



1 argument. *See* Fed. R. Civ. P. 78; C. D. Cal. L. R. 7-15. For the reasons discussed  
2 below, Plaintiff’s Motion is **DENIED**.

## 3 **II. FACTUAL BACKGROUND**

4 Plaintiff is a recently retired civil service employee who was a subscriber to the  
5 Blue Shield of California Health Plan (the “Plan”) under the Federal Employee Health  
6 Benefits Act (“FEHBA”). (App. of Adverse Benefit Determination Under FEHBA  
7 (“App.”) ¶ 3.) On December 29, 2011, Plaintiff filed this Appeal of Adverse Benefit  
8 Determination against Defendant to appeal Defendant’s December 20, 2010 decision  
9 directing the Plan to approve one psychotherapy session per week for the period of  
10 April 10, 2010, through December 31, 2010, rather than Plaintiff’s requested three  
11 sessions per week

12 In 2002, Plaintiff began receiving psychotherapy services from Kathleen Gates,  
13 Ph.D., a licensed psychologist and a Preferred Provider under the Plan.  
14 (Administrative Record “AR” A0007, A0046.) From 2002 to June 2009, Plaintiff  
15 visited Dr. Gates for therapy sessions three times per week. (AR A0007.) Following  
16 a peer-to-peer review of Plaintiff’s case between Dr. Gates and a Plan Medical  
17 Director in mid-2009, the Plan advised Plaintiff and Dr. Gates that it no longer  
18 deemed three sessions per week medically necessary under the Plan and reduced the  
19 frequency of Plaintiff’s sessions with Dr. Gates to one session per week from May 6,  
20 2009, through December 31, 2009. (AR A0007–08.) Upon Plaintiff’s request for  
21 reconsideration of this decision, the Plan declined to reconsider its denial of Plaintiff’s  
22 request for three sessions per week; nevertheless, the Plan agreed to increase the  
23 frequency of Plaintiff’s therapy sessions from one to two sessions per week through  
24 December 31, 2009. (AR A0012–17, A0019.)

25 In January 2010, Dr. Gates contacted the Blue Shield of California Mental  
26 Health Service Administrator to obtain prior approval for outpatient psychotherapy  
27 visits for 2010, as she was required to do by the Plan. (AR B0047.) On April 15,  
28 2010, the Plan again conducted a peer-to-peer review between Dr. Gates and a

1 Medical Director to determine the medical necessity of three sessions per week. (*Id.*)  
2 By letter dated April 16, 2010, the Plan advised Plaintiff that it was unable to approve  
3 the requests for outpatient psychotherapy services by Dr. Gates because the Plan did  
4 not deem such services medically necessary. (AR B0011.)

5 On June 16, 2010, Plaintiff wrote the Plan to appeal its April 16, 2010 decision  
6 and request “approval of the two visits per week affirmed by the OPM with [his]  
7 doctor.” (AR B0016.) On August 24, 2010, the Plan advised Plaintiff that it would  
8 not approve three psychotherapy sessions per week and that additional psychotherapy  
9 services were not deemed medically necessary. (AR B0018.)

10 On September 5, 2010, Plaintiff appealed the Plan’s decision to Defendant.  
11 (AR B0001–21.) On December 20, 2010, following a medical review by a Board  
12 Certified Psychiatrist, Defendant issued its final decision affirming the Plan’s  
13 determination that three psychotherapy sessions per week were not medically  
14 necessary. (AR B0338.) Defendant did find, however, that one session per week  
15 from April 10, 2010, through December 31, 2010, was clinically appropriate to treat  
16 Plaintiff’s condition. (*Id.*) Accordingly, Defendant issued a directive ordering the  
17 Plan to provide Plaintiff with one psychotherapy session per week during this period.  
18 (AR B0340–41.)

19 Plaintiff’s Motion indicates that he switched to another insurer for coverage  
20 throughout 2011. (Mot. 4.) Plaintiff contends that this insurer found Plaintiff’s visits  
21 were medically necessary, but in 2012 the new insurer withdrew from FEHBA. (*Id.*)  
22 As a result, Plaintiff switched back to the Plan. (*Id.*)

23 Plaintiff further avers that during the first week of January 2012, he called the  
24 Plan for preauthorization of mental health benefits; Plaintiff was informed that  
25 preauthorization was no longer necessary and that all disbursements of mental health  
26 benefits are made upon a finding of medical necessity. (*Id.*) In conjunction with this  
27 telephone conversation, Plaintiff uses several Explanation of Benefits (“EOBs”)  
28 depicting payments disbursed on March 27, 2012, for three psychotherapy visits per

1 week from January through March 2012 to conclude that the Plan now capitulates his  
2 three visits per week are medically necessary. (*Id.*; *id.* Ex. 1.) Plaintiff further  
3 maintains that “[b]ecause no further records were demanded from Plaintiff, the  
4 medical necessity determination was made upon the records at issue in this case, the  
5 very same records used to deny medical necessity.” (*Id.*) Plaintiff now moves for  
6 summary judgment “based on this admission by the insurer and asks the Court to  
7 order the OPM to pay Plaintiff’s doctor for the 72 visits denied in 2010 based upon a  
8 false assertion of lack of medical necessity.” (*Id.*)

