UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV14-9803 PSG (PJWx)	Date	December 18, 2015
Title	Felanice L. Yancy v. United of Omaha Life Ins. Co.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order Finding for Plaintiff After Court Trial

This is an action for recovery of long-term disability benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The Court must determine whether Defendant United of Omaha Life Insurance Company ("Defendant") properly denied benefits to Plaintiff Felanice L. Yancy ("Plaintiff") on the basis that she was not totally disabled within the meaning of her ERISA-governed insurance plan. The Court held a bench trial on the administrative record on December 18, 2015. Having considered the arguments and evidence presented, the Court finds for Plaintiff. This constitutes the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

I. Background

Plaintiff brings this action against Defendant alleging wrongful denial of long-term disability benefits. Defendant issued a group long term disability policy ("the Policy" or "the Plan") to Plaintiff's former employer, AeroVironment. Plaintiff was a participant in the the Policy due to her employment with AVI as a software engineer. In the summer of 2012, Plaintiff began to suffer from migraines, body aches, weakness, fatigue, and memory loss, which were later attributed to migraines, major depression, fibromyalgia, and possible systemic lupus erythematosus ("SLE"). On August 1, 2012, Plaintiff consulted with a doctor who recommended a leave of absence. Plaintiff was then referred to a multi-disciplinary medical group where she received neurological, rheumatological and behavioral health treatment. After unsuccessfully attempting to alleviate her condition, Plaintiff filed a claim for long-term disability with Defendant in July, 2013. Her claim was denied. In March, 2014, Plaintiff submitted an appeal. Again, her claim was denied.

The decisional issues in this case center on: (1) whether the Plan documents delegate discretionary authority to make benefits determinations to Defendant, such that the abuse of

discretion standard of review applies; (2) whether a conflict of interest or procedural irregularities justify increased skepticism of Defendant's decision; (3) whether the Court may rely on evidence outside the Administrative Record; and (4) whether Defendant improperly denied Plaintiff long-term disability benefits. For the following reasons, the Court finds: (1) abuse of discretion is the appropriate standard of review in this case; (2) that review should include the rebuttal report which Plaintiff would have submitted in support of her appeal, had she been given the chance; (3) Defendant's procedural violation and conflict of interest justify an increased level of skepticism regarding its decision; and (4) Defendant improperly denied Plaintiff long-term disability benefits.

A. Procedural History

Plaintiff filed this action in December, 2014 seeking plan benefits, enforcement and clarification of rights, pre-judgment and post-judgment interest, and attorneys' fees and costs. *See* Dkt. # 1. Although Plaintiff initially brought suit against Defendant and AeroVironment, she dismissed AeroVironment under Federal Rule of Civil Procedure 41(a)(1) in February, 2015. *See* Dkt. # 16.

After the Court set a trial date, Plaintiff moved to augment the Administrative Record ("AR"). Dkt. # 27. During the appeals process, Defendant had required Plaintiff to undergo an independent medical examination with a neuropsychologist of its choosing, Dr. Charles Furst, Ph.D. ("Dr. Furst"). Plaintiff had requested that Defendant allow her own evaluating neuropsychologist, Dr. Steven Castellon, Ph.D. ("Dr. Castellon"), the opportunity to review and respond to Dr. Furst's report ("Furst report") before Defendant rendered its decision. Instead, Defendant did not provide Plaintiff with the Furst report until it had completed its appellate review and denied her claim for the second time. The Court found that under Ninth Circuit law, Defendant violated ERISA's procedural requirements by denying Plaintiff the opportunity to review the Furst report. *See* Dkt. # 32. To remedy the procedural irregularity, the Court held that Plaintiff could submit a rebuttal report, prepared by Dr. Castellon ("Castellon report"), to "recreate what the administrative record would have been had the procedure been correct." *Id.* (quoting *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 973 (9th Cir. 2006) (en banc)).

Shortly after the Court issued its ruling, Plaintiff moved for a *de novo* standard of review or, in the alternative, for remand to Defendant to reconsider Plaintiff's application in light of the augmented AR. *See* Dkt. # 36. Plaintiff argued that because the AR had been augmented with evidence that was never considered by Defendant during the administrative process, it would be impossible for the Court to grant any deference to the claim decision. *See id.*

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The Court noted that when reviewing an ERISA plan administrator's decision to deny benefits, "the *de novo* standard [of review] is appropriate unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Dkt. # 39 (citing *Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried Employees of Transf. GE Ops.*, 244 F.3d 1109, 1112 (9th Cir. 2001)). Where a plan grants the administrator such discretion, the district court reviewing the decision should apply an abuse of discretion standard unless the administrator engaged in a "wholesale and flagrant violation[] of the procedural requriements of ERISA" by altogether failing to exercise its discretion. *Id.* (citing *Abatie*, 458 F.3d at 971).

The Court found that here, the Plan unambiguously vested Defendant with broad discretionary authority to determine entitlement to benefits. *See* Dkt. # 39. While Defendant committed a procedural error by denying Plaintiff the opportunity to review the Furst report before denying her appeal, that error did not amount to a wholesale and flagrant violation. *Id.* Accordingly, the Court found that it would apply the abuse of discretion standard at trial. *See id.*

While the Court noted that it would not grant *de novo* review, it observed that the inclusion of Castellon report in the AR could "essentially convert the determination of whether [Defendant] abused its discretion into *de novo* review." *Id.* (citing *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 874 (9th Cir. 2008) ("If the parties wind up presenting significant new evidence in the district court, it may be impossible for the court to grant *any* deference to the decision of the claims administrator, as that decision will perforce have been made without taking into account the new evidence. As a practical matter, therefore, it may be unnecessary for the district court to determine the degree of deference to give MetLife's decision…").

Accordingly, the Court now determines whether, considering the augmented AR, Defendant's decision to deny Plaintiff's claim was an abuse of discretion.

II. Findings of Fact[1]

[1] Plaintiff submitted a Declaration in support of her claims. *See Declaration of Corinne Chandler in Support of Plaintiff's Rule 52 Motion for Judgment*, Dkt. # 54. Because the applicable standard of review is abuse of discretion, the Court may not consider facts outside the AR, other than the Castellon report and evidence of expert bias, as explained below.

A. Plaintiff's Employment

Plaintiff was employed from 2005 to 2011 by Northrup Grumman as a Software Test Engineer for the Space Navigation Systems Division. *Declaration of Jake Smith*, Ex. A ["AR"], 608. The only female on an all-male Engineering Test Team for a Space Shuttle, Plaintiff was responsible for determining the spacecraft's change in rotational altitude over a period of time. (AR608). As part of her duties, Plaintiff was required to climb latters and lift heavy equipment. (AR608). While working full-time up to 72 hours per week at Northrop Grumman, Plaintiff took classes for her Master's degree in Software Engineering, which she received in January, 2012. (AR608).

In December, 2011, Plaintiff was recruited to work for AeroVironment on the Systems Test Flight Team, earning $86,000 per year. (AR609). AeroVironment designs, develops, and produces unmanned aircraft systems for airborne reconnaissance and surveillance. (AR2696). Plaintiff's official duties and responsibilities included: developing software development processes at both the project and division wide level; conducting software functionality, performance, software integration, system, and acceptance testing; working closely with key leads on defect reporting, debugging, and tracking to isolate software faults and ensure that all requirements were tested and met; developing and executing test plans and procedures, based on requirements and an understanding of system operation and end user applications; producing reports of test results and tracing test objectives to stated requirements; ensuring that configuration management practices were enforced; and preparing documentation, including requirements, verification and validation reports and product release materials. (AR2695).

Besides mental clarity, Plaintiff's job sometimes required her to carry and lift flight and other test equipment. (AR609). In addition to writing procedures for unmanned aircrafts used by the military, Plaintiff's job included testing the plans by going into the field with the Test Flight Team and flying the aircrafts manually. (AR609). This required Plaintiff to stand, lift equipment, and put the equipment together. (AR609).

In the summer of 2012, Plaintiff notified her supervisor that she being harassed by some of her coworkers. (AR752). For example, Plaintiff forwarded her supervisor an email from a colleague where he called her racial slur and told her to go back to where she came from. (AR752-AR753). Later, in support of Plaintiff's appeal to Defendant, Plaintiff's sister later wrote a letter describing a phone call with Plaintiff where her sister could hear one of the leads in the background "screaming and yelling at her and even called her a [racial slur]." (AR2000).

B. Plaintiff's Symptoms and Treatment

Also in the summer of 2012, Plaintiff noticed the onset of several symptoms. Plaintiff felt fatigued, had swelling in her hands and feet, and would get rashes on her face when she went into the sun. (AR609). Plaintiff had difficulty walking or standing, developed joint pain, and became sensitive to sun exposure or cold temperatures. (AR609). Although Plaintiff had previously had migraines, they became more severe and Plaintiff became forgetful. (AR562, 609). Plaintiff obtained a referral to the Arroyo Oaks Medical Group ("AOMG") for evaluation. (AR609). On August 1, 2012, a doctor at AOMG issued a note putting Plaintiff on a medical leave of absence from work for one week due to migraines and insomnia. (AR588). After examining Plaintiff, the doctor extended her leave of absence through October 5, 2012 and referred her to a specialist at a multi-disciplinary medical group called the Facey Medical Group ("FMG"). (AR586).

