he was undergoing surgery for this very pain. Third, during this time period, Mr. Groch was also diagnosed with and had [surgery for prostate cancer](#). Yet, Dr. Marion did not find him to be disabled during the surgical period and the recovery. Finally, Dr. Marion completely disregarded the FCE as an “invalid assessment of Mr. Groch’s ability to return to work.”

42. Since Dr. Marion had disputed the FCE as a valid assessment, Plaintiff provided a rebuttal by the FCE administrator, Dr. Sebastian Jurado (Doctor of Physical Therapy). Thus, while Dr. Marion stated that the capacity measurements were based primarily on self reporting, Dr. Jurado pointed out that Mr. Groch was not aware that he was being tested on his postural tolerance through the testing because he was distracted by doing other work-related tasks or by talking about his history. Dr. Jurado noted that he could not comment on how he ambulated around his physicians or the physicians’ analysis of his gait, but he stated the measuring equipment he used for the FCE’s had been proved

to be more consistent than manual testing. Dr. Jurado's comments were sent to Dr. Marion for consideration.

43. On May 22, 2018, Dearborn had a new Own Occupational Assessment performed by Nancy Gilpatrick. Ms. Gilpatrick did not address the Occupational Analysis performed by Linda Hayes submitted by Mr. Groch in support of the appeal. Like Dr. Marion, she concluded Mr. Groch could perform his own occupation commencing as of June 3, 2015—a time period in which Dearborn had already found that Mr. Groch could not perform his own occupation.

II. CONCLUSIONS OF LAW

K. The Standard of Review Is De Novo

46. The parties agree the Court will review Dearborn's termination of Plaintiff's LTD claim *de novo*. DKT. #19, p. 2. In a *de novo* review, the Court undertakes an independent and thorough inspection of the administrator's decision without

affording any deference at all to the plan administrator's findings. [Silver v. Executive Car Leasing Long-Term Disability Plan](#), 466 F.3d 727, 728 (9th Cir. 2006). Regardless of the standard of review, “[w]hat the district court is doing in an ERISA benefits denial case is making something akin to a credibility determination about the insurance company's or plan administrator's reason for denying coverage under a particular plan and a particular set of medical and other records.” [Abatie v. Alta Health & Life Ins. Co.](#), 458 F.3d 955, 969 (9th Cir. 2006).

L. Plaintiff Has Proved His Continued Entitlement to LTD Benefits.

*8 47. In weighing the credibility of the evidence, the Court finds that plaintiff has met his burden of proof of proving his continued disability with credible, persuasive evidence. In the year up to the termination of his benefits, the medical records show the following symptoms and treatments.

Date	Physician	Symptoms Reported
1/11/16	Dr. Shi (Pain Management)	Left sided foot drop, peripheral neuropathy.
1/18/16	Dr. Shi	Adverse reaction to Nortriptyline and Cymbalta together.
1/25/16	Nurse Call	Headaches – noted as Nortriptyline combined with Cymbalta.
2/4/16	Dr. Petrovic	Severe jolts of back pain starting August 2015. Left leg numbness followed by milder right leg numbness (5645-5648).
2/5/16	Dr. Lin (Physical Medicine & Rehabilitation)	Acute chronic low back pain.
3/7/16	Dr. Shi	Neuropathic pain that involves his foot, it tends to occur when he is standing.
4/18/16	Dr. Shi	Bilateral LE pain from peripheral neuropathy. Constant dull pain with intermittent exacerbation.
5/19/16	Dr. Shi	Transferred from Dr. Lin's case to Dr. Shi for ongoing pain management.
6/13/16	Dr. Shi	Prescribed Norco.

