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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Eduardo L Nieves,

10 Plaintiff,

11 v.

12 Prudential Insurance Company of America,

13 Defendant.

No. CV-16-00768-PHX-DGC

**ORDER**

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15 The parties have filed briefs on the merits of this ERISA case. Docs. 26, 29.  
16 Defendant Prudential Insurance Company of America styled its opening brief as a motion  
17 for summary judgment, to which Plaintiff has responded. Doc. 24, 31. Despite this  
18 difference in briefing, Plaintiff agrees that the Court can resolve this case on the merits.  
19 Doc. 31 at 8.<sup>1</sup> The Ninth Circuit has also noted that, “[i]n the ERISA context, a motion  
20 for summary judgment is merely the conduit to bring the legal question before the district  
21 court and the usual tests of summary judgment, such as whether a genuine dispute of  
22 material fact exists, do not apply.” *Harlick v. Blue Shield of California*, 686 F.3d 699,  
23 706 (9th Cir. 2012) (quotation makes and citation omitted). After reviewing the merits of  
24 this case, the Court finds that Plaintiff is entitled to relief.

25 **I. Background.**

26 Plaintiff was employed with Comtech Telecommunications Corporation from  
27 \_\_\_\_\_

28 <sup>1</sup> Citations are to page numbers attached at the top of each page by the Court’s CMECF system, not to original page numbers at the bottom of each page.

1 June 16, 1997, until March 10, 2015. AR 85. Plaintiff participated in an employee  
2 welfare benefit plan that provided coverage for short-term and long-term disability (the  
3 “Plan”). Doc. 24 at 3. Plaintiff worked as a “Technician III” and made repairs on  
4 satellite communications equipment. AR 820-21, 843. Plaintiff alleges that his job  
5 required the continual use of his hands and constant sitting, standing, climbing, and  
6 crouching. Doc. 26 at 8.

7 In 2007, Plaintiff suffered from severe headaches and required spinal surgery to  
8 correct the problem. *Id.* at 9-10. According to Plaintiff, the performing surgeon “was  
9 clear the surgery didn’t permanently ‘fix’ the problem, and that [Plaintiff] should expect  
10 his symptoms to re-occur.” *Id.* In 2011, Plaintiff began suffering severe back and arm  
11 pain related to his spinal condition. *Id.* Plaintiff asserts that he went on light duty work  
12 in 2011 at his physician’s request. *Id.* His work restrictions included limits on “sitting,  
13 standing and lifting.” AR 538.

14 Plaintiff continued to work full-time for Comtech with the aid of pain relieving  
15 shots and medication. On March 10, 2015, he was terminated as part of a Reduction in  
16 Force (“RIF”). Doc. 26 at 10-11; AR 843, 865, 867. Plaintiff alleges that he learned of  
17 the RIF on March 9, 2015. Doc. 26 at 11. Plaintiff immediately spoke with his “boss’s  
18 boss,” Brian Rogge, and asked whether he would be laid off as part of the RIF. If so, he  
19 asked permission to file for disability instead. *Id.* Plaintiff asserts that Mr. Rogge  
20 assured him: “you’re good,” which led Plaintiff to believe he would not be laid off and  
21 should not file for disability. *Id.* Plaintiff was terminated the next day. *Id.* At his  
22 termination meeting, Plaintiff again asked to file for disability, and asked Comtech  
23 Human Resources staff for the paperwork to make a claim. *Id.* Staff did not provide  
24 Plaintiff with the paperwork, and he was escorted from the building. *Id.*

25 On April 14, 2015, Plaintiff filed a claim for short-term disability (“STD”)  
26 benefits under the Plan with Defendant Prudential, the Plan administrator. *Id.* at 13;  
27 AR 109. On April 22, 2015, Prudential issued a letter denying Plaintiff’s claim because  
28 he did not have coverage under the Plan at the time of his disability, which Prudential