On September 14, 2012, Plaintiff was evaluated by Dr. Ali Goharbin ("Dr. Goharbin") from FMG for multiple issues, including migraine headaches, anxiety, and musculoskeletal pain. Dr. Goharbin ordered lab work, x-rays, physical therapy and anti-inflammatory medications. Dr. Goharbin also recommended that Plaintiff see a neurologist and a behavioral health specialist for her anxiety. (AR1112-1114). Over the next ten months, Plaintiff consulted with doctors from FMG on twenty-three occasions. (AR2038, 2041, 2098, 1091, 1086, 2045, 1074, 1070, 1066, 2053, 1056, 1048, 2059, 1039, 1036, 2065, 1075, 1022, 1014, 1011, 1008, 1579 and 2072).

i. Neurology Visits

From September 2012 until July 2013, Plaintiff was treated by Dr. Doris Cardenis ("Dr. Cardenas"), a neurologist with FMG who diagnosed Plaintiff with migraines. (AR566, 1056). Dr. Cardenas prescribed Plaintiff sumatriptan, as well as a variety of other medications which she changed various times in an effort to treat Plaintiff's unalleviated migraines. (AR1056). In the visit notes from one of Plaintiff's earlier visits, Dr. Cardenas wrote:

> This is a 38-year old woman who has suffered from migraines all her life however they have been worsening in frequency over the past several months. In in (sic) addition she has been suffering from concentration difficulties, memory loss and episodes of right upper lower extremity numbness. She did get an MRI of the brain on the outside which by report was negative. She was tried on Topamax for a brief period of time and amitriptyline both which she did not like because of side effects. **I do believe she is currently suffering from migraines.** Will try a low dose of Namenda (she is still in school and very wary about any cognitive side effects). In conjunction she has had an number (sic) of rheumatological symptoms suggestive of SLE and she is currently being worked up for that. ..

(AR566) (emphasis added).

On Plaintiff's December 14, 2012 visit, Dr. Cardenas extended Plaintiff's disability to March, 2013, noting Plaintiff's continued migraines, concentration and memory loss. (AR529). As of March, 2013, Dr. Cardenas' notes indicate that Plaintiff still had migraines 13 times a month. (AR1025). The same notes indicate that at that time, Plaintiff had tried and failed Topamax, Namenda, Elavil, Celexa and Effexor. (AR1025-1027). Because Plaintiff could not obtain insurance coverage for Cymbalta, Neurontin was added to Plaintiff's medications as of June 2013. (AR1025-1027). Her dosage was increased in July, 2013 (AR1579-1580).

ii. Rheumatology Visits

On October 12, 2012, Plaintiff met for the first time with Dr. Sue Chung ("Dr. Chung"), a rheumatologist, to undergo physical examination and clinical testing. Dr. Chung stated that her initial suspicion for lupus was "high." (AR571). After the testing and examination, Dr. Chung reported that Plaintiff had high titre antinuclear antibodies ("ANA"), associated clinical findings of a malar rash with photosensitivity, arthralgias/arthritis, nonspecific fatigue, severe migraine headaches, shortness of breath, Raynauds phenomenon in her fingers and toes, recurrent first trimester miscarriages, and a history of frequently abnormal urinalyses. (AR554). Dr. Chung reported that Plaintiff's exam and family history of SLE suggested either SLE or Mixed Connective Tissue Disease, but that the high titre ANA, malar rash, photosensitivity, migraines, and Raynauds phenomenon in Plaintiff's fingers and toes "suggest[ed] SLE."[2] (AR554). Dr. Chung also stated that Plaintiff had "severe migraines assessed to be most consistent with Migraines," noting "bilateral ringing in [Plaintiff's] ears, hearing loss, and [the] refractory nature of [the] headaches." (AR554). Finally, Dr. Chung observed that Plaintiff had "increased tenderness in myofascial trigger points…suggestive of fibromyalgia." (AR555).

[2] SLE is a disorder of the immune system which affects more women than men and more blacks than Caucasians. (AR707). SLE can affect many parts of the body, including the joints, skin, kidneys, heart, lungs, blood vessels, and brain. (AR707). Although people with the disease have different symptoms, symptoms can include fatigue, photosensitivity, skin rashes (in particular malar rash), arthritis (joint pain and swelling), lung inflammation, miscarriages, Raynaud's phenomenon, chronic infections, weight changes, migraines, anxiety, depression, and cognitive disorders. (AR707-709, 721-724). Abnormal blood tests associated with the disease include anemia and a positive ANA. Plaintiff's medical record confirms she had all of these symptoms. (AR 2038, 2041, 2098, 1091, 1086, 2045, 1074, 1070, 1066, 2053, 1056, 1048, 2059, 1039, 1036, 2065, 1075, 1022, 1014, 1011, 1008, 1579, 2072).

From September 2012 to July 2013, Dr. Chung continued to treat Plaintiff for myofascial pain, prescribing various medications. In an examination on November 12, 2012, Dr. Chung again noted that Plaintiff's symptoms – including the positive trigger point test, fatigue, and joint swelling – were suggestive of fibromyalgia. (AR1064).

In March, 2013, Dr. Chung wrote in her visit notes that Plaintiff:

> remains on leave from her employment as an engineer. She had recently pursued an interest in dentistry and has taken a standardized dental exam. She states that her initial level of anxiety prevented her from performing as well as she had hoped on her dental exam. She has plans to repeat her exam in the future.

(AR499). The notes also state that Plaintiff reported "that her mind is not as sharp as it used to be, and foggy with decreased clarity. She is most distressed by her difficulty with memory and recall." (AR500).

iii. Behavioral Health Visits

Plaintiff was also referred to the FMG Behavioral Health team for treatment related to her depression and anxiety. (AR557). The doctor's notes from her initial visit on October 8, 2012 state:

> Ms. Felanice Yancy is a 38 year old female here for initial psychotherapy session. Nine months ago the pt. took a job at a small areospace (sic) company after interviewng (sic) with them for almost a year. The pt. had worked for Grumman Fairchild for six years and had received outsanding (sic) evaluations. After being hired Flanice (sic), who is African American, was told by one of her coworkers that she was dumb, was called the N word by another and was refused training and ridicuked (sic) when she asked questions about work she was doing fo rwhich (sic) she expected tobe (sic) trained but was not trained. When she went to H.R. and upper management the pt was stonewalled. She was also told by someone at the company that they wer (sic) unhappy because she knew more than the people who were her peers and the people she reported to. Soon after Ms. Yancy began working she started getting viscious headaches, having vision problems and generally feeling unwell. The pt went to a new doctor who told her that she had symptoms of Lupus disease (tests for which have not been evaluated) (sic). The pt has been given time off by her primary doctor and is not sure when she will be cleared to return to work work (sic) or if she will return when she has been cleared to return. Despite the verbal abusethe (sic) pt has been exposed to she is not willing to give in to the treatment she has received.

> The pt has a great deal of experience in her field and a Master (sic) degree in the same field.

(AR557).

The notes also list Plaintiff's symptoms of depression – including a depressed mood, insomnia, psychomotor agitation or retardation nearly every day, fatigue or loss of energy nearly every day, diminished ability to think or concentrate nearly every day, and recurrent thoughts of death – as well as her symptoms of anxiety. (AR557). The report notes that Plaintiff's problems were affecting her in all areas, including her job. (AR558). Under "patient motivated for treatment," the doctor wrote "yes." (AR558). The doctor diagnosed Plaintiff with recurrent major depression and prescribed a treatment plan. (AR559).

Between October, 2012 and April, 2013, Plaintiff consulted with either the psychologist or her treating psychiatrist, Dr. Mark Simonds ("Dr. Simonds") on 6 occasions. During that time, Dr. Simonds assessed Plaintiff's GAF[3] as between 50 and 60, with "serious symptoms." (AR519, 1066-1069, 1948-1052, 2134-2135). The notes from a visit on November 5, 2012 state:

> The pt has a lot on her mindincluding (sic) the daily migrains (sic), the dx of Lupus, the possible dx of fibromyalgia, fatigue her entire body aching and the uncertainty of how she will support herself going forward. Returning to work any time soon seems impossible. In addition pt is suffering from short tem (sic) memory loss.

(AR537).

During the course of Plaintiff's treatment, she was prescribed Elavil, Effexor, and Sertaline for her depression and anxiety. In notes from Plaintiff's December 27, 2012 visit, Dr. Simonds noted that she "had tried a number of different medications" which "have not been effective." (AR519). The note explains the side effects of her medications:

[3] The Global Assessment of Functioning (GAF) is a numeric scale used by mental health clinicians and physicians to subjectively rate the social, occupational, and psychological functioning of adults; e.g., how well or adaptively one is meeting various problems-in-living. The scale is often given as a range. The Range of 41-50 indicates: serious symptoms (e.g., suicidal ideation, severe obsessional rituals) or any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job, cannot work). (AR611).

> Topamax caused cognitive dulling. Elavil causes oversedation and severe appetite increase, even at a low dose of 10 mg nightly. It has not been effective in treating the headaches at this low dose. Patient doubts that she could tolerate a higher dose because of the sedation. Patient denies depression per se, but she admits that she feels irritated and frustrated much of the time. Her energy level is extremely low. She has trouble focusing on things. She forgets things easily. She has to be reminded to do things. Her neurologist placed her on Namenda, reportedly as an alternative migraine treatment. Patient doubts it has been helpful, and in fact, it makes her even more tired.

(AR519). During the same time period, Plaintiff's physical medicine physicians also noted Plaintiff's psychiatric affect as "depressed." (AR1045, 502).

C. Plaintiff's Claim

After unsuccessfully attempting to alleviate her condition, Plaintiff filed a claim for long term disability in July, 2013. At the time she filed her claim, Plaintiff was taking Gabapentin for nerve pain, Plaquenil for SLE, Namenda for migraines, Sentraline for depression, Topamax for migraines, and amitriptyline for depression and fatigue. (AR251). She had refilled her prescriptions twenty-six times since August 1, 2012. (AR598-599).

