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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Karen Judd,

10 Plaintiff,

11 v.

12 Qwest Communications International  
13 Incorporated, Plan Administrator of the  
14 Qwest Disability Plan aka Qwest  
Communications International,

15 Defendant.

No. CV-11-725-PHX-GMS

**ORDER**

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17 Pending before the Court are motions for summary judgment filed by Plaintiff  
18 Karen Judd (Doc. 42) and Defendant Qwest Communications (Doc. 39). For the reasons  
19 stated below, the Court denies Plaintiff's motion and grants Defendant's.  
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21 **BACKGROUND**

22 Plaintiff Karen Judd worked for Qwest Communications for nearly five years as a  
23 Credit Consultant. (Doc. 42 at 4). She brings an ERISA action for denial of benefits  
24 against her former employer, as the ERISA Plan sponsor. (Doc. 44 at 4). Plaintiff  
25 contends that there is a "structural conflict of interest" in the relationship between her  
26 former employer and the third-party administrator (TPA) responsible for administering  
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1 the plan. (Doc. 41 at 5-6; Doc. 46 at 2–3). Plaintiff further argues that the decision to  
2 terminate her long-term disability (LTD) benefits was arbitrary and capricious, and  
3 therefore an abuse of discretion. (Doc. 42 at 2).

4 **I. The Plan**

5 Qwest Communications sponsors an ERISA Plan for its employees. (Doc. 44 at 4).  
6 The Plan is administered by Qwest Employee Benefits Committee (EBC), and provides  
7 that the EBC may delegate its responsibilities “by entering into a contract” for a third  
8 party to act as Plan administrator. (Doc. 40, ¶2). Since April 2004, EBC has contracted  
9 with a third-party administrator (TPA), Reed Group Ltd., operating as Qwest Disability  
10 Services. (*Id.* at 2). The TPA is not a party to this action, and the parties do not dispute  
11 that the plan administrator delegated responsibility to the TPA. (Doc. 44 at 2; Doc. 42 at  
12 2–3).  
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16 **II. Denial of Plaintiff’s LTD Benefits**

17 The parties dispute whether the decision to terminate Plaintiff’s LTD benefits was  
18 arbitrary and capricious or otherwise an abuse of discretion. (Doc. 42 at 2). Ms. Judd has  
19 been variously diagnosed with mental health disorders including, *inter alia*, bipolar  
20 disorder, pathologic gambling and major depression recurrent, and has been prescribed  
21 multiple medications to address these issues. (Doc. 43, ¶5,7). She also has a history of  
22 substance abuse, including alcohol and methamphetamine abuse. (Doc. 43, ¶24; Doc. 40,  
23 ¶30; Doc. 44, ¶19).  
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26 On October 7, 2004, Ms. Judd “went out of work” and began to receive short-term  
27 disability (STD) benefits due to what was then labeled bipolar disorder. (Doc. 43, ¶3;  
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1 Doc. 41 at 2). Ms. Judd was hospitalized for a period in 2005 for severe depression. (Doc.  
2 43, ¶6). In October 2005, Ms. Judd was awarded Social Security SSDI benefits, and the  
3 TPA was so informed. (Doc. 43, ¶¶8–9; AR000355). Also in October 2005, Ms. Judd  
4 was given a Global Assessment of Functioning (GAF) and achieved a score of 50. (Doc.  
5 44, ¶8).<sup>1</sup>

7 Ms. Judd received 52 weeks of STD from the TPA, followed by another 40  
8 months of LTD benefits. (Doc. 43, ¶4; Doc. 41 at 2). Under the terms of the Plan, a  
9 participant, such as Plaintiff, who receives more than 12 months of LTD, is entitled to  
10 benefits if  
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12 (1) the Participant is unable to engage in any occupation or employment,  
13 which inability is supported by Objective Medical Documentation, or (2)  
14 the Participant is unable to engage in any occupation or employment for  
15 which he may reasonably become qualified for by training, education or  
16 experience, other than a job that pays less than 60% of his Base Pay at the  
17 time the Participant terminates employment due to the Disability. (Doc. 40,  
18 ¶4).

19 Following an in-person examination and a file review by experts retained by the TPA,  
20 Plaintiff was denied continued LTD benefits on March 1, 2009. (Doc. 43, ¶4; Doc. 41 at  
21 2). Following her denial of benefits and a substance abuse relapse, Ms. Judd was  
22 hospitalized again on June 8, 2009 for an attempted suicide. (Doc. 43, ¶24). Denial of  
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24 <sup>1</sup> Rated on a scale from zero to 100, the GAF is “used to rate social, occupational  
25 and psychological functioning on a hypothetical continuum of mental health.” Social  
26 Security Disability Law & Procedure in Federal Court § 5:30. “People with GAF scores  
27 of 41 to 50 have serious symptoms ... [or] serious impairment in social, occupational  
28 or school functioning (e.g., . . . unable to keep a job).” *Id.* (internal citations omitted). “A  
GAF score between 51 and 60 indicates moderate symptoms, such as occasional panic  
attacks, while a score from 71 to 80 indicates transient reactions to normal stress, with  
only a slight impairment of functioning.” *Gravatt v. Paul Revere Life Ins. Co.*,  
CV982166PHXROSOMP, 2005 WL 2789315, at \*4 (D. Ariz. Oct. 25, 2005).