6/20/16	Dr. Shi	Constant dull pain with intermittent exacerbation. Pain not better with Cymbalta. Taper off Cymbalta and re-start Nortriptyline.
8/1/16	Dr. Seyed-Kazemi (Pain Management)	Chronic low back, neck and LE pain due to neuropathy. Trial of Gabapentin for 6 weeks.
9/3/16	Dr. Seyed-Kazemi	Better with addition of gabapentin but still having bilateral foot pain; he reports no side effects with gabapentin so will start titrating up to 1800mg per day and continue Norco pm.
9/19/16	Dr. Seyed-Kazemi	Increased Gabapentin by one pill at night made him "woosie" and sleep in the afternoon everyday.
10/11/16	Dr. Seyed-Kazemi	Back went out from attempted prolonged sitting for 2 hrs. Nerve pain from additional Gabapentin, not yet at full dose. Taking 2 at night, 2 during day and 1 in am right now, in 1-2 weeks will add the 2nd one in the am.
11/7/16	Dr. Seyed-Kazemi	leg pain is better with higher dose of gabapentin but more low back pain over the past few weeks. Continue Norco, tizanidine and gabapentin (1800 mg per day).
11/7/16	Dr. Shi	Exacerbation of axial low back pain with exercise. pain worsens with prolonged car ride. The pain is bilateral lower lumbar region with no clear radiating features. Will try a bilateral lower lumbar MBB (medial branch block) and possibly RFA (radiofrequency ablation) in the future.
11/9/16	Dr. Shi	Lumbar Facet Medial Branch Blocks (L3, L4, L5).
11/22/16	Physical Therapy Assessment	Lumbar spine disc derangement, lumbar spine radiculopathy, back pain Key Impairment(s): [range of motion], strength, pain, mobility and functional mobility of transfers and/or gait.
11/28/16	Dr. Shi	Did not benefit from lumbar MBB and only received partial pain relief. Plan to perform bilateral lower lumbar

intra-articular facet joint injection after 01/2017.

11/28/16	Dr. Seyed-Kazemi	Injection from Dr. Shi did not work, request to renew Hydrocodone 10 mg Acetaminophen 325 mg. Report experiencing shakes and tremors, which Dr Shi thought was from the Gabapentin. Also still having memory issues.
1/5/17	Dr. Seyed-Kazemi	Didn't do well on nerve block. Received a facet joint injection yesterday; Start reducing norco to 7.5mg bid for the next month and re-evaluate (patient would like to get off opiates and see if he can manage his pain w/o and using cannabis); I will also reduce gabapentin to 900mg per day due to side effects (tremor, confusion, etc.).
2/6/17	Dr. Park (covering for Kazemi)	Taking gabapentin to 1200 mg daily. No side effects at lower dose of gabapentin 1200 mg daily. Stopped norco and started THC therapy. Patient willing to continue with THC therapy without opioids.



*9 48. The evidence summarized above is consistent with the history and treatment for Mr. Groch's medical condition. In addition to numerous MRIs, X-rays, and physical examinations which provided objective evidence of his conditions, the EMG [nerve conduction study](#) performed on October 23, 2015, confirmed [lumbar radiculopathy](#) with *acute denervation* features. Mr. Groch was treated with the nerve pain medication [Neurontin](#), which, even Dearborn's medical examiner, Dr. Fadly, admitted caused him to "present" with [cognitive deficits](#). Dr. Fadly also stated that said medication would impair Mr. Groch's ability to work.

49. The medication induced impairment was well documented within the medical records. Dearborn terminated benefits as of February 2017. During the relevant time period, Mr. Groch's physicians documented his medication induced impairment on the following occasions:

- March 2016: [Neurontin \(Gabapentin\)](#) caused "fogginess"
- September 2016: Gabapentin made Mr. Groch feel "woosie"
- November 2016: [Gabapentin](#) caused tremors and memory issues

- January 2017: [Neurontin](#) caused "tremors and confusion"
- February 2017: Nerve pain medication interferes with cognition and caused "shaking"

50. Moreover, the ever-changing medication regimen, together with the continued unsuccessful injection therapy shows that the pain caused by Mr. Groch's condition was not under control. Where there are frequent changes in medication and treatment, it is evidence that the condition is not under control. *Yancy v. United of Omaha Life Ins. Co.*, 2015 WL 9311729, *21 (C.D. Cal. Dec. 18, 2015).