### 9 III. LEGAL STANDARD

10 Summary judgment is appropriate when, after adequate discovery, the evidence  
11 demonstrates that there is no genuine issue as to any material fact and the moving  
12 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A disputed fact  
13 is “material” where the resolution of that fact might affect the outcome of the suit  
14 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968).  
15 An issue is “genuine” if the evidence is sufficient for a reasonable jury to return a  
16 verdict for the nonmoving party. *Id.* Evidence the Court may consider includes the  
17 pleadings, discovery and disclosure materials, and any affidavits on file. Fed. R. Civ.  
18 P. 56(c)(2). The evidence presented by the parties on summary judgment must be  
19 admissible. *See* Fed. R. Civ. P. 56(e). Where the moving party’s version of events  
20 differs from the nonmoving party’s version, “courts are required to view the facts and  
21 draw reasonable inferences in the light most favorable to the party opposing the  
22 summary judgment motion.” *Scott v. Harris*, 550 U.S. 372, 378 (2007) (internal  
23 quotation marks omitted).

24 The moving party bears the initial burden of establishing the absence of a  
25 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).  
26 The moving party may satisfy that burden by demonstrating to the court that “there  
27 there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.  
28



1 Local Rule 16-12(c), however, exempts “[a]ny case in which the plaintiff is appearing  
2 pro se.” Therefore, Plaintiff’s failure to meet and confer prior to filing his Motion for  
3 Summary Judgment is not grounds for denial of Plaintiff’s Motion.

4 Local Rule 56-1 requires a party filing a motion for summary judgment to lodge  
5 a proposed “Statement of Uncontroverted Facts and Conclusions of Law” and a  
6 proposed judgment. Plaintiff here has lodged neither. Plaintiff’s Motion is therefore  
7 dismissible on procedural grounds for Plaintiff’s failure to comply with the Local  
8 Rules. Nevertheless, the Court proceeds to consider the merits of Plaintiff’s Motion.

9 **B. Plaintiff Has Presented No Admissible Evidence in Support of His Claims**

10 Defendant contends next that Plaintiff’s Motion must be denied because  
11 Plaintiff has presented no admissible evidence in support of his Motion. Defendant is  
12 correct.

13 The OPM’s decisions on disputed claims are reviewable under the  
14 Administrative Procedures Act (“APA”). *Golinski v. U.S. Office of Personnel Mgmt.*,  
15 781 F. Supp. 2d 967, 973 n.1 (N.D. Cal. 2011) (citing 5 U.S.C. § 8912). Under the  
16 APA, action by the OPM will not be set aside unless its decision was “arbitrary,  
17 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.  
18 § 706(2)(A). In applying this standard, this Court’s focal point “should be the  
19 administrative record already in existence, not some new record made initially in the  
20 reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also* 5 C.F.R.  
21 § 890.107(d)(3) (judicial review of OPM’s final action on the denial of a health  
22 benefits claim limited to the record that was before OPM when it rendered its decision  
23 affirming the carrier’s denial of benefits).

24 Plaintiff supports his Motion with several EOBs reflecting payment for  
25 psychotherapy sessions thrice weekly from January 4, 2012, through March 14, 2012.  
26 Plaintiff contends that because the Plan requested no additional records from Plaintiff  
27 prior to issuing these payments, the Plan must have made its determination of medical  
28 necessity based on the same records before it in 2010. Aside from the logical

1 presumption that the Plan must have reviewed at least the claims Dr. Gates submitted  
2 for reimbursement for dates of service between January 4 and March 14, 2012,  
3 Plaintiff's EOBs (and any implications flowing therefrom) are inapposite to Plaintiff's  
4 Motion for the simple reason that these EOBs were not before the OPM when it made  
5 its 2010 determination of medical necessity. Because the EOBs were not before the  
6 OPM in 2010, they are irrelevant and therefore inadmissible to establish an absence of  
7 a material issue of fact on summary judgment. *See* Fed. R. Evid. 401.

8 In addition, Plaintiff's theory is entirely dependent upon the unnamed Plan  
9 representative's alleged statement over the telephone that disbursement of mental  
10 health benefits is made solely on the basis of medical necessity. Because Plaintiff  
11 offers the representative's statement for the purpose of establishing the truth of that  
12 assertion, the representative's statement is inadmissible hearsay. Fed. R. Evid. 801(a).  
13 Plaintiff does not direct the Court to any exception he contends may apply to bar  
14 application of the hearsay rule here, and the Court has found none. Therefore, even if  
15 the EOBs were admissible, Plaintiff fails to demonstrate their connection to a  
16 determination of medical necessity. Consequently, Plaintiff has not met his burden of  
17 establishing the absence of a genuine issue of material fact by admissible evidence.  
18 Plaintiff's Motion is therefore **DENIED**.

#### 19 V. CONCLUSION

20 For the reasons discussed above, Plaintiff's Motion for Summary Judgment is  
21 **DENIED**.

22 **IT IS SO ORDERED.**

23  
24 May 22, 2012

25  
26   
27 \_\_\_\_\_  
28 **OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**