1 benefits was confirmed on appeal by the TPA on October 19, 2009. (Doc. 44 at 7).

## 2 DISCUSSION

### 3 I. Legal Standard: *Abatie* Review

4 An ERISA denial of benefits challenge “is to be reviewed under a *de novo*  
5 standard unless the benefit plan gives the administrator or fiduciary discretionary  
6 authority to determine eligibility for benefits or to construe the terms of the plan.”  
7 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). *De novo* review  
8 “requires the district court to determine the presence of material facts in dispute, just as it  
9 does in other motions for summary judgment.” *Parra v. Life Ins. Co. of N. Am.*, 258 F.  
10 Supp. 2d 1058, 1064 (N.D. Cal. 2003) *aff’d sub nom. Parrra v. CIGNA Group Ins.*, 81 F.  
11 App’x 932 (9th Cir. 2003) (citing *Tremain v. Bell Industries*, 196 F.3d 970, 978 (9th Cir.  
12 1999)). Under *de novo* review, no deference is given to the administrator’s decision to  
13 deny benefits. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1090 n.2 (9th Cir. 2010). *See*  
14 *also Firestone*, 489 U.S. at 115.

15 “[T]he standard of review shifts to abuse of discretion,” however, when discretion  
16 has been granted to the administrator or fiduciary. *Abatie v. Alta Health and Life Ins. Co.*,  
17 458 F.3d 955, 963 (9th Cir. 2006) (en banc) (citing *Firestone*, 489 U.S. at 115); *See also*,  
18 *Met. Life Ins. Co. v. Glenn*, 554 U.S. 105, 110–11 (2008). “[F]or a plan to alter the  
19 standard of review from the default of *de novo* to the more lenient abuse of discretion, the  
20 plan must unambiguously provide discretion to the administrator.” *Id.* at 963. (citing  
21 *Kearney*, 175 F.3d at 1090).

22 “Under the deferential abuse of discretion standard of review, ‘the plan  
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1 administrator's interpretation of the plan will not be disturbed if reasonable.” *Day v. AT &*  
2 *T Disability Income Plan*, \_\_ F.3d \_\_, 2012 WL 2550597 at \*3 (9th Cir. July 3, 2012)  
3 (quoting *Conkright v. Frommert*, 130 S.Ct. 1640, 1651 (2010)). While the abuse of  
4 discretion review is a much more deferential standard, “‘applying a deferential standard  
5 of review does not mean that the plan administrator will prevail on the merits.’ What  
6 deference means is that the plan administrator’s interpretation of the plan ‘will not be  
7 disturbed if reasonable.’” *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666,  
8 674–75 (9th Cir. 2011) (quoting *Conkright v. Frommert*, 130 S. Ct. 1640, 1651 (2010)).  
9 “[T]he test for abuse of discretion . . . is whether ‘we are left with a definite and firm  
10 conviction that a mistake has been committed,’ and we may not merely substitute our  
11 view for that of the fact finder.” *Salomaa*, 642 F.3d at 676 (citing *United States v.*  
12 *Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)). “ERISA plan administrators abuse their  
13 discretion if they render decisions without any explanation, . . . construe provisions of the  
14 plan in a way that conflicts with the plain language of the plan or rely on clearly  
15 erroneous findings of fact.” *Day v. AT & T Disability Income Plan*, \_\_ F.3d \_\_, 2012 WL  
16 2550597 at \*3. A court examines for abuse of discretion by considering “whether  
17 application of a correct legal standard was ‘(1) illogical, (2) implausible, or (3) without  
18 support in inferences that may be drawn from the facts in the record.’” *Salomaa*, 642 F.3d  
19 at 676. Where an administrator acts “arbitrarily and capriciously,” it “thereby abuse[s] its  
20 discretion.” *Id.* at 680. A reviewing court should weigh any conflict of interest as a factor  
21 in its review. *Glenn*, 554 U.S. at 108. Similarly, “[p]rocedural errors by the administrator  
22 are also weighed in deciding whether the administrator’s decision was an abuse of  
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1 discretion,” but ““a single honest mistake in plan interpretation’ administration does not  
2 deprive the plan of the abuse of discretion standard.” *Salomaa*, 642 F.3d at 674, (quoting  
3 *Conkright* 130 S. Ct. at 1649). “When an administrator can show that it has engaged in  
4 an ““ongoing, good faith exchange of information between the administrator and the  
5 claimant,’ ” the court should give the administrator's decision broad deference  
6 notwithstanding a minor irregularity.”*Abatie*, 458 F.3d at 972.  
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## 8 9 **II. Analysis**