51. The above symptoms and treatment are consistent with Mr. Groch's reports of pain and medication induced impairment. There was no reason for Dearborn to discount Mr. Groch's credibility and as such, it is error for it to dismiss his subjective reports of impairment.  *Demer v. IBM Corp. LTD Plan*, 835 F.3d 893, 905-06 (9th Cir. 2016) (citing  *Montour v. Hartford*, 588 F.3d 623 (9th Cir. 2009)).

52. The evidence submitted by Plaintiff on appeal also proved his disability. On appeal, Mr. Groch provided an FCE, proving

that he could only sit for 4 hours a day. The Sixth Circuit held “[a]n FCE is generally a ‘reliable and objective method of gauging the extent one can complete work-related tasks.’” *Caesar v. Hartford Life & Acc. Ins. Co.*, 464 Fed. Appx. 431, 435 (6th Cir. 2012). See also *Holmstrom v. Metro. Life Ins. Co.*, 615 F.3d 758, 764 (7th Cir. 2010) (observing that an FCE can, depending on the circumstances, provide an objective measurement of plaintiff’s physical limitations). Dearborn’s decision to ignore the FCE as objective evidence supporting Mr. Groch’s claim shows it failed to give his claim a full and fair review.

53. The Court also finds that the vocational review conducted by Linda Hayes to be more credible than the two vocational reviews conducted by Dearborn’s reviewers, Sean Caron and Nancy Gilpatrick. Unlike the Dearborn reviewers, Ms. Hayes considered the evidence contained in the Record as a whole. In *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008), the Supreme Court made it very clear that an insurer acts in an arbitrary manner when it engages in a “selective review” of the evidence. The Court explained that as fiduciaries, ERISA insurers have “higher than marketplace” quality standards. ERISA imposes a special standard of care upon insurers, namely that the insurer must discharge its duties “solely in the interest of participants and beneficiaries.” Thus, in administering claims, an insurer is required to give a full and fair review of the claim. This must include consideration of the administrative record *as a whole*. Dearborn did not consider the administrative records as a whole, rather, it selectively chose only the information that supported termination of the claim. Both of the Dearborn vocational reviews were conducted *only* on the basis of the impairments identified by Dearborn’s physicians. Ms. Gilpatrick stated that her review was based only on the physical requirements of Plaintiff’s occupation. Therefore, the cognitive requirements outlined in the job description were not appropriately evaluated.

M. Dearborn's Evidence Is Not Credible.

*10 54. The Court finds that Dearborn’s termination decision was the product of a selective review of the medical evidence. For example, Dearborn found Plaintiff to be continually disabled in February 2017, based on Dr. Zaghi’s APS Statement and the medical records. Based on its own “clinical review,” Dearborn advised Plaintiff that he would continue to receive disability benefits until June 2017. Thereafter, Dearborn just stopped paying benefits.

55. Dearborn implies that it never considered Dr. Zaghi’s APS Statement because Dr. Marion “found” the Statement in the file. And, while Dr. Zaghi stated that he examined Mr. Groch in February 2017, Dearborn now states that the APS Statement is somehow defective because it was not based on a “clinical assessment.” This is not true and certainly was not an issue when Dearborn initially accepted Dr. Zaghi’s Statement in February 2017, as probative. In fact, Dearborn’s clinical assessment in February 2017, found Dr. Zaghi’s APS Statement to be consistent with the medical records. Said review also found that Mr. Groch’s lumbar back condition had worsened in the last few years and that he had increased pain with standing, sitting and walking. Dearborn’s Clinical Review stated:

The OVN [office visit notes] documented above indicate there is EMG testing indicting an L4-5 [radiculopathy](#). The clmt is noted to have a 40 year HX of back pain worsening in the last few years. The clmt has a HX of lumbar [laminectomy](#) in 1990. The clmt is noted to have moderate to severe [spinal stenosis](#) at L4/5. On 01/14/17 the clmt was given intra-articular facet injection bilateral L3/L4, L4/L5, L5/S1 for the [degenerative disc disease](#) noted on the 12/09/16 lumbar MRI. The clmt indicates that he has increased pain with sitting standing and walking. The APS signed by Dr. Zaghi, pain management, is consistent with the medical records. It is unclear if he clmt will have significant improvement with facet injections. The clmt is on anti-inflammatory medications, [Nortriptyline](#), muscle relaxants and narcotic pain medications to management pain.... (Emphasis added).

56. Based on this review, Mr. Groch was advised that his benefits would continue throughout the “your occupation” period until the change in definition to “any occupation” in June 2017. However, once Dearborn learned that there

were no gainful occupations, Mr. Groch's benefits were retroactively terminated under the “your occupation” criteria.

57. Dearborn's recently manufactured reasons for rejecting Dr. Zaghi's APS are nothing more than a selective review and post litigation rationale. In [Metropolitan Life Ins. Co. v. Glenn](#), 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299, the Supreme Court stressed that an administrator cannot cherry pick evidence that supports a denial while ignoring other reports that suggested a contrary conclusion. [Id.](#) at 118, 128 S.Ct. 2343; see also [Black & Decker Disability Plan v. Nord](#), 538 U.S. 822, 833, 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003) (Administrator cannot ignore credible evidence offered by claimant). That evidence includes, but is not limited to Dr. Zaghi's APS that Mr. Groch continued to be unable to work due to his pain and weakness; the Functional Capacity Evaluation; Ms. Hayes' vocational analysis; along with the MRIs, an EMG, a multitude of treating physician medical records; and the documented medication side effects, all of which support Mr. Groch's continuing disability.

58. Dearborn repeatedly emphasizes Dr. Lin's January 2017, APS Statement as supporting its termination decision. However, at the time Dearborn conducted its eligibility review, in January to February 2017, Dearborn did not believe that Dr. Lin's decision was entitled to any weight. In fact, Dearborn rejected Dr. Lin's statement as probative of Mr. Groch's disability. At the time, Dearborn knew that Dr. Lin had not treated Mr. Groch for approximately one year. Instead, it requested and received an opinion from Mr. Groch's current treaters and upon receipt of Dr. Zaghi's APS Statement, Dearborn approved the claim for the remainder of the “your occupation” period.

*11 59. When weighing the evidence, the Court must evaluate the credibility of the evidence relied upon by the parties. [Abatie v. Alta Health & Life Ins. Co.](#), 458 F.3d 955, 967 (9th Cir. 2006). In this instance, the evidence relied upon by Dearborn, the opinions of Drs. Velazquez, Fadly, and Marion did not address the actual requirements of Mr. Groch's occupation. The credibility of evidence, requested and received after benefits are discontinued is questionable, at best. See [Kosiba v. Merck](#), 384 F.3d 58 (3d Cir. 2004) (In a *fibromyalgia* case, the court expressed concerns that a post-denial demand for an IME was just a fishing expedition to support a denial); [Sidou v. UnumProvident Corp.](#), 245 F. Supp. 2d 207, 216 (D. Maine 2003) (It was apparent to

the court that a request for an examination after the appeal deadline was to supplement a final decision that had already been made.).

60. Inconsistent reasons for the denial are suggestive of an arbitrary and capricious claim decision. [Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc.](#), 125 F.3d 794, 799 (9th Cir. 1997). Dearborn's treatment of the same evidence is reminiscent of the “moving target” claims analysis criticized by the Seventh Circuit in [Holmstrom v. MetLife](#), 615 F.3d 758, 776 (7th Cir. 2010).