1 found to be March 11, 2015. AR 830. On September 2, 2015, Plaintiff appealed the  
2 decision and filed a new claim for long-term disability (“LTD”) benefits. AR 128. On  
3 November 20, 2015, Prudential issued Plaintiff two letters: one rejecting his appeal of the  
4 STD benefits claim, and a second denying the LTD benefits claim. Doc. 24 at 8. On  
5 January 19, 2016, Plaintiff appealed a second time, this time submitting 290 pages of his  
6 medical records in addition to the appeal paperwork. AR 238. Prudential denied the  
7 second appeal in a letter dated February 25, 2016, concluding again that Plaintiff was not  
8 covered on the March 11, 2015 date of his alleged disability. AR 856-58. Prudential’s  
9 letter acknowledged that Prudential did not conduct a review of Plaintiff’s submitted  
10 medical records. *Id.* Prudential stated that such a review was unnecessary “because  
11 [Plaintiff’s] claim was being denied for a lack of coverage.” *Id.*

12 On March 22, 2016, Plaintiff filed this action seeking to recover benefits under the  
13 Plan. Doc. 1. The issues are fully briefed, and oral argument will not aid in the Court’s  
14 decision.

## 15 **II. Analysis.**

### 16 **A. Standard of Review.**

17 ERISA allows a participant to bring an action “to recover benefits due to him  
18 under the terms of his plan.” 29 U.S.C. § 1132(a)(1)(B). Generally, a district court  
19 conducts *de novo* review of a denial of benefits. *Firestone Tire & Rubber Co. v. Bruch*,  
20 489 U.S. 101, 115 (1989). When a plan “unambiguously provide[s] discretion to the  
21 administrator” to interpret the terms of the plan and make final benefits determinations,  
22 however, the determination is reviewed for an abuse of discretion. *Abatie v. Alta Health*  
23 *& Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir.2006) (en banc). Defendants bear the burden  
24 of proving an ERISA plan’s grant of discretionary authority. *See Prichard v. Metro. Life*  
25 *Ins. Co.*, 783 F.3d 1166, 1169 (9th Cir. 2015); *see also Kearney v. Standard Ins. Co.*, 175  
26 F.3d 1084, 1089 (9th Cir. 1999).

27 Plaintiff argues that the appropriate standard of review is *de novo* because the Plan  
28 does not contain an unambiguous grant of discretion. Plaintiff concedes that “there is a

1 purported grant of discretion in” the Summary Plan Description (“SPD”), but argues that  
2 this grant is insufficient “because the discretionary language is contained only in the  
3 SPD” and “is not binding, unless it is incorporated into the Plan.” Doc. 26 at 20-21.

4 The Court agrees. Statements in the SPD “do not themselves constitute the terms  
5 of the plan.” *See Cigna Corp. v. Amara*, 563 U.S. 421, 438 (2011). The SPD is a  
6 statutorily-required document provided by the administrator of any employee benefit plan  
7 to participants and beneficiaries of that plan, and is intended to “be written in a manner  
8 calculated to be understood by the average plan participant.” 29 U.S.C. § 1022(a). The  
9 SPD contains information “about the plan,” but is not itself “part of the plan.”  
10 *Amara*, 563 U.S. at 436. The SPD cannot override or supplement the terms of other plan  
11 documents. *Prichard*, 783 F.3d at 1170. “[W]here – as here – a [SPD] is not  
12 incorporated in the plan document, and is ‘absent from documents listed in [the] plan’s  
13 integration clause,’ a grant of discretion in the [SPD] plainly cannot be considered a term  
14 of the Plan.” *Murphy v. California Phys. Servs.*, --- F. Supp. 3d. ---, 2016 WL 568 2567  
15 at \*5 (N.D. Cal. Oct. 3, 2016) (citing *Prichard*, 783 F.3d at 1170-71).

