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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JULIE HARDER,

Plaintiff,

v.

BRISTOL-MYERS SQUIBB  
COMPANY LONG TERM  
DISABILITY PLAN,

Defendant.

No. CV 17-1426 PA (GJSx)

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This is an Employee Retirement Income Security Act (“ERISA”) action for recovery of long-term disability benefits. Plaintiff Julie Harder (“Plaintiff” or “Harder”) seeks benefits from defendant Bristol-Myers Squibb Company Long Term Disability Plan (“Defendant” or the “Plan”). The Plan is sponsored and funded by Harder’s former employer Bristol-Myers Squibb Company (“BMS”).

Plaintiff filed the Administrative Record (“AR”) (Docket No. 29). Following the filing of the parties’ Opening and Responsive Trial Briefs, the submission of their respective Proposed Findings of Fact and Conclusions of Law, and their objections to each other’s Proposed Findings of Fact and Conclusions of Law, the Court, sitting without a jury, conducted a bench trial on December 5, 2017.

1           Having considered the materials submitted by the parties and after reviewing the  
2 evidence, the Court makes the following findings of fact and conclusions of law pursuant to  
3 Federal Rule of Civil Procedure 52(a). Any finding of fact that constitutes a conclusion of  
4 law is hereby adopted as a conclusion of law, and any conclusion of law that constitutes a  
5 finding of fact is hereby adopted as a finding of fact.

6 **I.     Findings of Fact**

7           1.     This is an action for recovery of long-term disability benefits under ERISA.  
8 This Court has jurisdiction of this matter pursuant to 29 U.S.C. §§ 1132(a), (e), (f) and (g),  
9 as well as 28 U.S.C § 1331.

10          2.     Venue is proper in this district because a substantial part of the events giving  
11 rise to the claim occurred within the Central District of California. 28 U.S.C. § 1391(b)(2).

12          3.     Harder began working for BMS in 1989. Within two years, BMS promoted  
13 her to senior clinical site manager.

14          4.     As a BMS employee, Harder was eligible to participate in the Plan. (AR  
15 4091.) The Plan, which BMS self-funds (AR 5893), provides long-term disability benefits  
16 and defines “Total Disability” as:

17                   1.6.1 during the first year of an Employee’s disability  
18                   (which shall include 26 weeks of “Disability” pursuant to the  
19                   Short Term Disability Plan, as defined therein, and the first 26  
20                   weeks of Total Disability pursuant to this Plan) an Employee is  
21                   absent from work because of the presence of an impairment for  
22                   which there is material objective medical evidence that prevents  
23                   the Employee from performing the essential functions of his own  
24                   occupation or any other job that the Company offers him, with or  
25                   without any reasonable accommodations that the Employee  
26                   requests, other than a Temporary Alternative Work Duty  
27                   assignment, for which he is reasonably qualified by reason of his  
28                   education, training, or experience; and

1 1.6.2 after the Employee's first year of disability, as  
2 defined in Section 1.6.1, an Employee is absent from work  
3 because of the presence of an impairment for which there is  
4 material objective medical evidence that prevents the Employee  
5 from engaging in any occupation, with or without reasonable  
6 accommodations, for which he is reasonably qualified by  
7 education, training or experience.

8 (AR 5894-5895.)

9 5. The Plan provides:

10 The determination of whether an Employee is Totally Disabled  
11 shall be made in the sole discretion of the Plan Administrator, or  
12 in the sole discretion of the Claims Administrator if the Plan  
13 Administrator has delegated his power to make such  
14 determination to the Claims Administrator, based upon the  
15 material objective medical evidence that the Plan Administrator  
16 or Claims Administrator determines to be relevant to the  
17 Employee's claim.

18 (AR 5899.)

19 6. Plan benefits continue until the "Employee ceases to be Totally Disabled" or  
20 fails "to submit evidence of continuing Total Disability." (AR 5899; see also AR 5915.)