61. The Court also finds that Dearborn's medical evidence was not credible. Dearborn had three (3) physicians render a decision on plaintiff's disability: (1) Dr. Velazquez, an in house reviewer, (2) Dr. Fadly, a medical examiner and (3) Dr. Marion, who was retained by a medical vendor, University Disability Consortium.

62. To fully appreciate Dr. Velazquez's opinion, one must remember the context in which it was rendered—after Mr. Groch had been approved for benefits through the remainder of the “your occupation” period. Dearborn was conducting its “change in definition” analysis and requested that Dr. Velazquez provide general restrictions and limitations. Dr. Velazquez was not asked whether Mr. Groch could perform the physical and/or cognitive requirements of his occupation.

63. Similarly, Dr. Velazquez never gave an opinion on whether Mr. Groch could perform his own occupation, including the cognitive requirements of “critical thinking, decision making and high levels of concentration.” Moreover, it does not appear that Dr. Velazquez understood the significance of Dr. Zaghi's February 2017 APS. Dr. Velazquez's review acknowledged information showing that medication “interfered” with [something];” however, he gave no opinion on that issue. This is further reason to discount the opinion; it was not fully informed. As previously stated, an opinion which does not consider the cognitive demands of an occupation is defective and should not support a claim decision.

64. Dr. Fadly's opinion is highly suspect. His initial observation included a specific assessment, based upon a “presentation” that Mr. Groch's *Neurontin* would affect his “ability to work.” Dr. Fadly's initial assessment characterized the consequences of these side effects as “restrictions.” Dr. Fadly then revised his report regarding Mr. Groch's

medication. In the revised Report, Dr. Fadly repeated his statement that Mr. Groch “presented” with mental restrictions. However, now he attributed the “presentation” to a description by Mr. Groch that was allegedly too generic to assess restrictions. However, at the same time, Dr. Fadly stated that the restrictions might include mood or behavior changes, depression, anxiety, memory loss, dizziness and drowsiness. Without any indication why he changed his opinion, Dr. Fadly stated that the symptoms were too generic to assess, were “sub clinical” and “irrelevant” in an occupational setting. The resulting change in opinion is entitled to no weight.

*12 65. Dr. Marion's Paper Review was also a selective review. Dr. Marion only performed a paper review of the file and his report reflects that he too disregarded the significance of Plaintiff's reported pain. For example, from December 2016 to December 2017 Plaintiff endured injections for his pain on 5 occasions. His physicians increased his medication, which had to be reduced on multiple occasions due to sedating side effects. He was treated by a team of Pain Management Specialists at Kaiser. Painful injections and medication changes are evidence of disability, and are indicative of the severity of Plaintiff's condition.  [Diaz v. Prudential Ins. Co. of America](#), 499 F.3d 640, 647 (7th Cir. 2007).

66. Yet, Dr. Marion did not comment on these treatments. He referenced certain “normal” findings in the Kaiser medical records, without mentioning the abnormal findings. For example, Dr. Marion never mentioned that upon examination, Mr. Groch's physicians repeatedly noted that Mr. Groch had difficulty rising from a seated position and that he ambulated with assistance. This assessment was included in the medical notes of April 18, 2016, June 20, 2016 and November 7, 2016 and was recognized by Nurse Thompson and Dr. Velazquez. Dr. Marion's review also failed to mention the following abnormal findings or indicia of pain:

6/20/16: (Dr. Shi) Symptoms show positive for muscle pain and weakness. Mr. Groch was again able to raise from seated position with difficulty and his gait continued to be antalgic, ambulating with assistance.