16 Prudential argues that the SPD is part of the Plan and that its grant of discretion is  
17 valid. Prudential argues that *Amara* does not hold “that [a grant of] discretion cannot be  
18 contained in an SPD,” but rather “implies that, though not in all cases, the SPD may be  
19 enforced as a plan term when it does not contradict a plan.” Doc. 24 at 11. Prudential  
20 contends that because “[t]he SPD here does not conflict with the other governing plan  
21 documents . . . it constitutes a plan document and the grant of discretion to Prudential  
22 contained there is valid.” *Id.* In support, Prudential cites *Eugene S. v. Horizon Blue*  
23 *Cross Blue Shield of N.J.*, 663 F.3d 1124, 1131 (10th Cir. 2011), which stated:

24 We interpret *Amara* as presenting either of two fairly simple propositions,  
25 given the factual context of that case: (1) the terms of the SPD are not  
26 enforceable when they conflict with governing plan documents, or (2) the  
SPD cannot create terms that are not also authorized by, or reflected in,  
governing plan documents.

27 *Eugene S.*, 663 F.3d at 1131. The court found it unnecessary to determine which  
28 proposition applied because the SPD at issue “does not conflict with the Plan or present

1 terms unsupported by the Plan; rather it *is* the Plan.” *Id.* (emphasis in original). The SPD  
2 stated in the introduction “that it, along with the individual Certificate of Coverage[,]  
3 forms the Group Insurance Certificate; that it is made part of the Group Policy; and that  
4 all benefits are subject in every way to the entire Group Policy, which includes the SPD.”  
5 *Id.* at 1132 (internal quotations omitted). *Eugene S.* held that the SPD was part of the  
6 plan and that its language provided an unambiguous grant of discretion to the plan  
7 administrator. *Id.*

8 Here, the SPD is not incorporated into the Plan. The SPD cover page states in  
9 large bold font that “The Summary Plan Description is not part of the Group Insurance  
10 Certificate. It has been provided by your Employer and included in your Booklet-  
11 Certificate upon the Employer’s request.” Doc. 25-1 at 73 (Exhibit A to Prudential’s  
12 Statement of Undisputed Facts – SPD to the Group Insurance Certificate). The SPD is  
13 not listed among the documents making up “[t]he entire Group Contract.” AR 10, 22.  
14 Nor is the SPD listed in the table of contents for Comtech’s Group Insurance Certificate.  
15 AR 33. No provision in the Plan cited by the parties or found by this Court incorporates  
16 the SPD into the Plan. As a result, the Court cannot conclude that the SPD is a part of the  
17 Plan that unambiguously grants discretion to Prudential.

18 Prudential contends that other provisions in the Plan contain an unambiguous  
19 grant of discretion. Doc. 24 at 11-12 (listing Plan provisions containing the language  
20 limiting a participant’s benefits eligibility to “when Prudential determines,” requiring  
21 proof of disability that is “satisfactory to Prudential,” stating that “Prudential will  
22 consider” a claimant to be able to work if he can work 40 hours per week, and noting that  
23 “Prudential will look to your occupation” as it is normally performed) (citing Doc. 25,  
24 ¶12). This argument also fails. Numerous courts have held that similar provisions do not  
25 convey an unambiguous grant of discretion. *See, e.g., Murphy*, 2016 WL 5682567, at \*4  
26 (finding no grant of discretion where plan provisions gave the administrator authority to  
27 interpret federal and state law, to require satisfactory proof of disability, and to determine  
28 eligibility of benefits under the plan); *Mazet v. Halliburton Co. Long Term Disability*

1 *Plan*, 366 Fed. App'x. 839, 840-41 (9th Cir. 2010) (“satisfactory proof” provisions are  
2 ambiguous and thus do not provide sufficient grounds for adopting abuse of discretion  
3 standard); *Feibusch v. Integrated Device Tech.*, 463 F.3d 880, 883-85 (9th Cir. 2006)  
4 (language requiring “satisfactory proof” of claim is inadequate to confer discretion);  
5 *Simkins v. Nevadacare, Inc.*, 229 F.3d 729, 733-34 (9th Cir. 2000) (grant of discretion to  
6 define policy and procedure was not the same as discretion to construe terms of plan).