The claim forms requested by Defendant included an Attending Physician Statement, which Dr. Simonds completed. (AR110). The claims form stated that Plaintiff suffered from lupus and major depression. (AR109). In the small space provided for listing "diagnostic tests confirming the conditions," Dr. Simonds wrote "ESR; C-reactive protein and ANA."[4] (AR109). In the small space provided for listing "objective findings," Dr. Simonds wrote "facial rash, morning stiffness, depression and low energy." (AR109). Dr. Simonds also noted that Plaintiff's current GAF level was 50 and that she had been prescribed Neurontin, Hydroxychloroquine (plaquenil, which is used to treat lupus) and Zoloft. (AR109). Additionally, Dr. Simonds noted that Plaintiff had extremely low energy level and poor concentration, and was depressed. (AR110).

Under "Briefly describe the patient's restrictions (SHOULD NOT DO)," Dr. Simonds wrote "Completely disabled from previous or any other job at present." (AR110). Lower on the same page, the form asked whether there were restrictions in certain areas, such as driving, lifting, carrying, use of hands, squatting, climbing, etc. (AR110). Here, Dr. Simonds did not check "Yes" or "No" for each individual category, but wrote "N/A – see above" across the entire

[4] ESR and C-reactive protein are markers for inflammation. (AR758, 553).

area of the form. (AR110).

After obtaining Plaintiff's medical records, Defendant sent Plaintiff's file to University Disability Consortium ("UDC") for a medical review, which was conducted by Nurse Tina Sturgess ("Sturgess"). (AR453-459). Sturgess noted that there were no documents of the Plaintiff being treated for a behavioral health condition as of her last day of work on July 31, 2012 (Plaintiff was put on disability leave as of August 1, 2012). (AR453-457). Sturgess wrote that "the records available to review fail to consistently document mental status findings nor do they consistently document abnormal clinical observations." (AR457). Sturgess also focused on the lack of documentation that Plaintiff was "disheveled," had "poor hygiene," or was "lethargic…hypervigilant, paranoid, psychotic, [or] drowsy" at her visits. (AR457). Finally, Sturgess emphasized that there was no documentation that Plaintiff had a "lack of facial expression or inability to maintain eye contact" and that there was "no indication of stammering, slurring, [] paucity of spontaneous speech…delusions…disorientation, impaired memory tested with mini mental status exam, [and] no impaired attention or intelligence." (AR457). Sturgess concluded:

> [T]here lack[] (sic) a continuous period of time resulting in functional impairments. As such there are no restrictions or limitations which would impact in ability to handle goals objectives and performance measurements, ability to perform intellectually complex tasks requiring high level of reasoning, perform varied tasks meet deadlines and maintain schedules and multi-task, ability to make independent judgments executive type decisions, perform under stress, ability to relate to others manage self care socialize maintain appropriate control of emotions perform work requiring regular social contact with others, perform work tasks involving minimal intellectual effort, and ability to perform repetitive tasks.

(AR458).

Under "Please review and identify any restrictions and limitations supported by the documentation in file, with the understanding if something is not listed as a restriction or limitation, they would be capable of performing the function," Sturgess, apparently ignoring Dr. Simonds' opinion, wrote "As noted in the medical analysis there are no restrictions or limitations supported for a behavioral health condition." (AR458). Under "does the indicated activity level appear to be in accordance with the documentation in the file," Sturgess, again ignoring the opinions of Plaintiff's treating physicians, wrote "[t]he claimant's perceived behavioral health condition as self limiting activity is greater than that observed by the treating providers as such no impairments are supported." (sic) (AR459). Finally, where the form asked Sturgess to

provide guidelines concerning the time frame to update medical records, Sturgess wrote "NA as functional impairment from a [Behavioral Health] condition is not supported" (sic) (AR459).

Defendant then had a medical review conducted by in-house Nurse Denise Thiesen ("Thiesen"). (AR2785). Again, the form which Thiesen filled out stated "Please review and identify any restrictions and limitations supported by the documentation in file, with the understanding that if something is not listed as a restriction or limitation, they would be capable of performing the function." (AR2787). Thiesen wrote:

> no restrictions and limitations identified. Multiple chronic medical conditions without obvious significant physical or cognitive/memory impairment to preclude previous strength demand from date last worked and ongoing. No evidence in file that claimant would be unable to lift up to 30 lbs occasionally and sit, stand or walk up to 6 hours in an 8 hour workday.

(AR2787). Where the form asked whether the "indicated activity level appear[ed] to be in accordance with the documentation in the file," Thiesen wrote:

> No, appears claimant went off work related to stress. No evidence that claimant is unable to perform own ADL's (sic), drive personal vehicle, get to and from multiple MD appointments unassisted, perform household chores or shop for needs. Claimant (sic) symptoms are subjective and chronic and continues conservative treatment. Evidence that claimant is pursuing other type of job (dentistry) which is not consistent with significant impairment.

(AR2787).

On September 21, 2013, Defendant notified Plaintiff that her claim had been denied. (AR2307). Defendant directed Plaintiff to pertinent policy provisions, identified the information which it relied on to render the claims decision, summarized the information in the medical records reviewed, and identified the information that it considered about the physical requirements of her occupation. (AR2307-2313). Then, in three cursory paragraphs, Defendant explained its decision. (AR2311-2312).

Defendant stated that "there was no evidence of testing to confirm Lupas (sic). The file notes indicate you left work for stress." (AR2311). Defendant also stated "the exams noted to be within normal limits, no mini mental status exams or any evidence of cognitive and memory deficits." (AR2311). The notice further stated:

> File notes you were pursuing another career in dentistry which is inconsistent with significant cognitive and memory or physical impairment. Your file does not indicate any evidence on exams of significant migraine headaches during exams or evidence of headache diaries to confirm frequency, duration and intensity of headaches.

(AR2312).

D. Plaintiff's Appeal

Plaintiff hired Kantor & Kantor, who submitted an appeal on her behalf on March 24, 2014. (AR606). Plaintiff submitted updated medical records with her appeal, which showed continued treatment with FMG. In December, 2013, Dr. Chung noted "we have assessed [Plaintiff's] symptoms to correlate clinically with fibromyalgia." (AR2154). Dr. Chung also noted that Plaintiff had "demonstrate[d] subjective improvement on Imuran 50 mg daily." (AR2160). Although Dr. Chung noted that Plaintiff "has not fulfilled strict criteria for SLE," she wrote that Plaintiff's "response to Imuran raise[d] additional consideration for new assessment of SLE with ongoing monitoring and response to targeted therapy." (AR2154). Under "Active Problems," Dr. Chung listed, among other things: anemia; anxiety; arthralgias; fibromyalgia; headache; hyperactivity of the bladder; limb pains; lower back pain; Meniere's disease; migraine headache; mild recurrent major depression; neck pain; skin rash; and SLE. (AR2154-2155). Despite noting that Plaintiff "does not demonstrate severe manifestations of inflammatory SLE, and does not demonstrate end-organ damage or patterns of injury," Dr. Chung also wrote that Plaintiff's "symptoms of Raynauds phenomenon, malar rash, highly elevated ANA, and arthralgias can be assessed to be associated with SLE." (AR2160).

Dr. Cardenas also continued to treat Plaintiff with various medications, noting in December, 2013 that Plaintiff was still suffering from migraines 3-4 times per week, which lasted all day. (AR1536-1539). In the notes from a visit in February, 2014, Dr. Cardenas noted that Plaintiff was taking "high risk medications." (AR187).

In May, 2014, Plaintiff had to switch providers due to a change in insurance. She began treatment with Dr. Platzer (a neurologist), Dr. Katz (a rheumatologist) and Dr. Gorbaty (internal medicine). (AR157, 181, 369). That same month, Plaintiff received an occipital trigger point injection for her migraines. (AR1485-1487). In July, 2014, she was underwent a pulmonary function test for her shortness of breath, which revealed mild restrictive lung disease. (AR1438). In August, Dr. Gorbaty noted Plaintiff as having SLE and referred her for testing to determine if she had lupus lung, which would require more intensive medications. (AR1490-1491). Also in August, Dr. Platzer noted that Plaintiff was being evaluated for possible SLE. (AR1494). That

same month, a cardiologist noted that she likely had "chronic dyspnea due to her underlying mild restrictive lung disease, history of asthma, and possibly her [SLE]." (AR1440). In September, 2014, Dr. Katz added methotrexate[5] to Plaintiff's medication regimen. (AR1429).

Along with her appeal, Plaintiff also submitted the results of an independent medical examination by Dr. Stuart Silverman ("Dr. Silverman"), a rheumatologist at UCLA, who conducted pain tests and reviewed Plaintiff's medical history. (AR393-398). Dr. Silverman noted that Plaintiff developed symptoms "consistent with fibromyalgia but also with [SLE] with associated symptoms of Raynaud's, cognitive problems, difficulty functioning, constipation, and sleep disorder. Her fibromyalgia may be secondary to her SLE." (AR397). Although Dr. Silverman noted that Plaintiff "fortunately…did not show significant fisceral involvement by [SLE]," he stated that she "did show skin and joint involvement [by SLE]" and clarified that "[SLE] patients may show one without the other." (AR397). Dr. Silverman went on to note that Plaintiff was "disabled from her occupation of software engineer due to [SLE] with secondary fibromyalgia and associated migraine headaches," that she had "loss of cognitive function and significant loss of physical functioning," and that "her pain level remain[ed] high." (AR397-398). Finally, Dr. Silverman noted that "much of [Plaintiff's] current disability may be related to her fibromyalgia" and that "[h]er workplace stress can be one of the triggering factors for her fibromyalgia." (AR398).