### 10 **A. Discretion and Conflict of Interest**

#### 11 **1. Standard of Review**

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13 To be reviewed under the abuse of discretion standard, “the plan must  
14 unambiguously provide discretion to the administrator.” *Abatie*, 458 F.3d at 963 (citing  
15 *Kearney*, 175 F.3d at 1090). Here, both parties agree Reed/QDS is a third party  
16 administrator, upon whom the plan confers discretionary authority. (Doc. 41 at 5; Doc. 42  
17 at 2). And, indeed, the contract between Defendant Qwest Communications and the TPA  
18 indicates that the TPA has the “exclusive right to exercise discretionary authority” under  
19 the plan, “including questions of eligibility, [and] interpretation of Plan provisions.”  
20 (Doc. 40-1 at 3). *See Abatie*, 458 F.3d at 963 (holding where a plan delegates both the  
21 exclusive authority to interpret the terms of the plan and determine eligibility for benefits  
22 unambiguously “vest[s] discretion in the administrator”). Because the TPA has exclusive  
23 discretionary authority to interpret plan provisions and to determine eligibility, the Court  
24 reviews the denial of benefits under the abuse of discretion standard. *See Firestone*, 489  
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1 U.S. at 115.

2 **2. Structural Conflict of Interest**

3 Courts have found a conflict of interest when an insurer both administers and  
4 funds an ERISA plan, as this creates a potential conflict between the duty to pay benefits  
5 to those who deserve them and, the duty to make profits for shareholders. *Abatie*, 458  
6 F.3d at 966 (noting that where sponsor and administrator are the same entity there may be  
7 a desire to retain money in the sponsor’s “own coffers” rather than pay out benefits). In  
8 contrast, Defendant has separated its role in funding the plan from that of the TPA, which  
9 administers the plan. Additionally, the contract between Qwest and the TPA not only  
10 compensates the TPA on a flat fee basis, but provides for an indemnification of Qwest  
11 by the TPA for ERISA breach of duty claims. (Doc. 40-1 at 6). The contract also  
12 provides that the TPA has no liability for paying benefits to participants. *Id.* Neither  
13 Plaintiff’s arguments nor the Court’s review of the administrative record reveal a  
14 structural conflict of interest.

15 Plaintiff also argues that the TPA fails to use “truly independent medical  
16 examiners.” (Doc. 46 at 3–4). In support of her argument, Plaintiff argues that “[t]he U.S.  
17 Supreme Court and the lower appellate courts recognize that the opinions of consulting  
18 physicians that regularly contract with a long-term disability plan, as opposed to the  
19 opinions of treating physicians, may be tainted.” (Doc. 42 at 9). Indeed, the Supreme  
20 Court has acknowledged “that physicians repeatedly retained by benefits plans may have  
21 an incentive to make a finding of ‘not disabled’ in order to save their employers money  
22 and preserve their own consulting arrangements.” *Black & Decker Disability Plan v.*

1 *Nord*, 538 U.S. 822, 832 (2003). Plaintiff also points to a Sixth Circuit ruling, *Kalish v.*  
2 *Liberty Mutual/ Liberty Life Assur. Co. of Boston*, which found that an administrator  
3 which hires “experts who are paid to assess a claim, is operating under a conflict of  
4 interest that provides it with a ‘clear incentive to contract with individuals who were  
5 inclined to find in its favor that a claimant was not entitled to continued disability  
6 benefits.’” 419 F.3d 501, 507–08 (6th Cir. 2005) (internal citation omitted). Therefore,  
7 “although routine deference to the opinion of a claimant’s treating physician is not  
8 warranted, we may consider whether a consultant engaged by a plan may have an  
9 incentive to make a finding of not disabled as a factor in determining whether the plan  
10 administrator acted arbitrarily and capriciously in deciding to credit the opinion of its  
11 paid, consulting physician.” *Id.* (internal citations omitted). Similarly, “a conflicted plan  
12 administrator may find it advisable to bring forth affirmative evidence demonstrating  
13 ‘that it used truly independent medical examiners or a neutral, independent review  
14 process; that its employees do not have incentives to deny claims; that its interpretations  
15 of the plan have been consistent among patients; or that it has minimized any potential  
16 financial gain through structure of its business.’” *Wallace v. Intel Corp.*, CIV.04-492  
17 PHX RCB, 2006 WL 2709839 at \*6 (D. Ariz. Sept. 20, 2006) (citing *Abatie*, 458 F.3d at  
18 969, n. 7).