7 Lastly, Prudential argues that courts in this district have previously applied the  
8 abuse of discretion standard to identical Plan language. Doc. 24 at 12; Doc 29 at 3 (citing  
9 *Horton v. Phoenix Fuels, Co., Inc.*, 611 F. Supp. 2d 977, 986 (D. Ariz. 2009); *Fulayter v.*  
10 *The Prudential Ins. Co. of Am.*, No. CV06-1435-PCT-NVW, 2007 WL 4335840, \*10 (D.  
11 Ariz. Feb. 6, 2007)). But both of these cases pre-date the Supreme Court’s decision in  
12 *Amara*. They also are distinguishable. In *Horton*, the court notes that:

13 The provision allegedly granting Prudential discretion is contained in an  
14 [SPD]. The text of this [SPD] is preceded by a notice that reads, “This [SPD]  
15 is not part of the Group Insurance Certificate.” The Court declines to  
16 consider whether, in light of this statement, the [SPD] is a plan document and  
what effect, if any, this fact has on the standard of review. *Horton* has raised  
no such arguments, and the Court will not rule on matters not before it.

17 611 F. Supp. 2d at 985 n.7. In *Fulayter*, the Court did not consider the question of  
18 whether the SPD was a plan document because the plaintiff conceded the issue. 2007  
19 WL 433580, at \*10 (“Plaintiff concedes as much by offering that ‘the standard of review  
20 in this matter is abuse of discretion.’”).

21 The Court finds that Prudential has failed to meet its burden of showing an  
22 unambiguous grant of discretion. *See Prichard*, 783 F.3d at 1169. Accordingly, the  
23 Court will review Prudential’s denial of Plaintiff’s claim *de novo*.

24 **B. Was Plaintiff Covered Under the Plan?**

25 Prudential denied STD and LTD benefits because Plaintiff was not covered under  
26 the Plan. The parties agree that Plaintiff was covered through the date of his termination,  
27 March 10, 2015. Prudential argues that Plaintiff’s claim is not covered by the Plan  
28 because he was not disabled until March 11, 2015, the day after he had been terminated.

1 Doc. 24 at 13-16. The question to be decided by the Court is whether Plaintiff's  
2 disability claim arose on March 11, 2015, after he was no longer covered by the Plan, or  
3 whether it arose before that date while Plaintiff was covered.<sup>2</sup>

4 Prudential asserts that "Plaintiff's alleged date of disability is March 11, 2015."  
5 Doc. 26 at 15; Doc. 31 at 11; Doc. 25 at 6, ¶ 19. But every citation Prudential makes to  
6 the administrative record in support of this assertion cites to a document Prudential  
7 created. See Doc. 25 at 6, ¶ 19; AR 830 (April 22, 2015 Prudential letter denying  
8 Plaintiff's claim); 832 (May 1, 2015 Prudential letter denying Plaintiff's claim); 843  
9 (November 20, 2015 Prudential letter denying Plaintiff's claim); 864 (Prudential internal  
10 notes stating date of disability as March 11, 2015); 866 (same). None of the cited  
11 documents explains how Prudential arrived at such a conclusion, and no evidence cited  
12 by Prudential shows that Plaintiff ever claimed a disability date of March 11, 2015.