Dr. Silverman's opinion of cognitive dysfunction was confirmed by psychiatrict testing conducted by Dr. Audrey Katchikian, Ph.D. ("Dr. Katchikian") at Cedars Sinai in March, 2014. (AR363). Although Dr. Katchikian noted that Plaintiff's "cognition was attentive, displaying adequate judgment," she wrote that "the patient displayed occasional pain behavior such as wincing and shifting in her chair." (AR364). Dr. Katchikian administered a Mini-Mental Status Exam which "suggest[ed] [Plaintiff's] gross cognitive functioning was intact." (AR365). Dr. Katchikian then administered 12 additional exams, noting that Plaintiff "was cooperative with testing and appeared to exert her best effort." (AR365). Under "motivation and cooperation," Dr. Katchikian noted that "select measures sensitive to effort during test taking were administered to discretely assess motivation, cooperation, and approach to test-taking procedures." (AR365). Here, Dr. Katchikian again wrote "results…suggest [Plaintiff] was exerting her best effort during the evaluation." (AR365).

Among the results of her 12 tests, Plaintiff obtained a score of 38 out of 63 on a test measuring depression, "indicating [Plaintiff] was experiencing a severe degree of depression at

[5] Methotrexate is a drug for SLE patients which can increase one's chance for opportunistic infections. (AR1960, 2014).

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the time of the evaluation." (AR366). Although Dr. Katchikian noted that Plaintiff's "scores on the MMPI-2-RF validity scales raise concerns about the possible impact of over-reporting," she also noted that "[w]ith that caution noted, scores on the substantive scales indicate somatic and cognitive complaints, and emotional, thought, and interpersonal dysfunction." (AR367). Finally, Dr. Katchikian concluded:

> [r]esults from clinical interview and assessment measures suggest the patient is having difficulties in multiple areas of physical and psychological functioning. Findings from pain, stress and coping, and emotional measures suggest [Plaintiff] continues to have limited effectiveness in coping with her condition and is experiencing marked emotional distress.

(AR367-368). Dr. Katchikian diagnosed Plaintiff with mood disorder due to fibromyalgia. (AR368).

Finally, with her appeal Plaintiff submitted a neuropsych evaluation conducted by Dr. Castellon at UCLA. After conducting 20 tests designed to test Plaintiff's cognitive functioning and reviewing her medical files, Dr. Castellon stated there was "evidence of cognitive impairment seen on the current evaluation – with several scores well below expected, often falling in the Borderline or impaired range (i.e., < 9th percentile)." (AR1642-1643, 1647). Dr. Castellon noted that the "main areas of cognitive compromise" he found through testing were verbal and non-verbal learning and memory; sustained attention/concentration; divided attention; and executive functioning. (AR1647). Dr. Castellon reported that

> in spite of solid test-taking effort and motivation (i.e. she easily passed all "malingering" tests), her scores on learning and memory measures were particularly problematic. She showed a limited ability to learn new material and poor ability for a woman with her educational and occupational background to successfully retain newly learned information over time.

(AR1647).

In addressing Plaintiff's self-reporting of pain and fatigue, Dr. Castellon noted that he obtained a similar profile to Dr. Katchikian on the MMPI-2 RF, which showed an "over-endorsement of pain, somatic, and cognitive to a degree that is not typically seen in medical patients with pain and/or fatigue conditions." (AR1648). Dr. Castellon noted that on Plaintiff's fatigue inventory,

> almost all items were endorsed at the highest level possible – often well above where individuals with disabling fatigue who are not in medical legal settings report (e.g. cancer survivors who are going through chemotherapy). Similarly, [Plaintiff's] report of depressive symptoms…was inconsistent with her affect, behavior, and general demeanor on the day of testing.

(AR1648). Dr. Castellon explained this pattern, "in the context of strong performance on all cognitive malingering/effort measures," as stemming from Plaintiff's individual reporting style (emphasizing what is not working), which Dr. Castellon noted was "likely intensified by the medical-legal setting in which she is being questioned and (apparently disbelieved) about whether she really has problems or not." (AR1649). Dr. Castellon noted there was "no doubt in [his] mind, given the review of the extensive medical records, the consistent treatment history that she has sought out since 2012 when the problems first started, and the opinions of multiple medical doctors who have treated/and or evaluated that there is real pain, real fatigue, and real somatic dysfunction present." (AR1649).

Dr. Castellon noted that there seemed to be "no dispute among those providers that have worked with her most closely that she has SLE, Fibromyalgia, Arthritis, and Migraines – so it is highly unlikely that she wouldn't have some degree of pain, fatigue, and depression complaints." (AR1649). He also emphasized that there was "no evidence whatsoever of an attempt to feign or malinger *cognitive* deficits," and that Plaintiff performed within normal limits on neurocognitive test-taking effort. (AR1649) (emphasis in original).

Finally, Dr. Castellon noted that after reviewing the job description of what was required of Plaintiff at her job, Plaintiff's borderline and impaired test results on cognitive tasks (which showed no evidence of malingering) "***make it highly unlikely*** that she could successfully go back to her work as a software engineer." (AR1649) (emphasis in original). Dr. Castellon noted that Plaintiff's "inefficiency with learning and retaining material and efficiently recalling new and old information" would "predict a poor outcome" because she was required to work closely with key leads "on defect reporting, debugging, and tracking to isolate software faults and ensure that all requirements are tested and met." (AR1649). He elaborated:

> With a poor ability to focus and sustain attention and deficits in multi-tasking (divided attention) it is hard to see how she could code, de-bug, keep track of, trouble shoot, and follow through on complex computer algorithms.

(AR1649). Finally, Dr. Castellon diagnosed Plaintiff as meeting the medical criteria for "Major Neurocognitive Disorder, due to a medical condition (SLE, Fibromyalgia), with behavioral

disturbance" and stated that while Plaintiff could perform basic activities of daily living, her "cognitive compromise" had caused "significant impairment in…occupational functioning" which made her "unable to manage finances or pay bills or discharge activities that require more complex cognitive functioning without assistance." (AR1649).

E. Defendant's Appeal Review

Defendant had a peer review conducted by Dr. David Knapp ("Dr. Knapp"), who concluded that "the records do not confirm a diagnosis of [SLE] based on current SLICC (Systemic Lupus International Cooperating Clinics) Criteria. All of the claimant's somatic complaints appear to be directly related to the diagnosis of fibromyalgia." (AR1361). Dr. Knapp stated that one of his reasons for concluding that Plaintiff did not have SLE was her lack of responsiveness to SLE treatment in the form of Plaquenil, Imuran and Methotrexate. (AR1346). However, Dr. Knapp's conclusion was contrary to the December 2, 2013 medical notes from Dr. Chung indicating that Plaintiff's positive reaction to Imuran raised additional questions about whether Plaintiff might be suffering from SLE. (AR2154). Dr. Knapp acknowledged Plaintiff's positive response to Imuran in his summary of Dr. Chung's notes, where he stated "Treatment with Imuran is noted to be associated with clinical improvement." (AR1362).

Moreover, despite listing Dr. Castellon's report as one of the documents he reviewed, Dr. Knapp wrote that "No restrictions (things the insured should not do) and limitations (things the insured cannot do) are supported by the records, examinations, and diagnostic tests…". (AR1348). To support his assertion, Dr. Knapp then cherry picked several incidents of "unremarkable examinations" or incidents where "no examination findings [are] noted", without addressing any of the contrary findings of Plaintiff's treating physicians regarding Plaintiff's pain, fatigue, diffuse tenderness and swelling, Dr. Silverman's findings of physical impairment, Dr. Castellon's findings of cognitive impairment, or Dr. Katchikian's findings of physical and physiological dysfunction. (AR1348-1349).

Dr. Knapp also asserted that the "medical records do not document clinically significant objective physical or physiological abnormalities on as (sic) a result of examination and diagnostic efforts that indicate the presence of a medical impairment…" without acknowledging Plaintiff's elevated sedimentary rates, inflammatory markers, or clinical examinations which identified positive fibromyalgia tender points. (AR1349). Dr. Knapp also ignored entirely the possibility that Plaintiff's subjective abnormalities – migraines, joint pain, depression and fatigue – could themselves be disabling.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV14-9803 PSG (PJWx)	Date	December 18, 2015
Title	Felanice L. Yancy v. United of Omaha Life Ins. Co.		

When asked to document consistencies and inconsistencies in Plaintiff's diagnosis, treatment, and claimed restrictions and limitations, Dr. Knapp ignored the consistent opinions from Plaintiff's many treating physicians that she was suffering from fibromyalgia, major depression and possible SLE. (AR1351). Although Dr. Knapp noted Plaintiff's objective clinical findings, he did not acknowledge that those findings were consistent with Plaintiff's SLE diagnosis. (AR1351). Moreover, Dr. Knapp failed to acknowledge that those findings were consistent with Plaintiff's subjective complaints of pain and fatigue. (AR1351).

Instead, Dr. Knapp focused solely on aspects of Plaintiff's record which were inconsistent with a finding of impairment. For example, Dr. Knapp began by stating that "claimant's subjective complaints of activity intolerance and poor endurance are out of proportion to the objective findings noted in the records reviewed." (AR1351). Dr. Knapp then noted Plaintiff's lack of responsiveness to anti-rheumatic therapy – a lack of responsiveness which was unsupported by the record Dr. Knapp reviewed – as being inconsistent with a diagnosis of SLE. (AR1351).

Finally, Dr. Knapp sparsely listed only a few notes from Plaintiff's most positive medical visits, emphasizing the "unremarkable" findings and discounting evidence consistent with Plaintiff's prior diagnoses. For example, Dr. Knapp acknowledged that in a physical examination in March of 2014, "pain with cervical lumbar range of motion is noted with mild edema of the right hand and generalized tenderness over peripheral joints," but emphasized that "the remainder of the examination is noted to be unremarkable." (AR1351). The next visit listed is a general examination with Dr. Platzer in May, 2014, which Dr. Knapp stated was "unremarkable except for malar rash and allergic shiners." (AR1351). Dr. Knapp then noted that "medical records from North ridge Hospital Medical Center document emergency room care on 3/19/2014 indicate an unremarkable examination." (AR1352). Other than pointing out the few incidents of "unremarkable" findings over Plaintiff's two years of treatment, there appears to be no rhyme or reason to the slim collection of excerpts Dr. Knapp offered in response to an inquiry regarding the consistency of Plaintiff's treatments, diagnoses and limitations. In any event, Dr. Knapp discounted entirely the consistency of Plaintiff's complaints, recurrent diagnoses and responses to treatment, and the professional opinions of her treating physicians.