21 7. BMS has contracted with Aetna Life Insurance Company ("Aetna") to provide  
22 claims administration services for the Plan. (AR 5958.) Pursuant to their contract, BMS  
23 "delegates to Aetna complete discretionary authority and duty to Aetna to make all claim  
24 determinations under the Disability plans." (AR 5967.) The agreement between BMS and  
25 Aetna provides that, "[t]o the extent applicable, Aetna will process the claims for Plan  
26 benefits . . . using Aetna's normal claim determination, payment and audit procedures and  
27 applicable cost control standards in a manner consistent with the terms of the Plan, the  
28 Services Agreement, and applicable law." (AR 5974.)

1           8.       In November 2010, Harder’s doctors determined that she was no longer able to  
2 work due to her medical conditions, which included anxiety disorder and depression. (AR  
3 527.)

4           9.       Harder submitted a claim for short-term disability benefits and Aetna agreed  
5 that she was disabled under the terms of the Plan. Harder received short-term disability  
6 benefits through May 1, 2011.

7           10.      Harder applied for long-term disability benefits under the Plan. Aetna  
8 approved long-term disability benefits beginning May 2, 2011. (AR 901.)

9           11.      In an October 10, 2011 letter, Aetna concluded that Harder qualified for  
10 disability benefits under the Plan’s “any occupation standard” applicable after one year of  
11 disability. (AR 932.)

12          12.      In May 2012, Aetna arranged a psychological Independent Medical  
13 Examination (“IME”) for Harder with Dr. Kathi Studden. (AR 4345.) Tests administered  
14 by Dr. Studden resulted in a diagnosis of “Major Depression, recurrent, severe, without  
15 psychotic features, Generalized Anxiety Disorder, Posttraumatic Stress Disorder Avoidant,  
16 Dependent and Schizoid Personality Traits.” (AR 4347.) Dr. Studden’s test results reflected  
17 “no indication of malingering.” (Id.)

18          13.      On June 20, 2012, Harder was reassessed by Dr. David Freeman, whom  
19 Harder had first met with for an “agreed” psychological evaluation in February 2011, and for  
20 subsequent evaluations in August and December 2011. (AR 4671.) In a 110 page report  
21 dated June 20, 2012, Dr. Freeman concluded that Harder “has undergone an intensification  
22 of psychological symptomology such that our original diagnosis of Anxiety Disorder NOS  
23 has developed into a Major Depressive Disorder, Single Episode with Anxious Features.”  
24 (AR 4777.) Dr. Freeman’s review of Harder’s medical records, including from Harder’s  
25 treating mental health professionals, noted:

26                   Per treating psychologist Shannae Anderson, Ph.D.’s treatment  
27 notes dated March 1, April 1, and April 3, 2011 reveals that the  
28 claimant’s emotional condition has deteriorated subsequent to

1 the February 16, 2011 loss of her job. In particular, Ms. Harder  
2 was noted to be easily overwhelmed, labile, tearful, and  
3 distractible with high anxiety and sadness, ongoing panic  
4 attacks, distractibility, and passive suicidal ideation without plan.  
5 Similarly, in her May 9, 2011 report, Ellen Shirman, PsyD noted  
6 substantial sadness, crying spells, anxiety and tension,  
7 heightened emotionality concentration and memory problems,  
8 anger and agitation regarding her occupational situation. Dr.  
9 Shirman also observed that Ms. Harder was easily overwhelmed  
10 and reported an increase in weight, problems with sleeping,  
11 nightmares, changes in sexual functioning due to physical  
12 limitation, and social withdrawal as well as diminished  
13 motivation and self-confidence. At the conclusion of her  
14 examination of the claimant, Dr. Shirman also found that Ms.  
15 Harder's symptom pattern was consistent with a Major  
16 Depressive Disorder.

17 (AR 4777-78.) Dr. Freeman assessed Harder as having a Global Assessment of Functioning  
18 ("GAF") of 55 on a 100 point scale, which is "warranted when there are moderate  
19 symptoms." (AR 4771.)