13 Prudential's primary argument appears to be that Plaintiff could not have been  
14 disabled before March 11, 2015, and therefore could not have had a disability claim  
15 before that date, because he was working full time for Comtech. Although this argument  
16 has superficial appeal, many cases have recognized that disability is not disproved by the  
17 mere fact that the claimant found a way to continue working. See, e.g., *Hawkins v. First*  
18 *Union Corporation Long-Term Disability Plan*, 326 F.3d 914, 918 (7th Cir. 2003) (there  
19 is no "logical incompatibility between working full time and being disabled from  
20 working full time" as "a desperate person might force himself to work despite an illness  
21 that everyone agreed was totally disabling"); *Wilcox v. Sullivan*, 917 F.2d 272, 277 (6th  
22 Cir. 1990) (a claimant "should not be penalized because he had the courage and  
23 determination to continue working despite his disabling condition"); *General American*  
24 *Life Ins. Co. v. Yarbrough*, 360 F.2d 562, 566 (8th Cir. 1966) ("the mere fact that the  
25 insured performs certain labor, when common care and prudence require otherwise, does

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27 <sup>2</sup> The parties appear to agree that if Plaintiff was disabled before coverage lapsed  
28 on March 10, 2015, he would be permitted to file a claim up to 270 days after the date his  
disability arose. See Doc. 24 at 7, 13; Doc 29 at 10-11; Doc. 26 at 15; Doc. 31 at 11-14.  
Prudential does not argue that Plaintiff's claim is untimely if, as Plaintiff alleges, he  
became disabled before March 10, 2015.

1 not of itself demonstrate a lack of total disability”).

2 What is more, the Court’s task at this point is not to decide whether Plaintiff was  
3 actually disabled before March 11, 2015. Prudential denied benefits on the basis that  
4 Plaintiff was not covered by the Plan when his claim arose. Thus, the question is not  
5 whether Plaintiff had a *valid* disability claim, but when his disability claim (whether valid  
6 or invalid) arose.

7 Plaintiff offers evidence that he attempted to file for disability before March 11,  
8 2015. He provides a declaration submitted to Prudential during the administrative  
9 appeals process. AR 823. The declaration states that “in early 2015 I informed my  
10 superiors that I was planning to go on disability in August of 2015[,]” and that on  
11 March 10, 2015, when “I was told I was being laid off[,] I told one of the HR people,  
12 Tom Blackwell, that I wanted to file for disability instead.” AR 824-25, ¶¶ 30, 32.  
13 Plaintiff alleges that he tried to file a claim for disability, but that Comtech personnel  
14 would not provide his with the necessary paperwork and he was escorted from the work  
15 site. AR 825. Plaintiff also cites an email exchange between Comtech Director of  
16 Human Resources, Audrey Bethea, and Plaintiff’s attorney. AR 826. In her email, sent  
17 on March 17, 2015, Ms. Bethea acknowledges that Plaintiff “had mentioned during the  
18 exit interview that he wanted to apply for disability.” *Id.* These two pieces of evidence  
19 confirm that Plaintiff attempted to file for disability before his coverage lapsed, and  
20 nothing in the administrative record suggests otherwise.

21 Given this evidence, the Court concludes that Plaintiff’s claim for disability,  
22 whether valid or invalid, arose before he was terminated. Prudential erred when it found  
23 that Plaintiff’s claim arose after his coverage had lapsed.<sup>3</sup>

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25 <sup>3</sup> The Court would reach this conclusion even if it was applying abuse-of-  
26 discretion review. Prudential’s position that Plaintiff made no claim until after his  
27 termination is supported by no evidence in the record. A denial based on no evidence is  
28 an abuse of discretion. In addition, as Plaintiff notes, he submitted a declaration during  
the administrative review process stating that he sought to make a claim for disability  
before his termination. Doc. 31 at 16. Prudential did not have to take him at his word.  
Prudential could have interviewed Plaintiff about this assertion, asked Comtech about the  
allegations, or compiled a full record on Plaintiff’s claim. *Id.* Having failed to determine  
when Plaintiff first claimed disability, Prudential’s lack-of-coverage denial was an abuse

1           **C.     Was Plaintiff Disabled?**

2           Prudential argues that Plaintiff was not disabled because he was able to perform  
3 the material and substantial duties of his regular occupation and he did not have a 20% or  
4 greater loss in his monthly earnings due to sickness or injury, as required by the Plan.  
5 Doc. 29 at 6-9. Prudential notes that Plaintiff worked up until the date of his termination  
6 through the RIF, and reviews various parts of the medical records in the administrative  
7 record to show Plaintiff was able to work. *Id.* The problem with this position is that  
8 Prudential never took it before this litigation.