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24 Unlike the situation in *Nord* and *Kalish*, however, in this case the Plan sponsor and  
25 the TPA are not the same entity. In *Wallace*, where the court found for the defendant plan  
26 sponsor, the court found that there was “scant evidence warranting great skepticism of the  
27 Administrator's decision,” given that the administrator had delegated responsibilities to a  
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1 third party for claims administration under a flat rate fee system. *Wallace*, 2006 WL  
2 2709839 at \*8. Here, as in *Wallace*, there is a separation between the plan sponsor and  
3 the TPA which administers the claims. Additionally, the TPA is paid via a flat rate fee  
4 system, tempering any financial incentive on the part of the TPA to deny otherwise  
5 worthy claims.  
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7       Moreover, Qwest has affirmatively stated that the doctors in question are not  
8 employees of the TPA, but rather “independent expert[s] retained by [the TPA] to  
9 conduct a peer review of the work of [Plaintiff’s] treating [physicians], and to examine  
10 the other medical records in [Plaintiff’s] file.” *Kalish*, 419 F.3d at 507. Despite the  
11 availability of limited discovery on the question of a conflict of interest, Defendant has  
12 not produced any evidence to the contrary. While the plan administrator “may bring forth  
13 evidence” showing there is no “taint,” this does not imply that the administrator must do  
14 so, particularly where “[t]here is no evidence that [the TPA] attempted to tamper with or  
15 inappropriately influence [these physicians’] evaluation[s].” *Id.* Indeed, the TPA retained  
16 Dr. Willson for all three of Plaintiff’s in-person exams, despite Dr. Willson’s findings in  
17 2006 and 2007 that Plaintiff remained disabled. Only when Dr. Willson found Plaintiff’s  
18 condition had improved to GAF ranges within working capacity did the TPA deny  
19 Plaintiff’s continued LTD benefits.  
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24       Thus, as in *Kalish*, Plaintiff “has offered only conclusory allegations of bias” with  
25 regard to the physicians in question. *Kalish*, 419 F.3d at 508. Absent evidence to support  
26 the allegations of bias, “we are unable to conclude . . . that [the TPA] acted arbitrarily and  
27 capriciously in deciding to credit the opinion of [their physicians] over that of [Plaintiff’s]  
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1 treating physicians].” *Id.* “The absence of such evidence weighs in favor of the Court's  
2 reviewing the Administrator's decision with a low level of skepticism.” *Wallace*, 2006  
3 WL 2709839 at \*8 (citing *Abatie*, 458 F.3d at 968).

#### 4 **B. Plan Interpretation**

5 Judd argues that the TPA construed the Plan in a way that conflicts with its plain  
6 language by not considering the possible future deterioration of her mental health  
7 condition.  
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9 Dr. Willson, who conducted independent medical examinations of Ms. Judd, noted  
10 that Ms. Judd’s “history of poor psychiatric mood control and medical problems could  
11 suddenly change her status, as could sudden environmental setbacks related to lifestyle.”  
12 (Doc. 46 at 7–8). Plaintiff argues that this means that she is unable to “sustain gainful  
13 employment on a continuous basis.” *Id.* Plaintiff relies on *Gatliff v. Commissioner of the*  
14 *Social Security Administration*, for the proposition that “substantial gainful activity  
15 means more than merely the ability to find a job and physically perform it; it also requires  
16 the ability to hold the job for a significant period of time.” 172 F.3d 690, 694 (9th Cir.  
17 1999).<sup>2</sup> Given the possibility of future set-backs, Plaintiff argues she is unable to sustain  
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22 <sup>2</sup> Plaintiff also cites to *Peterson v. Federal Express Corp. Long Term Disability*  
23 *Plan*, which states that “a total-disability determination cannot reasonably hinge on  
24 whether an employee is minimally capable, on a good day, at the right hour, of fulfilling  
25 her job duties in barely tolerable fashion.” CV-05-1622-PHX-NVW, 2007 WL 1624644  
26 at \*34 (D. Ariz. June 4, 2007). However, this statement was one of six rationales offered  
27 for overturning a plan administrator’s decision. Made without citation or attribution, it  
28 was given in the context of a moderate level of scrutiny, due to several factors that  
warranted less deference to the administrator’s decision. Those factors are not present  
here, where we only review for clear error under the traditional deferential abuse of  
discretion standard.

1 gainful employment and should, therefore, be considered disabled under the ERISA Plan.