Lastly, Dr. Knapp focused on Plaintiff's feeling betrayed by her former employer, noting that her date of disability occurred after she started her job with AeroVironment, where she was faced with a hostile work environment which included racial discrimination. (AR1352). Dr. Knapp opined that there were issues of secondary gain related to these events. (AR1352).

Defendant also had Plaintiff examined by Dr. Furst. Dr. Furst found that Plaintiff's

memory and attention were impaired. (AR1313, 1315). Dr. Furst also found that Plaintiff's language functioning and executive functioning, measured by verbal abstract reasoning, were borderline. (AR1314, 1315). However, Dr. Furst concluded that his cognitive tests were "invalid and uninterpretable, due to indications of over-reporting." (AR1315). Although Dr. Furst acknowledged that Plaintiff had passed validity measures when tested by Dr. Castellon, Dr. Furst stated that he could not reconcile Dr. Castellon's results with his own. (AR1318). Dr. Furst speculated that Dr. Castellon did not use sensitive enough tests, or that Plaintiff may have detected the purpose of the validity tests. (AR1318). Dr. Furst further offered his observations that although Plaintiff complained of fatigue, she declined the offer to reschedule testing to a later date, and that although Plaintiff reported constant depression, she exhibited a broad level of affective expression during his examination... (AR1304).

Dr. Furst concluded that Plaintiff had Somatic Symptom Disorder because she had experienced "a severe degree of emotional stress in the time interval just preceding the onset of symptoms which have led to her diagnoses of SLE and fibromyalgia." (AR1316). However, despite Dr. Furst's insistence that "neurocognitive testing at this time is invalid, related to a pattern of poor effort on performance-validity tests," he did not rule out the possibility that Plaintiff was impaired from underlying medical conditions. (AR1318-1319). Dr. Furst stated:

> I have no objective evidence of any neurocognitive or neurobehavioral restriction or limitation for this claimant. The records appear to describe a significant degree of chronic pain and chronic fatigue secondary to medical diagnoses of SLE and fibromyalgia. My diagnosis of Somatic Symptom Disorder indicates the likelihood that the claimant has significant contributions to her condition from psychological factors, which amplify any underlying dysfunction from SLE or fibromyalgia. However, this does not rule out an underlying medical condition or conditions which may exist and which I must defer to appropriate examiners in internal medicine and rheumatology.

(AR1319).

After the examination, Plaintiff wrote to Defendant on December 2, 2014 requesting a copy of Dr. Furst's report and the raw data from his testing so that Dr. Castellon could "be given a chance to review and comment." (AR1334). Defendant did not provide Plaintiff with a copy of the report before rendering its decision, but instead provided Plaintiff with the Furst report concurrently with its rejection of her appeal. (AR2866).

F. Defendant's Final Decision

On December 17, 2014, Defendant notified Plaintiff that it had completed its review and determined that denial of her claim was appropriate. (AR1291). Defendant relied heavily on Dr. Knapp's report, adopting his conclusion verbatim: "Dr. Knapp indicated that the records do not document clinically significant objective and measurable examinations and diagnostic findings to support impairment." (AR1292-1293). In particular, Defendant repeatedly emphasized Dr. Knapp's erroneous assertion that there had been a lack of response to steroid therapy as support for rejecting Plaintiff's SLE diagnosis. (AR1292). Defendant also noted that other than malar rash, Raynaud's phenomenon, and a positive ANA, there were "no other objective findings noted" to support the diagnosis of SLE. (AR1293). Defendant did not acknowledge the subjective findings or the opinions of any of Plaintiff's treating physicians over the course of two years which supported Plaintiffs' diagnoses.

Like Dr. Knapp, Defendant then cherry picked the few instances of Plaintiff's medical record where her *physical* impairment was found to be unremarkable. (AR1293). Defendant emphasized repeatedly that Plaintiff was not physically impaired from performing the material duties of her "sendentary" job, which only required her to exert up to 10 lbs of force occasionally. (AR1292, 1294-1295). Notably, Defendant did not address the cognitive requirements of Plaintiff's job. Nor did it explain why it chose to discount Dr. Castellon's findings of cognitive impairment, other than (incorrectly) noting that two of the three "freestanding performance-validity tests [performed by Dr. Castellon]…have a notably lower degree of sensitivity than the measures administered by Dr. Furst." (AR1294).

Instead, Defendant relied heavily on Dr. Furst's diagnosis of Somatic Symptom Disorder and his findings that *he* had "no objective evidence of any neurocognitive or neurobehavioral restriction or limitation for [Plaintiff]." (AR1294). Defendant also appeared to weigh heavily Dr. Furst's subjective observations that despite Plaintiff's assertion that she experiences a severe level of chronic pain and fatigue, "her demeanor throughout the long interview and testing session…did not appear to reflect typical emotional expressions of pain." (AR1294). Defendant also repeated Dr. Furst's observation that "[d]espite complaints of fatigue, [Plaintiff] declined offers to reschedule testing to a later date." (AR1294).

G. Dr. Castellon's Rebuttal Report[6]

First, Dr. Castellon clarified that the scores reported by Dr. Furst in his testing as "failing" were actually "close to established cutoffs" from the test manuals. *Declaration of Corinne*

[6] For reasons stated above and outlined in the Court's August 25, 2015 order, the Court will treat Dr. Castellon's rebuttal report as part of the Administrative Record.

Chandler, Ex. A ["Castellon rebuttal"], 2. The scores were "not below chance (which is truly the *sine qua non* of "malingering") but rather well above chance and near recommended "cut offs" – couple more correct answers and she's 'passed.'" *Id.* Dr. Castellon acknowledged that many regard effort as either strictly sufficient or strictly insufficient, but explained that "there is indeed significant debate within the field as to the meaning of the 'near pass'…and whether it might be associated with other behavioral and/or psychological factors." *Id.* Dr. Castellon also noted that one of the reasons he did not use a validity test which Dr. Furst performed was because Dr. Katchikian had just performed that test on Plaintiff in March, 2014, and that Plaintiff had in fact passed that test with Dr. Katchikian. *Id.*

Dr. Castellon also disagreed that his tests had "lower degree[s] of sensitivity (ability to detect malingering)" than those which Dr. Furst had used. *Id.* Dr. Castellon noted that the two measures he used whose sensitivity Dr. Furst questioned are more frequently used than either of the measures used by Dr. Furst. *Id.* Additionally, Dr. Castellon cited a study showing that in actuality, those two measures had solid sensitivity (80%) and excellent specificity (97%), respectively. *Id.* Dr. Castellon provided research and multiple studies supporting the validity of his tests as measures of test-taking effort. *Id.* Dr. Castellon explained that Plaintiff passed those measures of test-taking effort with perfect scores. Accordingly, the results of testing her cognitive functioning, which showed several relative and absolute deficits, were valid. *Id.*

Dr. Castellon then reiterated that nothing in Dr. Furst's report would change his opinion that at the time he evaluated Plaintiff, she provided sufficient test-taking effort and still showed obvious signs of cognitive deficit. *Id.* at 3. He concluded:

> While it is beyond my purview to determine how to adjudicate her case as it relates to disability status, I would think that her performance on Dr. Furst's testing – with variable/questionable effort – shouldn't mean that [Plaintiff] is now suddenly free of any of the cognitive dysfunction that was seen on my evaluation. As noted in my original report, my focus was on the assessment of [Plaintiff's] cognitive function, but it needs to be reiterated that several other medical professionals have weighed in on her pain, fatigue, and other somatic issues (called either Fibromyalgia and/or SLE at different times) are all likely to impact her cognitive efficiency.

Id.

H. Pertinent Plan Provisions

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV14-9803 PSG (PJWx)	Date	December 18, 2015
Title	Felanice L. Yancy v. United of Omaha Life Ins. Co.		

Plaintiff's policy with Defendant ("the Policy") provides that Defendant will pay disability benefits to an employee who is totally disabled because of an injury or sickness. (AR16). The Policy defines "Total Disability" as follows:

> Total Disability and Totally Disabled, for other than a pilot, means that because of Injury or Sickness:
>
> (a) You are unable to perform all of the material duties of Your regular occupation on a full time basis; and
>
> (b) You are unable to generate Current Earnings which exceed 20% of Your Basic Monthly Earnings due to that same Injury or Sickness…

(AR28). Under "Proof of Loss Requirements," the Policy states that a claimant is required to submit certain forms, together with forms completed by a physician and the employer. (AR48). There is no statement regarding the type or amount of evidence a claimant is required to provide. The Policy also contains a Rider, limiting benefits after 24 months if the disability is "primarily based" on self-reported symptoms.[7] (AR47).

Additionally, the Policy sets forth Defendant's "Authority to Interpret Policy" as follows:

> By purchasing the Policy, the Policyholder grants Us the authority to construe and interpret the Policy. Benefits under the Policy will be paid only if the Insured Person is entitled to them. We have the authority to determine eligibility for benefits and interpret the terms and conditions of the Policy. In making any decision, We may rely on the accuracy and completeness of any information furnished by the Policyholder or an Insured Person. Determinations made by Us do not prohibit or prevent a claimant from seeking judicial review in federal court of Our determinations.
>
> The authority to interpret made under this provision only establishes the scope of review that a federal court will apply when a claimant seeks judicial review of Our determination of eligibility for benefits, the payment of benefits, or interpretation of the terms and

[7] "Self-Reported Symptoms" is defined as "the manifestations of Your Condition which You tell Your Physician that are not verifiable using tests, procedures or clinical examinations standardly accepted in the practice of medicine. Examples of Self-Reported Symptoms include, but are not limited to headaches, pain fatigue, stiffness, soreness, ringing in ears, dizziness, numbness, and loss of energy." (AR47).