20 14. In July 2012, Aetna arranged for an IME with Dr. Lorin Lindner. Dr.  
21 Lindner's report, dated August 4, 2012, stated that Harder "did not demonstrate 'emotional  
22 decontrol' at any time during the evaluation" and noted that there "were no dramatic  
23 emotional shifts, and only once did she begin to cry and she recovered very quickly (within  
24 2-3 seconds) with minimal effort and answered the question at hand." (AR 4129.) Dr.  
25 Lindner concluded that the tests she administered demonstrated that Harder suffered from no  
26 cognitive impairment or any clinically significant behavioral impairment. (Id.)

27 15. On March 3, 2013, Aetna sent a letter to Harder in which Aetna "determined  
28 that you no longer meet the definition of disability." (AR 946.) Aetna stated that Harder

1 would receive a final disability payment for March 2013, and that her “claim will be closed  
2 effective 04/01/2013.” (AR 947.)

3 16. Harder, represented by counsel, appealed Aetna’s decision on August 19,  
4 2013. (AR 4211.) On September 18, 2013, in support of Harder’s appeal, her counsel  
5 provided Aetna with records, including reports from her treating physicians, and a letter with  
6 counsel’s argument in support of Harder’s continued disability. (AR 4217-25.)

7 17. Among the materials provided by Harder’s counsel was an April 19, 2013  
8 letter from Dr. Anderson, in which Dr. Anderson stated:

9 After reviewing the psychological evaluation and meeting with  
10 Julie, I am puzzled as to why you have chosen to stop her  
11 long-term disability. As numerous evaluations have noted, Julie  
12 has a consistent ability to “pull it together” for the examiner  
13 when evaluated. The greater issue for Julie is being able to cope  
14 under medium to high stress conditions for lengthy periods of  
15 time as would be necessary if she returned to full-time work.  
16 Julie’s history throughout our work together has been one of  
17 taking a few steps forward and then a few steps back. She may  
18 be able to function better for short periods of time, but she  
19 quickly unravels and regresses back to where she started. She is  
20 still experiencing significant symptoms of anxiety and  
21 depression including insomnia, shortness of breath, panic, and  
22 high anxiety that often renders her frozen to complete even  
23 simple tasks. I am concerned about her ability to return to work  
24 full-time at this time. I am recommending that she be able to  
25 continue with her disability while returning to work on a  
26 part-time basis so that she can slowly ease back into the demands  
27 of work while integrating that stress into her daily life. I fear if  
28 she is required to return to work on a full-time basis, that it

1 would be a set up for failure for her and once again she would  
2 regress back to an anxiety-ridden paralyzed state. As it is she is  
3 barely able to tackle the necessary demands of dealing with her  
4 disability denial, her workman's comp situation, and managing  
5 daily life. A very slow return to work with a minimally stressful  
6 work environment is required for Julie to succeed after this time  
7 on disability.

8 (AR 4353.)

9 18. Dr. Studden, whom Aetna had arranged to conduct an IME in May 2012  
10 before becoming one of Harder's treating mental health professionals in June 2013,  
11 supported Harder's appeal with a September 13, 2013 letter. According to Dr. Studden,  
12 Harder was "working on issues of anxiety, panic, posttraumatic stress disorder and  
13 depression subsequent to extreme work stress at her previous employment." (AR 4349.) Dr.  
14 Studden's opinion was "that Ms. Harder is unable to work due to her significant symptoms."

15 (Id.)

16 19. Aetna obtained "paper reviews" from doctors specializing in physical  
17 medicine and rehabilitation and psychology. The reviewing psychologist, Dr. Leonard  
18 Schnur, concluded there was a "lack of examination findings to substantiate the presence of  
19 a functional impairment across cognitive, emotional, and behavioral spheres for the time  
20 period of 4/1/2013 through 10/4/2013 which would have precluded the claimant from  
21 performing the work of any occupation." (AR 3939.)