8/1/16: (Dr. Kazemi) As a result of chronic pain, he will again try [gabapentin \(Neurontin\)](#) which he was unable to tolerate in the past

9/13/16: (Kazemi) Increased gabapentin

9/19/16: Increased gabapentin made him “woosie”

11/7/16: After reports of increased low back pain in October 2016, Mr. Groch consults Dr. Shi on November 7, 2016. The physical exam again shows that Mr. Groch was able to raise from a seated position with difficulty and that his gait was antalgic and that he ambulated with assistance. His symptoms were positive for muscle pain and weakness. [Sensory testing](#) showed loss in the lower extremities. He was advised to have injections, which he underwent on November 9, 2016

11/28/2016: Experienced shakes and tremors from the [Gabapentin](#)



1/4/17: Lumbar injections


5/3/17: Lumbar injections

Dr. Marion's review did not mention the above adverse symptoms and medical treatments. Dr. Marion's review was selective and clearly ignored Plaintiff's reports of pain and his physicians' unsuccessful attempts to treat the same. His opinion is entitled to little weight.

N. Remedy.

69. This case is unusual because Dearborn stopped paying Mr. Groch benefits based on “own occupation” criteria, after evaluating him under “any occupation” criteria. Plaintiff argues that in this instance, the appropriate remedy is for payment of benefits, from February 2017 up to the date of Judgment. This would include payment of benefits during the “any occupation” phase of the Plan, which commenced in June 2017.

70. Defendant has argued that if benefits are awarded, they should be limited to the remainder of the “your occupation” period of February 2017 to June 2017. Defendant cites  [Lavino v. MetLife](#), 2010 WL 234817 (C.D. Cal. 2010) in support of its position. In  [Lavino](#), the Court only awarded benefits for the remainder of the “your occupation” period because the administrator had not had an opportunity to evaluate the claimant's disability under the more stringent “any occupation” criteria.

71. Defendant's suggested remedy is not appropriate in this case for two reasons. First, under Ninth Circuit precedent,  [Pannebecker v. Liberty Life Assur. Co. of Boston](#), 542 F.3d 1213, 1221 (9th Cir. 2008), the appropriate remedy in a

case where benefits have been awarded and terminated is that benefits should be awarded until the administrator properly applies the plan's provision. Notably, in [Pannebecker](#), as in this case, that period of time spans the date in which the definition for disability changed in the Policy. Second, unlike *Lavino*, Dearborn herein had an opportunity to and indeed did evaluate plaintiff's eligibility for benefits under "any occupation" criteria. See [Austin v. LINA](#), 2010 WL 1576718, *15 (C.D. Cal. 2010) (where administrator had opportunity to assess eligibility for benefits under "any occupation" criteria, it is appropriate for judgment award to include benefits during that period of time). In this case, Dearborn's vocational representative, Sean Caron, concluded that there were no "gainful" occupations suitable for Plaintiff. Therefore, there are no occupations which Plaintiff could perform. However, Plaintiff was entitled to a maximum of five years of long term disability benefits under the Plan starting from April 28, 2015—the date of his disability. Therefore, Plaintiff's benefits under the Plan would have terminated on April 28, 2020. Accordingly, Plaintiff is entitled to benefits from February 27, 2017 (the date Dearborn stopped paying his benefits) through April 28, 2020. See [Pannebecker](#), 542 F.3d at 1221 (benefits may "be reinstated if the claimant would have continued receiving benefits absent the administrator's

arbitrary and capricious conduct"); [id.](#) at 1221 n.6 (citing [Patterson v. Hughes Aircraft Co.](#), 11 F.3d 948 (9th Cir. 1993)).

* * *

*13 Any finding of fact which constitutes a conclusion of law is hereby adopted as a conclusion of law. Any conclusion of law which is determined to also be a finding of fact is so deemed.

III. CONCLUSION

For the foregoing reasons, the Court grants the [Fed. R. Civ. P. 52](#) Motion of Plaintiff Joel Groch and denies Defendant's Cross Motion for Judgment. Plaintiff is directed to prepare a Judgment and lodge the same with the Court within fourteen (14) days. Plaintiff shall have thirty days (30) after entry of Judgment to bring a Motion for an Award of attorneys' fees.

All Citations

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