> conditions applicable to the Policy.
>
> We are an insurance company that provides insurance to this benefit plan and the federal court will determine the level of authority to interpret that it will accord Our determinations.

(AR6).

III. Legal Standard

ERISA allows a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

"When Congress enacted ERISA, it did not specify the standard of review that courts should apply when a plan participant challenges a denial of benefits." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 964 (9th Cir. 2006). The Ninth Circuit interprets the Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) as "provid[ing] for only two alternatives" to the applicable standard of review. *Abatie*, 458 F.3d at 964. "When a plan confers discretion, abuse of discretion review applies; when it does not, de novo review applies." *Id.*

Although Plaintiff moves again for a *de novo* standard of review, *see* Dkt. # 47, the Court already ruled on October 14, 2015 that it would apply an abuse of discretion standard at trial because the language of the plan was sufficient to vest discretion in Defendant. *See* Dkt. # 39.

The Ninth Circuit's standard for abuse of discretion review has been "gradually refined and restated." *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011). The test for abuse of discretion in a factual determination is whether "we are left with a definite and firm conviction that a mistake has been committed." *Id.* at 676 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The Court may not merely substitute its judgment for that of the fact finder. *Id.* However, in the ERISA context, "[a]pplying a deferential standard of review [] does not mean that the plan administrator will always prevail on the merits. It means only that the plan administrator's interpretation 'will not be disturbed if reasonable.'" *Conkright v. Frommert*, 130 S.Ct. 1640, 1644 (2010) (quoting *Firestone*, 489 U.S. at 111). In determining the reasonableness of the administrator's decision, a reviewing court should consider "all the circumstances before it," rather than considering factors which support

the administrator's determination "in isolation." *Pac. Shores Hosp. v. United Behavioral Health*, 764 F.3d 1030, 1042 (9th Cir. 2014).

"A plan administrator abuses its discretion if it renders a decision without any explanation, construes provisions of the plan in a way that conflicts with the plain language of the plan, or fails to develop facts necessary to its determination." *Id.* (quoting *Anderson*, 588 F.3d at 649). For example, "[a]n administrator…abuses its discretion if it relies on clearly erroneous findings of fact in making benefit determinations." *Id.* (quoting *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1473 (9th Cir. 1994)).

Because the standard of review is abuse of discretion, the Court's factual review is limited to the administrative record. *See Abatie*, 458 F.3d at 970.

IV. Discussion

"[W]hen judges review the lawfulness of benefit denials, they…determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing [the factors] all together." *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008).

Here, several factors weigh in favor of finding that Defendant abused its discretion in denying Plaintiff her benefits under the Plan. First, Defendant was operating under a structural conflict of interest which, in light of all the evidence, appears to have impacted the handling of Plaintiff's claim. Second, Defendant committed a procedural error in denying Plaintiff the opportunity to respond to the Furst report before administering its decision. Third, Defendant construed provisions of the plan in a way that conflicted with the plain language of the plan. Fourth, Defendant failed to develop facts necessary to its determination, even going so far as to rely substantially on clearly erroneous findings of fact in making its determination.

Finally, the Court notes that although abuse of discretion review requires it to assess the reasonableness of Defendant's decision in light of the administrative record at the time it rendered its decision, the Court has already ruled that it will augment the record with the Castellon rebuttal report. The Court must therefore engage in the fiction of addressing whether Defendant's decision *would have been* reasonable had it been based on the augmented administrative record. The Court finds that although brief, the Castellon report effectively eliminates the few pillars upon which Defendant's decision might be construed as reasonably based. The Court is left with the definite sense that a mistake has been made because Defendant's decision – that Plaintiff was capable of performing all the material duties of her job as a software engineer – was not reasonable in light of the record.

A. Structural Conflict of Interest

Conflict of interest is one of several factors which a court should consider in reviewing the lawfulness of a benefits denial. *See Metropolitan Life Ins. Co.*, 554 U.S. at 117. Under Ninth Circuit law, "[p]laintiffs…have the benefit of an abuse of discretion review that always considers the inherent conflict when a plan administrator is also the fiduciary[.]" *Abatie*, 458 F.3d at 969.

"What 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*, 458 F.3d at 970. A court may view a conflicted administrator's decision with a low level of skepticism where "a structural conflict of interest is unaccompanied, for example, by any evidence of malice [or] self-dealing." *Id.* at 968. In contrast, "a court may weigh a conflict more heavily [where] the administrator provides inconsistent reasons for denial, fails adequately to investigate a claim or ask the plaintiff for necessary evidence; [or] fails to credit a claimant's reliable evidence." *Id.*

Here, Defendant is a conflicted decision-maker because it both funds the benefits for the Policy and determines eligibility for policyholders' claims. *See id.* at 965 ("an insurer that acts as both the plan administrator and the funding source for benefits operates under…a structural conflict of interest"). While Defendant's basic structural conflict would not alone be sufficient to significantly increase the Court's skepticism, the Court cannot ignore the evidence before it that Defendant engaged in self-dealing with respect to Plaintiff's claim.

First, Defendant provided inconsistent reasons for denying Plaintiff's claim. In its initial rejection of Plaintiff's claim, Defendant focused on the fact that Plaintiff's "exams [were] noted to be within normal limits, no mini mental status exams or any evidence of cognitive and memory deficits." (AR2311). Defendant elaborated that Plaintiff's file was "inconsistent with significant cognitive and memory or physical impairment." (AR2312). Of apparent significance to Defendant was the lack in Plaintiff's file of "any evidence on exams of significant migraine headaches during exams or evidence of headache diaries to confirm frequency, duration and intensity of headaches." (AR2312). In other words, Defendant emphasized a lack of proof regarding Plaintiff's cognitive impairment as its preeminent reason for denying her claim.

However, when Plaintiff provided evidence of her cognitive impairment on appeal, Defendant shifted the focus of its reasoning. In its notice denying Plaintiff's appeal, Defendant essentially ignored the evidence provided regarding Plaintiff's cognitive impairment. Instead,

Defendant focused anew on the physical requirements of Plaintiff's "sedentary" job and Plaintiff's failure to submit adequate evidence regarding her physical impairment. (AR1292-1295). Defendant's inconsistency regarding its reason for denying Plaintiff's claim casts doubt on whether Defendant made that decision free from the influence of its conflicted interest. *See Abatie*, 458 F.3d at 968.

Second, Defendant failed to adequately investigate Plaintiff's claim or to ask Plaintiff for evidence it deemed necessary to render its decision. In a cursory explanation of its initial denial, Defendant stated that "there was no evidence of testing to confirm Lupas (sic)." (AR2311). Defendant also stated there were "no mini mental status exams" to confirm cognitive and memory deficits. (AR2311). The notice further stated that Plaintiff's file "[did] not indicate any…evidence of headache diaries to confirm frequency, duration and intensity of headaches." (AR2312). Notably, Defendant pointed to no evidence that Plaintiff was *not* impaired. Instead, Defendant arbitrarily imposed a requirement for specific forms of evidence (e.g. "headache diaries") which Plaintiff had not provided. If Defendant had "requested the needed information and offered a rational reason for its denial," its decision would be entitled to more deference. *Booton v. Lockheed Medical Ben. Plan*, 110 F.3d 1461, 1464 (9th Cir. 1997). However, Defendant's denial of Plaintiff's claim – without much explanation and without obtaining information it deemed relevant – weighs in favor of finding that Defendant was influenced by its conflict of interest. *See id.*; *see also Abatie*, 458 F.3d at 968.

Third, Defendant failed to credit Plaintiff's reliable evidence. For example, in its initial denial, Defendant stated that "there was no evidence of testing to confirm Lupas (sic)." (AR2311). While Plaintiff's doctors had not definitively diagnosed her with SLE at that time, there was absolutely some evidence of clinical testing, performed by Dr. Chung, to support an SLE diagnosis. Defendant also noted that Plaintiff's file did not indicate any evidence on exams of significant migraine headaches. However, Plaintiff's medical record contained the opinion of Plaintiff's treating neurologist that she believed Plaintiff to be suffering from migraines. Defendant was not entitled to arbitrarily cast aside that opinion and conclude that there was "no evidence" of migraines. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 823 (2003) ("Plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician.")

Similarly, Defendant based its initial denial in part on Plaintiff's failure to provide testing which proved her cognitive impairment. On appeal, Plaintiff therefore submitted medical evidence proving her cognitive deficits in the form of objective neuropsych testing from Dr. Castellon and Dr. Katchikian. Those cognitive functioning tests were accompanied by separate validity measures which confirmed the reliability of the tests. In rejecting Plaintiff's appeal,

Defendant offered no explanation for apparently discounting that evidence, other than (incorrect) speculation that Dr. Castellon's validity measures were "less sensitive" than those used by its own neuropsychologist (whose neuropsych testing, incidentally, also revealed cognitive deficits). Defendant's repeated failure to credit Plaintiff's reliable evidence indicates that Defendant's inherent conflict of interest impacted its decision. *See Abatie*, 458 F.3d at 698.

Lastly, the Court acknowledges that Defendant's choice of reviewers provides at least some evidence that Defendant's conflict of interest affected the decision-making process. Although a district court is generally confined to reviewing the administrative record when considering whether a plan administrator abused its discretion, "when a court must decide how much weigh to give a conflict of interest under the abuse of discretion standard…the court may consider evidence outside the record…to decide the nature, extent, and effect on the decision-making process of any conflict of interest." *Id.* The Ninth Circuit has held that in cases where the issue of whether benefits were improperly denied is a "close question," extrinsic evidence regarding the bias of a reviewing physician is pertinent to determine whether to apply abuse of discretion or "abuse of discretion tempered with skepticism." *Nolan v. Heald College*, 551 F.3d 1148, 1155 (9th Cir. 2009).