2 Plaintiff's reliance on *Gatliff*, however, is misguided. First, the facts are very  
3 different. In *Gatliff*, the plaintiff was a severely mentally impaired individual who had a  
4 15-year record of attempting to work. Unfortunately, because of his mental limitations,  
5 Mr. Gatliff was unable to maintain any of the 20 to 30 jobs he obtained for more than a  
6 few short months. *See generally, Gonzales v. Astrue*, 1:10-CV-00657-SKO, 2011 WL  
7 4500838 (E.D. Cal. Sept. 27, 2011) (reviewing facts and scope of *Gatliff* holding). In  
8 contrast, here Ms. Judd does not have a multi-year history of trying and failing to support  
9 herself, but rather a multi-year history of being supported by ERISA benefits. Ms. Judd is  
10 arguing that the Court should apply an ex post holding to her situation ex ante. If Ms.  
11 Judd's logic were applied, any one-time ERISA claimant, otherwise able to work, whose  
12 symptoms may possibly recur at some indeterminate and unspecified point in the future,  
13 would be eligible for continued disability benefits. This proves too much. *See also*  
14 *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 880 (9th Cir.  
15 2004) ("That a person has a true medical diagnosis does not by itself establish  
16 disability."); *Perryman v. Provident Life & Accident Ins. Co.*, 690 F. Supp. 2d 917, 943  
17 (D. Ariz. 2010), *reconsideration denied in part* (Mar. 30, 2010) ("[A] mere diagnosis of a  
18 condition . . . is not determinative of disability for purposes of ERISA disability  
19 benefits.")  
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25 Second, Plaintiff asks this court to apply *Gatliff* out of context. *Gatliff* is a social  
26 security case; social security disability cases use a different standard of disability than  
27 ERISA plans. ERISA, unlike the Social Security Act, does not have a single inflexible  
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1 national standard. Rather, ERISA, was developed to give employers flexibility in  
2 designing their voluntary disability programs. *Nord*, 538 U.S. at 833. For this reason,  
3 “[t]he validity of a claim to benefits under an ERISA plan,’ on the other hand, ‘is likely  
4 to turn,’ in large part, ‘on the interpretation of terms in the plan at issue.’” *Id.* (quoting  
5 *Firestone Tire*, 489 U.S. at 115). Here, the relevant Plan terms are that

7 Disability means (1) the Participant is unable to engage in any occupation  
8 or employment, which inability is supported by Objective Medical  
9 Documentation, or (2) the Participant is unable to engage in any occupation  
10 or employment, for which he may reasonably become qualified for by  
11 training, education or experience, other than a job that pays less than 60%  
12 of his Base Pay at the time the Participant terminates employment due to  
13 the Disability.

14 (Doc. 30-1 at 9). Defendant, through a vocational assessment, has identified several  
15 positions which provide more than 60% of her Base Pay at the time she left on disability  
16 and in which Plaintiff, can engage given her current medical restrictions. The TPA has  
17 not abused its discretion in interpreting the plan; nor will the Court will read into the Plan  
18 a requirement that is not there.

19 In the absence of a clear conviction that the administrator has abused its discretion,  
20 “the plan administrator’s interpretation of the plan will not be disturbed.” *Day v. AT & T*  
21 *Disability Income Plan*, -- F.3d --, 10-16479, 2012 WL 2550597 at \*3 (9th Cir. July 3,  
22 2012) (quoting *Conkright v. Frommert*, 130 S. Ct. 1640, 1651 (2010)). Here, the  
23 administrator has provided reasons for its decision, and has neither misconstrued the  
24 provisions of the Plan, nor relied on clearly erroneous findings of fact. *Id.* The Court,  
25 therefore, “respect[s] the discretionary authority conferred on ERISA fiduciaries.” *Glenn*,  
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1 554 at 120 (Roberts, C.J. concurring).

2 **C. Procedural Claims Under the Abuse of Discretion Review**

3 Plaintiff alleges three procedural violations, which she claims show that the  
4 administrator abused its discretion. Plaintiff asserts that the administrator (1) failed to  
5 credit the opinions of her treating physicians, (2) did not take the Social Security  
6 Administration’s (SSA) finding of disability into account, and that (3) the vocational  
7 assessment it commissioned was arbitrary and capricious.  
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9 **1. TPA’s Deference to Plaintiff’s Treating Physicians’ Opinions**

10 Plaintiff claims that the TPA did not properly credit the opinions of her treating  
11 physicians. (Doc. 42 at 7–8). “Nothing in [ERISA] itself, however, suggests that plan  
12 administrators must accord special deference to the opinions of treating physicians. Nor  
13 does the Act impose a heightened burden of explanation on administrators when they  
14 reject a treating physician’s opinion.” *Nord*, 538 U.S. at 831. However, plan  
15 administrators “may not arbitrarily refuse to credit a claimant’s reliable evidence,  
16 including the opinions of a treating physician.” *Id.* at 834.  
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19 Plaintiff asserts that her treating “physicians agree that she is totally disabled and  
20 unable to work.” (Doc. 42 at 7). However, this is not true. While Plaintiff’s arguments  
21 rely upon the opinions of Dr. Koelsch and Ms. Todd, neither of these providers was  
22 treating Plaintiff in the period immediately preceding the denial of benefits. In fact, at the  
23 time of the denial of benefits, Ms. Judd was being treated by medical professionals at  
24 JFCS. Throughout the multiple visits Ms. Judd paid to JFCS in the period from March  
25 2008 to March 2009, three different JFCS providers noted GAF scores in the 60s, within  
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1 the range of those capable of working. (Doc. 44 at 8). Furthermore, the record clearly  
2 shows that the opinions of all Ms. Judd's treating physicians were included in the review  
3 of over 60 medical visits and observations made throughout the course of Ms. Judd's  
4 disability.