9           “The general rule . . . is that a court will not allow an ERISA plan administrator to  
10 assert a reason for denial of benefits that it had not given during the administrative  
11 process.” *Harlick v. Blue Shield of California*, 686 F.3d 699, 719-20 (9th Cir. 2012). As  
12 the Ninth Circuit has explained:

13           An ERISA plan administrator who denies a claim must explain the  
14 “specific reasons for such denial” and provide a “full and fair review” of  
15 the denial. 29 U.S.C. § 1133. The administrator must also give the  
16 claimant information about the denial, including the “specific plan  
17 provisions” on which it is based and “any additional material or  
18 information necessary for the claimant to perfect the claim.” 29 C.F.R.  
19 § 2560.503-1(g). A plan administrator may not fail to give a reason for a  
20 benefits denial during the administrative process and then raise that reason  
for the first time when the denial is challenged in federal court, unless the  
plan beneficiary has waived any objection to the reason being advanced for  
the first time during the judicial proceeding.

21 *Id.* at 719. “The purpose of ERISA’s requirement that plan administrators provide  
22 claimants with specific reasons for denial is undermined where plan administrators have  
23 available sufficient information to assert a basis for denial of benefits, but choose to hold  
24 that basis in reserve rather than communicate it to the beneficiary.” *Mitchell v. CB*  
25 *Richard Ellis Long Term Disability Plan*, 611 F.3d 1192, 1199 n.2 (9th Cir. 2010).  
26 Indeed, Prudential itself takes a similar position, arguing that Plaintiff should not be  
27 permitted to make arguments in this Court that he did not make in the administrative  
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of discretion.

1 review process. Doc. 29 at 10.<sup>4</sup>

2 In *Harlick*, a plan administrator, Blue Shield, denied the plaintiff’s claim on the  
3 basis that the plan did not cover residential treatment programs. *Id.* The plaintiff brought  
4 suit and the district court granted summary judgement for Blue Shield, upholding its  
5 determination that the plan did not cover residential treatment programs. *Id.* at 706. The  
6 Ninth Circuit reversed, holding that although the plan did not cover residential treatment  
7 programs, the plaintiff’s claim must be covered as a “medically necessary treatment”  
8 under California law. *Id.* at 719. Blue Shield asked the court to remand the case so Blue  
9 Shield could determine whether the residential care was medically necessary. *Id.* The  
10 Ninth Circuit denied the request, stating:

11 Blue Shield had discretion to determine whether treatment was medically  
12 necessary during the administrative review process of Harlick’s claim. But  
13 Blue Shield had to tell Harlick the “specific reasons for the denial” – not  
14 just one reason, if there was more than one – and provide a “full and fair  
15 review” of the denial. 29 U.S.C. §1133. Blue Shield told Harlick . . . that  
16 medical necessity was not the reason for its denial of Harlick’s claim. It  
cannot now bring out a reason it has “held in reserve” and commence a new  
round of review. . . . By failing to assert during the administrative process  
that medical necessity was a reason for denying Harlick’s claim, Blue  
Shield forfeited the ability to assert that defense in litigation now before us.

17 *Id.* at 720-21 (case citations omitted)(emphasis in original).