Here, Plaintiffs have produced an authenticated letter from Dr. Knapp, addressed to Dr. Peter Skeie ("Dr. Skeie") in response to Dr. Skeie's article *Doctors, Lawyers and Disability Benefit Claims*, published in May 2013.[8] *See Chandler Decl.* Ex. C ["Knapp letter"]. In the letter, Dr. Knapp explains his belief that behavioral issues (such as the anxiety, depression and stress associated with disability claims) perpetuate patients' unexplained pain and fatigue. *Id.* Dr. Knapp describes fibromyalgia as the "poster-child for chronic pain and fatigue," and cautions against the "medicalization of misery." *Id.* For patients suffering from chronic pain and fatigue, Dr. Knapp describes disability income as a "port in the storm of life" which "may ease a patient's burden but also condemns them to a new role." *Id.* Dr. Knapp asserts that the "real issue for such patients is not disability but 'perceived' disability." *Id.* He concludes "Bottom line – the symptoms are real, but the "impairments"…are not." *Id.*

Given the extent to which Defendant appeared to rely on Dr. Knapp's report in denying Plaintiff's claim, the Court finds it troubling that Dr. Knapp was apparently of the belief that

[8] Although Plaintiff provided other evidence of Dr. Knapp's and Dr. Furst's biases, the Court agrees with Defendant that some of the extrinsic evidence proffered by Plaintiff is not, as Plaintiff contends, probative of bias. That evidence is therefore inadmissible under Federal Rule of Evidence 402.

disability benefits are actually *harmful* to patients suffering from fibromyalgia, which Dr. Knapp conceded that Plaintiff had. The Court also reads Dr. Knapp's letter to indicate that he does not believe in the existence of actual impairment due to fibromyalgia. Courts in other Circuits have held that "premising the denial of LTD benefits solely on a report of a physician who does not believe a particular disease exists, and does not believe that the proper treatment for that [disease] can include the award of disability benefits, is an abuse of discretion." *Hoffpauir v. Aetna Life Ins. Co.*, No. 06-1939, 2009 WL 1675975, at *8 (W.D. La. 2009). The Court finds that Defendant's use of a reviewing physician who does not believe in disability benefits for patients in Plaintiff's condition is evidence that Defendant engaged in self-dealing with respect to Plaintiff's claim. *See Metropolitan Life. Ins. Co.*, 554 U.S. at 115. ("[C]laims processing…falls below par when it seeks a biased result, rather than an accurate one.")

In sum, there is ample evidence that Defendant permitted its structural conflict of interest to influence its handling of Plaintiff's claim. This weighs in favor of viewing Defendant's decision with more skepticism than if the Court were to apply a stringent abuse of discretion standard. *See Abatie*, 458 F.3d at 968.

B. Procedural Error

"A procedural error, like a conflict of interest, is a matter to be weighed in deciding whether an administrator's decision was an abuse of discretion." *Abatie*, 458 F.3d at 972. The Court has already held that Defendant committed a procedural error by relying on the Furst report without affording Plaintiff an opportunity to view and respond to the report. *See* Dkt. # 32; *see also Salomaa*, 642 F.3d at 680 (finding that by "denying [Plaintiff] the disclosure and fair opportunity [to] comment" on a physician report upon which it based its decision, an ERISA plan administrator denied Plaintiff "the statutory obligation of a fair review procedure."). The Court has also already determined that despite Defendant's error, *de novo* review is not appropriate in this case, because the error was not so flagrant that Defendant altogether failed to exercise its discretion. *See* Dkt. # 39; *see also Abatie*, 458 F.3d at 971-72 (finding that *de novo* review is only appropriate "[w]hen an administrator engages in wholesale and flagrant violations of the procedural requirements of ERISA.").

While Defendant's error may not mandate *de* novo review, it does weigh in favor of finding that Defendant abused its discretion in denying Plaintiff's claim. *See Abatie*, 458 F.3d at 972. Defendant's refusal to grant Plaintiff the opportunity to review and comment on the Furst report was a violation of Plaintiff's rights under ERISA and Ninth Circuit law. What makes Defendant's action all the more suspicious, however, is the fact that Plaintiff's counsel explicitly requested a copy of Dr. Furst's report and the raw data from his testing so that Dr. Castellon

could "be given a chance to review and comment." (AR1334). Two weeks after receiving Plaintiff's request, Defendant issued its final decision without providing Plaintiff with the report. That Defendant refused to heed Plaintiff's simple request weighs in favor of finding that Defendant abused its discretion in denying Plaintiff's claim. *Cf. Abatie*, 458 F.3d at 972 ("When an administrator can show that it has engaged in an 'ongoing, good faith exchange of information between the administrator and the claimant,' the court should give the administrator's decision broad deference notwithstanding a minor irregularity.'") (quoting *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Protection Plan*, 349 F.3d at 1098, 1107 (9th Cir. 2003)).

C. Conflicting Construction of Plan Provisions

The Court also notes that Defendant construed the Plan in a way that conflicted with its plain language, which the Ninth Circuit considers an abuse of discretion. *See Pac. Shores Hosp.*, 764 F.3d at 1042. The Court agrees with Plaintiff that Defendant effectively construed the Plan as requiring objective, as opposed to subjective, evidence in order to approve Plaintiff's claim.

Defendant asked Dr. Knapp whether the restrictions and limitations were supported. Dr. Knapp stated: "No. The medical records do not document "clinically significant objective physical or physiological abnormalities on as (sic) a result of examination and diagnostic efforts that indicate the presence of a medical impairment…". In its final decision, which appears to have been based primarily on Dr. Knapp's report, Defendant adopted his conclusions verbatim: "Dr. Knapp indicated that the records do not document clinically significant objective and measurable examinations and diagnostic findings to support impairment." Defendant emphasized the same of Dr. Furst's findings: that there was "no objective evidence of any neurocognitive or neurobehavioral restriction or limitation for [Plaintiff]."

Defendant's implicit requirement that Plaintiff submit objective evidence of her disability in order to be totally disabled within the meaning of the Policy contradicts the explicit terms of her Policy. The Policy defines total disability as (1) the inability, due to injury or sickness; (2) to perform all the material duties of one's regular occupation on a full time basis. The "Proof of Loss Requirements" stated in the Policy requires a claimant to submit certain forms, together with forms completed by a physician and the employer. In practice, Defendant imposes a requirement, not stated in the Policy, that a claimant prove her disability with "objective evidence" or "measurable examinations." Moreover, by requiring the total disability to be one which is actually capable of proof by clinically objective means (which fibromyalgia, for example, is not), Defendant essentially reads a third criterion into the definition of total disability and effectively precludes claimants suffering from certain ailments – migraines, depression,

fibromyalgia – from receiving disability benefits.

Defendant's construction of the Plan might not be so troubling if it did not conflict with the Plain language of other Plan provisions. *See Pac. Shores Hosp.*, 764 F.3d at 1042 (holding that it is an abuse of discretion for a plan administrator to construe provisions of the plan in a way that conflicts with the plain language of the plan). Here, however, the Plan implicitly acknowledges that it will pay benefits for claims lacking in objective evidence, because it imposes a 24-month limitation for "self-reported claims" (those for which a claimant offers only subjective proof). Because the Plan acknowledges that objective evidence is not a prerequisite to receiving benefits, constructing the plan in a way that precluded Plaintiff from receiving benefits based on the subjective nature of her claims was an abuse of discretion. *See id.*

The Court is further convinced that Defendant abused its discretion because under Ninth Circuit law, the imposition of an "objective evidence" requirement is "arbitrary and capricious" where the condition in question, such as fibromyalgia, is not capable of being measured or diagnosed by objective criteria:

> …As we said in dicta in a fibromyalgia case, "if the administrator had said, 'we will not accept fibromyalgia as a diagnosis unless you present objective evidence of it such as positive findings on x rays,' she would have been demanding what cannot exist…" We now establish as holding what was then dicta, that conditioning an award on the existence of evidence that cannot exist is arbitrary and capricious.

Salomaa, 642 F.3d at 678. Here, Defendant abused its discretion in basing its denial of Plaintiff's claim on the absence of "objective measurable findings" where no such requirement existed as part of the Plan. *See id.*

D. Erroneous Factual Basis for Determination

As already explained, Defendant failed to develop facts which it apparently deemed necessary to making its determination. That failure alone may constitute an abuse of discretion. *See Pac. Shores Hosp*, 764 F.3d at 1042. Here, Defendant's abuse of discretion was even more apparent because Defendant "relie[d] on clearly erroneous findings of fact in [denying Plaintiff's claim]." *Id.* (quoting *Taft*, 9 F.3d at 1473).

For example, Dr. Knapp asserted that the medical records did not "document clinically objective physical or physiological abnormalities" supporting medical impairment. Similarly, Dr. Furst reported that he had "no objective evidence of any neurocognitive or neurobehavioral

restriction or limitation." Defendant relied on these findings in support of denying Plaintiff's claim. However, both doctors' assertions fly in the face of the evidence contained in the records they claimed to have reviewed. Those records contained evidence of abnormal findings on a trigger point fibromyalgia test, neuropsych tests from Dr. Castellon and Dr. Katchikian reflecting cognitive and neurobehavioral impairment, clinical tests from Dr. Chung revealing signs of SLE, and the results of a pulmonary function test revealing mild restrictive lung disease.