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6 The administrator's conclusion, therefore, did not fail to credit the opinions of  
7 Plaintiff's treating physicians. Absent a conflict of interest, "the existence of a single  
8 persuasive medical opinion supporting the administrator's decision can be sufficient to  
9 affirm" the administrator's decision. *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d  
10 623, 630 (9th Cir. 2009). Here, the notes of the treating providers at JFCS reasonably  
11 support such a finding. Given these notes, the improvements noted by Dr. Willson and  
12 the file reviews conducted by independent medical experts, the administrator could  
13 reasonably conclude that Ms. Judd was capable of working. Therefore, the Court does not  
14 find that the plan administrator's decision was "(1) illogical, (2) implausible, or (3)  
15 without support in inferences that may be drawn from the facts in the record." *Salomaa*,  
16 642 F.3d at 676.

## 20 **2. Vocational Assessment**

21 Plaintiff argues that the TSA is contradicted by her physicians' assessment that she  
22 is "unable to engage in any full time, competitive occupation on a continuous basis as  
23 indicated by their continual statements that her disabling conditions are permanent."  
24 (Doc. 42 at 11). As noted above, however, Ms. Judd's physicians' opinions do not  
25 consistently reflect an opinion that she is unable to engage in an occupation. Instead, the  
26 record shows progressive improvement, particularly as noted in her GAF scores over the  
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1 four-year period in question.

2 Plaintiff also argues that Dr. Willson stated that Ms. Judd could only return to  
3 part-time employment, (Doc. 42 at 12), and therefore a TSA based upon this assessment  
4 is arbitrary and capricious. However, Plaintiff references Dr. Willson's August 2007  
5 report. (Doc. 31-3 at 31-34). The 2007 report found that Plaintiff was "not totally  
6 disabled" but did not recommend a return to full-time employment. *Id.* Dr. Willson's  
7 2008 report, however, noted improvement and stated that she "did not find evidence of  
8 psychological or cognitive disability" at that time. (Doc. 31-3 at 14-15). Dr. Willson  
9 noted that while Plaintiff "would need to have a clear task with specific steps towards a  
10 predictable goal, and a clear chain of command with only moderate interpersonal skills,"  
11 she was capable of a return to full-time work, following a training and phase-in period of  
12 a month. *Id.* Therefore, the TSA, which was based upon Dr. Willson's updated 2008  
13 assessment, and not Dr. Willson's 2007 assessment, was not arbitrary and capricious.

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17 The notes of Plaintiff's treating medical providers at JFCS, along with those of Dr.  
18 Willson, indicate a patient with mental health issues, but not issues that are severe enough  
19 to preclude Ms. Judd from "engag[ing] in any occupation or employment." As noted  
20 above, JCFS was the treatment provider for Plaintiff in the period immediately preceding  
21 the denial of benefits. And, over the course of half a dozen visits, providers at JFCS  
22 consistently noted GAF scores in the 60s. (Doc. 44 at 8). "GAF scores in the 60s are 'not  
23 incompatible with work capacity.'" (Doc. 45 n. 2, citing AR001841). Dr. Willson's 2008  
24 assessment and that of the file reviewers bore out this assessment.

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28 Plaintiff further argues that the TSA is arbitrary and capricious because it lists

1 positions requiring customer service or interpersonal interaction. Plaintiff asserts that she  
2 “can no longer be in any occupation that requires customer service or interpersonal  
3 interaction of any kind.” (Doc. 42 at 11). Plaintiff asserts too much.

4           Some of Plaintiff’s examining physicians and file reviewers have noted that Ms.  
5 Judd “is easily irritated by other people’s neediness or what may seem like personal  
6 demands, so primary customer service jobs would be contraindicated.” (Doc. 43, ¶6).  
7 However, the denial of benefits letter included options, such as a data entry clerk or a  
8 word processor, which require limited or no customer service interaction. (Doc. 43, ¶42,  
9 43; Doc. 44 at 14). Similarly, some of Ms. Judd’s reviews noted that she “should be  
10 restricted to work responsibilities that are consistent with low interpersonal demands.”  
11 (Doc 43, ¶31). Plaintiff, however, interprets this to mean that she should be limited to “no  
12 personal interaction of any kind.” (Doc. 42 at 11).

13           Under an abuse of discretion review, the Court is required to uphold the plan  
14 administrator’s decision if it is reasonable. *Conkright*, 130 S. Ct. at 1651. Here, the  
15 findings of Ms. Judd’s own treating physicians at JFCS, together with that of the TPA’s  
16 retained medical experts support a finding that Ms. Judd can return to work. These  
17 findings appear to have been taken into consideration in the TSA. TPA’s decision was  
18 not, therefore, “illogical, implausible, or without support in inferences that may be drawn  
19 from the facts in the record.” *Salomaa*, 642 F.3d at 676.

### 20           **3.       TPA’s Consideration of Plaintiff’s SSDI Benefits**

21           Finally, Plaintiff argues that Ms. Judd’s SSDI benefits were not considered in  
22 making the benefits decision. (Doc. 42 at 10–11). There is no indication that the TPA or  
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1 its retained experts specifically considered the SSA's determination in Ms. Judd's case.  
2 However, such a procedural error alone does not lead the Court to conclude the  
3 administrator acted "illogically, implausibly or without support in inference that may be  
4 drawn from the facts in the record." *Salomaa*, 642 F.3d at 676.