18 Prudential, like Blue Shield, denied Plaintiff’s claim solely on the basis that it was  
19 not covered under the Plan. Under *Harlick*, Prudential cannot assert a different reason for  
20 denying the claim – that Plaintiff was not disabled. Prudential, like Blue Shield, failed to  
21 provide a “full and fair review” of Plaintiff’s claim and now seeks remand to conduct  
22 such a review. But under *Harlick*, Prudential cannot assert a reason for denial that it  
23 previously “held in reserve” for another round of review. *See* 29 U.S.C. §1133; *Harlick*,  
24 686 F.3d at 720-21. Other Ninth Circuit cases have recognized the same rule applied in  
25 *Harlick*. *See Mitchell*, 611 F.3d at 1199 n.2.

26 Prudential’s argument for remand relies on several Ninth Circuit cases, but the  
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28 <sup>4</sup> The Court notes that the Ninth Circuit has rejected Prudential’s argument.  
*Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620 (9th Cir. 2008).

1 Court finds them less relevant than *Harlick*. Prudential quotes *Pannebecker v. Liberty*  
2 *Life Assur. Co. of Boston*, 542 F.3d 1213 (9th Cir. 2008), for the proposition that “where  
3 an administrator’s initial denial of benefits is premised on a failure to apply plan  
4 provisions properly, [courts] remand to the administrator to apply the terms correctly in  
5 the first instance.” *Id.* at 1221. But *Pannebecker* held that an administrator’s decision to  
6 terminate benefits it had been paying for three years was arbitrary and capricious, and  
7 that the claimant should have continued to receive the benefits during her appeal of the  
8 plan administrator’s decision. *Id.* at 1221. *Pannebecker*’s comment about remand in  
9 other cases is dictum.

10 Prudential cites *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620,  
11 635 (9th Cir. 2008), for the proposition that failing to remand would frustrate the purpose  
12 of ERISA’s exhaustion requirement. Doc. 29 at 16. But the language Prudential cites is  
13 from the dissent in *Vaught* and provides little support for Prudential’s remand argument.

14 Prudential cites *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term*  
15 *Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996), which does address remand to an  
16 administrator. The Ninth Circuit held “that remand for reevaluation of the merits of a  
17 claim is the correct course to follow when an ERISA plan administrator, *with discretion*  
18 *to apply a plan*, has misconstrued the Plan and applied a wrong standard to a benefits  
19 determination. *Id.* at 460 (emphasis added). But *Saffle* is less than fully applicable in this  
20 instance because, as discussed above, Prudential did not have discretion to apply the Plan.  
21 Furthermore, Prudential’s mistake was not a legal error, such as misconstruing a  
22 provision of the Plan, but a factual error in failing to address Plaintiff’s argument that his  
23 claim arose before he was terminated.

24 The Court acknowledges that language from *Pannebecker* and *Saffle* can be  
25 viewed as inconsistent with the Ninth Circuit’s more recent decisions in *Harlick* and  
26 *Mitchell*. But the Court finds *Harlick* to be squarely on point. The Court must follow  
27 controlling Ninth Circuit precedent, and therefore holds that, by failing to assert during  
28 the administrative process that Plaintiff was not disabled under the Plan, Prudential has

1 forfeited its ability to assert that defense in this litigation. *See Harlick*, 686 F.3d at 721.  
2 Because Plaintiff's claim was covered by the Plan at the time it arose, and Prudential is  
3 foreclosed from asserting that Plaintiff was not medically disabled, the Court concludes  
4 that Plaintiff is entitled to judgement in this case.

5 **IT IS ORDERED:**

- 6 1. Plaintiff's Motion for Judgment (Doc. 26) is **granted**.
- 7 2. Prudential's Motion for Summary Judgment (Doc. 24) is **denied**.
- 8 3. Prudential is ordered to pay back benefits under the STD and LTD  
9 coverages, and to continue to pay Plaintiff benefits so long as Plaintiff  
10 remains disabled under the terms of the Plan.
- 11 4. The Clerk of Court is directed to enter judgment accordingly.

12 Dated this 17th day of January, 2017.

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15 David G. Campbell  
16 United States District Judge  
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