Similarly, in denying Plaintiff's claim, Defendant adopted Dr. Knapp's assertion that Plaintiff did not have SLE because she did not respond favorably to SLE treatment in the form of Plaquenil, Imuran or Methotrexate. Dr. Knapp's conclusion was contrary to the December 2, 2013 medical notes from Dr. Chung indicating that Plaintiff's positive reaction to Imuran had raised Dr. Chung's suspicions that Plaintiff might in fact be suffering from SLE. Not only was Dr. Knapp's assertion clearly erroneous, but it should have been obvious to Defendant because Dr. Knapp acknowledged Plaintiff's positive response to Imuran in his summary of Dr. Chung's notes. The Court finds that Defendant's reliance on clearly erroneous facts as a basis for denying Plaintiff's claim was an abuse of discretion. *See Pac. Shores Hosp*, 764 F.3d at 1042.

E. Augmented Record

Viewing Defendant's decision with increased skepticism because of its structural conflict of interest and procedural error, the Court would find that Defendant abused its discretion even if it had not unfairly construed the terms of the plan or relied on clearly erroneous factual bases (which themselves constitute abuses of discretion). In light of *all* of the evidence before it, Defendant did not have a reasonable basis to conclude that Plaintiff was capable of performing the material duties of her regular occupation on a full time basis.

Plaintiff has submitted years of medical records that document extensive treatment, constantly changing medication, and the opinions of treating neurologists, rheumatologists, internists, and psychologists that Plaintiff was suffering from some combination of SLE, fibromyalgia, migraines, and major depression. Plaintiff met with members of FMG group twenty-three times between August 2012 and July 2013. The records uniformly show that Plaintiff's treating physicians, considering her condition to be valid, continued to change her prescribed medications and increase her dosages in an attempt to alleviate her persistent symptoms. As of July, 2013, Plaintiff was taking Gabapentin for nerve pain, Plaquenil for SLE, Namenda for migraines, Sentraline for depression, Topamax for migraines, and Amitriptyline for depression and fatigue. (AR251). Plaintiff's physicians considered at least some of these medications to be "high risk," but prescribed them anyway.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV14-9803 PSG (PJWx)	Date	December 18, 2015
Title	Felanice L. Yancy v. United of Omaha Life Ins. Co.		

Although Plaintiff's conditions do not readily lend themselves to objective evidence, the opinions of Plaintiff's treating physicians are supported by the objective evidence which does exist in the record. Plaintiff had inflammation markers, high ANA rates and malar rash. Because of her symptoms, at least six of Plaintiff's treating physicians stated that she had either SLE or probable SLE. Plaintiff's medical records also demonstrate that Plaintiff suffered from diffuse joint pain, swelling, constant migraines, fatigue, cognitive deficits and depression. Those symptoms are consistent with Plaintiff's fibromyalgia diagnosis, which none of Plaintiff's treating or examining physicians disputed.

Moreover, when Plaintiff's initial denial was premised on the absence of proof regarding her cognitive deficit, she obtained that proof from a credible neurologist. Plaintiff submitted the results of Dr. Castellon's neuropsych testing, which showed that despite solid test-taking effort, Plaintiff was cognitively impaired. Dr. Castellon opined that given the extent of her impairment, it was unlikely she could perform the material functions of her cognitively demanding job. Plaintiff also submitted reliable evidence from Dr. Katchikian showing that despite exerting solid effort, Plaintiff's tests revealed that she was "having difficulties in multiple areas of physical and psychological functioning." With respect to proving both physical and cognitive impairments, Plaintiff met her burden of demonstrating disability.

In contrast and despite its best efforts, Defendant failed to debunk any of Plaintiff's evidence, either by offering affirmative, credible evidence that Plaintiff was not disabled or by showing that Plaintiff's evidence of disability was not reliable. *See Abatie*, 458 F.3d at 970 ("What 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.")

Neither of the nurse reviews conducted as part of Defendant's initial denial were credible. Nurse Sturgess found that because Plaintiff was not "disheveled," "paranoid," "psychotic," "stammering" having "delusions" or in possession of "bad hygiene," she was capable of performing the material duties of her job. Nurse Thiesen opined that Plaintiff had no limitations because she could drive and perform household chores. Both nurses ignored the critical question of whether Plaintiff could perform the material functions of a cognitively demanding job as a software engineer. Both Nurses ignored the explicit findings of her attending physician that she could not.

Similarly, none of the evidence which Defendant relied on during the appeals process credibly supported a finding that Plaintiff was not disabled. The Court has already addressed the credibility issues surrounding Dr. Knapp's report: mainly, that Dr. Knapp appeared to be biased,

and that some of his conclusions contradicted the facts on which he relied. The Court now adds that Dr. Furst's report was similarly lacking as a credible means of refuting Plaintiff's disability.

First, Dr. Furst's report actually confirmed that Plaintiff *was* cognitively impaired with respect to verbal learning, recall and problem-solving. Even if Defendant chose to overlook Dr. Furst's findings, based on his own assertion that his results lacked validity, the invalidity of those results does not affect the validity of Dr. Castellon's results, which revealed that Plaintiff was cognitively impaired. In other words, although Dr. Furst stated that *he* had no objective evidence of impairment, Dr. Castellon did. Although Dr. Furst offered some evidence (in the form of mere speculation) that Dr. Castellon's results regarding Plaintiff's test-taking efforts were not reliable because his validity measures were lacking in sensitivity, the Court finds that Dr. Furst's bare speculation, without more, is not credible. In contrast, the Court is persuaded by Dr. Castellon's rebuttal report, which provided ample support that the validity measures Dr. Castellon used were of solid, and even excellent, sensitivity. Moreover, the Court is persuaded that Dr. Furst may have overstated the invalidity of his results which showed cognitive impairment. Dr. Furst believed that Plaintiff was malingering, but her results on his measures of effort were in the borderline zone. In sum, there was no credible evidence that Plaintiff did not expend adequate test-taking effort when she took Dr. Furst's tests, which revealed her to be cognitively impaired. There was, however, evidence that Plaintiff did expend adequate test-taking effort when she took Dr. Castellon's tests, which also revealed her to be cognitively impaired.

Defendant argues that its decision was reasonable by pointing to isolated aspects of Plaintiff's record. For example, Defendant points to Dr. Furst's diagnosis of Somatic Symptom Disorder as evidence that Plaintiff fabricated her dysfunction. Similarly, Defendant points to the fact that Plaintiff was experiencing racial harassment at work shortly before she began her disability leave as evidence that her disability is feigned. To further its portrayal of Plaintiff as a malingerer, Defendant emphasizes that (after seven months of unsuccessfully attempting to alleviate her condition), Plaintiff *unsuccessfully* looked into alternative career options. A court could certainly view these pieces of evidence in isolation as forming some reasonable basis for the determination that Plaintiff was not truly disabled.

However, the Ninth Circuit warned against exactly this type of piecemeal evaluation in *Pacific Shores Hosp.*, 764 F.3d at 1041-42. There, the court explicitly rejected an "any reasonable basis" test that did not consider "all the circumstances of the case." *Id.* at 1042. The court explained:

> [F]actors favoring discharge from the hospital might provide reasonable bases if considered in isolation. A plaintiff might be eating well, have proper blood sugar levels, have no infections, and have a supportive family. Those factors, considered in isolation, would support discharge. But if the reason for the patient's hospitalization is severe congestive heart failure, those factors would not be reasonable bases to support discharge.

Id. The Court concluded that under *Abatie*, a court assessing a denial of benefits under ERISA should consider "all the circumstances before it." *Id.*

Applying the Ninth Circuit's reasoning, the Court regards the evidentiary bases on which Defendant relies in the broader context of Plaintiff's entire claim. The reasonableness of Defendant's decision does not hold up under that assessment.

For example, Defendant is correct to note that Plaintiff took leave of absence around the same time she was facing racial harassment at her job, but neither the Court nor Defendant may view this reality to the exclusion of extensive evidence on the record that Plaintiff was also medically impaired. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 823 (2003) ("Plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician.") Moreover, the facts are reconcilable given the view, held by several of Plaintiff's treating and evaluating physicians, that Plaintiff's workplace stress explained, rather than discredited, the onset of her medical condition. For example, Dr. Silverman noted that "much of [Plaintiff's] current disability may be related to her fibromyalgia" and that "[h]er workplace stress can be one of the triggering factors for her fibromyalgia." This view was also supported by Dr. Furst, who acknowledged that his diagnosis of Somatic Symptom Disorder only meant that psychological factors brought on by stress might have *amplified* any underlying dysfunction from SLE or fibromyalgia. Dr. Furst was careful to state that his diagnosis did not "rule out" any underlying condition, and that he would "defer to appropriate examiners in internal medicine and rheumatology" as to whether Plaintiff was medically, as well as psychologically, impaired.

Similarly, facts regarding Plaintiff's over emphasis of pain and fatigue during the appeal process cannot be viewed to the exclusion of evidence that she was cognitively impaired, or to the exclusion of the explanation, offered by Dr. Castellon, that a medical-legal setting can cause such over-reporting. Nor can Defendant focus purely on the physical requirements of Plaintiff's occupation to argue that she was not disabled, when her material duties involved cognitive functioning at a level at which Plaintiff was not capable of performing. Likewise, Plaintiff's sitting for a dental exam while on leave from her job as a software engineer may be construed in isolation as evidence that Plaintiff feigned her illness. Alternatively, it may be viewed as

evidence that Plaintiff would prefer to working in some capacity, but is prevented from doing so because of her disability. Regardless, it does not negate the rest of the evidence on the record regarding Plaintiff's medical condition.

In sum, there is no evidence which can provide a reasonable basis for Defendant's denial when all of the circumstances of Plaintiff's case are considered in the aggregate. The Court therefore finds that Defendant abused its discretion in denying Plaintiff's claim.

V. Conclusion

For the foregoing reasons, the Court finds for Plaintiff. Plaintiff is entitled to back benefits to the date of judgment. Plaintiff is instructed to submit a judgment consistent with this order.

IT IS SO ORDERED.