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6 Any Social Security Administrator's contrary determination should be considered  
7 as a factor in an ERISA plan's decision to deny benefits. *Montour*, 588 F.3d at 635.  
8 "While ERISA plan administrators are not bound by the SSA's determination, complete  
9 disregard for a contrary conclusion without so much as an explanation raises questions  
10 about whether an adverse benefits determination was the product of a principled and  
11 deliberative reasoning process. In fact, not distinguishing the SSA's contrary conclusion  
12 may indicate a failure to consider relevant evidence." *Id.* at 635 (citing *Glenn v. MetLife*,  
13 461 F.3d 660, 669 (6th Cir. 2006); *Glenn*, 554 U.S. at 123). "Ordinarily, a proper  
14 acknowledgment of a contrary SSA disability determination would entail comparing and  
15 contrasting not just the definitions employed but also the medical evidence upon which  
16 the decisionmakers relied." *Id.* at 636. *See also Salz v. Standard Ins. Co.*, 380 F. App'x  
17 723, 724 (9th Cir. 2010). ("A proper administrative process will meaningfully discuss a  
18 claimant's award of social security benefits . . . [and] analyz[e] the distinctions between  
19 the basis for the two awards"). "[R]egulations promulgated by the Secretary of Labor  
20 authorize, if not require, plan administrators working with an apparently deficient  
21 administrative record to inform claimants of the deficiency and to provide them with an  
22 opportunity to resolve the problem by furnishing the missing information." *Montour*, 588  
23 F.3d at 636 (citing 29 C.F.R. § 2560.503-1(f)(3)-(4), (g)(1)(iii)). "[E]ven under a

1 traditional abuse of discretion standard,” failure to consider the SSA determination or to  
2 request information about it is a procedural error on the part of the TPA. *Kludka*, 454 F.  
3 App’x 611, 612–13 (9th Cir. 2011).

4 Here, other than a bare mention that Plaintiff is receiving SSDI, there is no  
5 mention in the record indicating that the reviewers or the TPA took the SSA’s 2005  
6 decision awarding benefits into account. (Doc. 31-1 at 61). Nor does the fact that the SSA  
7 uses a different methodology “alone . . . provide a basis for disregarding the SSA’s  
8 determination.” *Montour*, 588 F.3d at 636. Even if the administrator did not have a copy  
9 of the opinion accompanying the SSA’s award, the administrator “still was well aware of  
10 the uniform federal standard that applies to Social Security claims” *Id.* (Citing *DeLisle v.*  
11 *Sun Life Assurance Co. of Canada*, 558 F.3d 440, 446 (6th Cir. 2006)).

12 “Procedural errors by the administrator are . . . weighed in deciding whether the  
13 administrator’s decision was an abuse of discretion.” *Salomaa*, 642 F.3d at 674.  
14 However, “a single honest mistake in plan interpretation administration does not deprive  
15 the plan of the abuse of discretion standard.” *Id.* (internal citations omitted). Rather, all  
16 the factors must be weighed and considered together. *Montour*, 588 F.3d at 637.

17 Courts which have addressed this issue have typically remanded based on a  
18 multiplicity of factors, in combination with a failure to consider SSDI benefits. *See*  
19 *generally Kludka v. Qwest Disability Plan*, CV-08-01806-PHX-DGC, 2012 WL 1681983  
20 at \*9-10 (D. Ariz. May 14, 2012) (analyzing recent Ninth Circuit opinions related to  
21 administrator’s abuse of discretion and concluding that typical Ninth Circuit cases which  
22 address this issue involve a multiplicity of factors in combination with a failure to  
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1 consider SSDI benefits). Thus, for example, in the Supreme Court’s *Glenn* decision, “the  
2 Court considered the insurer’s dual-role conflict of interest as one of a combination of  
3 factors,” including the administrator’s failure to weigh the Plaintiff’s SSDI decision.  
4 *Brown v. Hartford Life Ins. Co.*, 428 F. App’x 817, 820 (10th Cir. 2011) Likewise, in the  
5 Ninth Circuit’s *Montour* decision, failure to consider the SSDI award was only one of  
6 several issues which led the court to conclude there had been an abuse of discretion. 588  
7 F.3d at 637 (“failure to explain why it reached a different conclusion than the SSA is *yet*  
8 *another factor* to consider in reviewing the administrator's decision for abuse of  
9 discretion”) (emphasis added). In this District, this has led this Court to conclude,  
10 “*Montour* does not, however, resolve the issue” of a non-conflicted administrator which  
11 neglected to review a claimant’s SSDI benefits. *Kludka v. Qwest Disability Plan*, 2012  
12 WL 1681983 at \*9.

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16 Unlike the typical cases, these other factors do not present themselves here. Unlike  
17 the administrators in *Glenn*, *Montour* and *Brown*, the TPA is not a structurally conflicted  
18 administrator. Unlike the Plaintiff in *Montour*, who regularly kept the plan administrator  
19 informed of his SSA status and forwarded his SSA determination, there is no evidence  
20 that Ms. Judd did the same for the TPA. *Montour*, 588 F.3d at 635, 637; *See also*  
21 *Salomaa*, 642 F.3d at 676 (noting that claimant provided administrator with the SSA  
22 award, which was disregarded). Unlike *Montour*, where the administrator only conducted  
23 a “pure paper” review without an in-person evaluation of the claimant, here the TPA  
24 conducted multiple in-person examinations of Plaintiff. *Id.* at 634. *See also Saffron*, 552  
25 F.3d at 869 (same).  
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1           There is no evidence suggesting that the TPA’s reason for denial shifted over  
2 time. *See Salomaa*, 642 F.3d at 676. There is no evidence that the TPA failed to obtain  
3 and request medical records documenting Plaintiff’s condition. *See Booton v. Lockheed*  
4 *Medical Ben. Plan*, 110 F.3d 1461, 1464 (9th Cir. 1997). There is no record that the TPA  
5 denied benefits subsequent to a near-contemporaneous contrary SSA determination.  
6 *Glenn*, 554 U.S. at 188. Put simply, this case is unlike other cases where the  
7 administrators made multiple procedural errors and had conflicts of interest warranting an  
8 moderate level of scrutiny. This case involves only “a single honest mistake”: the failure  
9 to address a four year-old SSA determination, made in a period when Plaintiff’s doctors  
10 still consistently opined that she was unable to work. *Salomaa*, 642 F.3d at 674.

11           The parties have not indicated, and the court’s own research has not discovered,  
12 any Ninth Circuit precedent dealing directly with a non-conflicted administrator that has  
13 failed simply to consider a contrary SSA determination in its benefits review. However,  
14 in *Brown v. Hartford Life Ins. Co.*, the Tenth Circuit considered a case with only two  
15 factors: a structurally conflicted administrator’s mere failure to consider a contrary SSA  
16 determination. 428 F. App’x 817 (10th Cir. 2011). In *Brown*, the court found that the  
17 conflicted administrator had “taken steps to reduce potential bias and to minimize any  
18 conflict of interest.” *Id.* at 821. The steps included, for example, “separating the initial  
19 claims handler from the appeals specialist, paying a fixed salary to its decision makers  
20 without incentives for denying claims, and separating the financial department from the  
21 claims department such that the claims handlers do not interact with the underwriters or  
22 financial department in the handling of a claim.” *Id.* Given these precautions to prevent  
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1 its structural conflict from impacting how it administered the plan, the *Brown* court found  
2 that a “Plan administrator’s failure to distinguish or discuss the SSA’s . . . findings of  
3 disability does not weigh heavily against [the administrator].” *Id.*

4 *Brown* is directly on point. There, looking only at the two factors of conflict of  
5 interest and the procedural error of failing to address the SSA’s contrary findings, the  
6 court found the error was not such that it rose to an abuse of discretion. *Accord,*  
7 *Conkright v. Frommert*, 130 S. Ct. 1640, 1643 (2010) (““one-strike-and-you’re-out’  
8 approach has no basis in *Firestone*”). Here, the TPA made a similar error. Moreover, the  
9 TPA is not structurally conflicted, as the *Brown* administrator was. Weighing the factors  
10 discussed, this Court is not “left with a definite and firm conviction” that the TPA made a  
11 mistake in denying Ms. Judd’s benefits. *Salomaa*, 642 F.3d at 676.

## 12 **CONCLUSION**

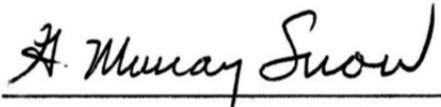
13 For the forgoing reasons, the Court holds that the decision of the TPA was neither  
14 “illogical, implausible” nor “without support in inferences that may be drawn from the  
15 facts in the record.” *Salomaa*, 642 F.3d at 676. While the TPA should have considered  
16 Plaintiff’s SSDI benefits, *Glenn*, 554 U.S. at 109, the Court does not find that this rises to  
17 the level of an abuse of discretion where there is no structural conflict of interest, and  
18 where the administrator has otherwise conducted a full and fair review of a very  
19 extensive medical record. Weighing all factors discussed above, the Court is not “left  
20 with a definite and firm conviction that a mistake has been made.” *Salomaa*, 642 F.3d at  
21 676. Thus, Defendants are entitled to summary judgment.

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**IT IS THEREFORE ORDERED** that Plaintiff Judd's Motion for Summary Judgment (Doc. 42) is **DENIED**.

**IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment (Doc. 39) is **GRANTED** and the Clerk of the Court is directed to terminate this action.

Dated this 28th day of August, 2012.

  
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G. Murray Snow  
United States District Judge