22 20. Aetna issued a letter dated October 30, 2013, in which it upheld its original  
23 decision to terminate Harder's benefits effective April 1, 2013. (AR 966-68.)

24 21. Harder, again through counsel, filed a second appeal on April 24, 2014. The  
25 second appeal included a letter from counsel (AR 3941-55) and additional reports from  
26 Harder's physicians, including letters from Harder's psychiatrist, Dr. Martin Schuster, dated  
27 March 17, 2017, and April 10, 2014, letters from Dr. Studden dated February 13, 2014, and  
28 April 21, 2014, and a March 21, 2014 letter from Dr. Alvin Mahoney, whom Harder had

1 been seeing weekly at the Mission Community Hospital Turning Point Intensive Outpatient  
2 Psychiatric Program beginning in August 2013. (Id.)

3 22. In his March 17, 2014 letter, Dr. Schuster states:

4 Ms. Harder came to me to discuss high work stress and  
5 requested that I see her as a patient to help her in managing  
6 medication for increasing anxiety and depression that she began  
7 to experience with extreme work demands. Several psychotropic  
8 medications and several psychiatric follow-up appointments later  
9 it is clear that Ms. Julie Harder had a diagnosis of Bipolar  
10 Disorder II, Mixed. Her response to antidepressants was initially  
11 fair-good; however, she always continued with a disabling  
12 degree of anxiety which was felt to be caused by her need to  
13 manage pain related to Worker's Compensation injury and in her  
14 clinical presentation (i.e. her concerns of inability to complete  
15 work under the high stress that was required at work). She  
16 continues to experience nightly insomnia without medication and  
17 becomes tearful with anxiety and panic like reactions when  
18 faced with deadlines or high work demands. She was unable to  
19 focus on tasks indicating that even managing requirements of  
20 this LTD case add high anxiety to her life.

21 At no time in my clinical care of Ms. Harder it was felt  
22 she could perform her habitual work duties, because of her  
23 disabling condition, i.e. chronic pain, severe anxiety, severe  
24 insomnia, lack of concentration, restlessness, inattention, etc. in  
25 fact these symptoms led her to start drinking alcohol to self  
26 medicate. This clearly brought very negative consequences to  
27 her family life, downhill to her marriage and relationship with  
28 her children. Almost to the point of alienating herself from

1           them. The pain this cause in her was something she still carries  
2           and prevents her from adequately functioning. She started an  
3           outpatient psychiatric program at Mission Community Hospital  
4           not just to deal with this disastrous situation in her life but a fair  
5           support system as well.

6 (AR 3956).

7           23. Dr. Studden's February 13, 2014 letter stated that Harder "continues to exhibit  
8           and experience symptoms of Posttraumatic Stress Disorder and Major Depressive Disorder.  
9           These symptoms include hopelessness, psychomotor retardation, excessive crying,  
10          difficulties with attention and concentration, difficulties with sleep and appetite, increased  
11          startle response, and intrusive flashbacks. These symptoms would most certainly interfere  
12          with any ability to perform in a work situation." (AR 3976.) According to Dr. Studden:  
13          "[A]t the present time, Ms. Harder is unable to perform in an employee capacity." (Id.)

14          24. Dr. Studden's April 21, 2014 letter stated:

15                   It is my opinion that Ms. Harder continues to meet the  
16                   diagnosis of Major Depression, Posttraumatic Stress Disorder  
17                   and Generalized Anxiety Disorder. Despite her high cognitive  
18                   functioning, she continues to have the symptoms of mood  
19                   swings, frequent crying, feelings of hopelessness, significant  
20                   weight loss, very poor sleep, irritability, extreme distractibility,  
21                   problems with memory and concentration, low motivation and  
22                   impaired activities of living. She displays an inability to  
23                   complete even simple tasks and she has impaired judgment.  
24                   This has impacted her ability to work and has had a significant  
25                   impact on her relationships with her family and friends.

26                   It is my strong opinion that Ms. Harder has consistently  
27                   remained unable to work and that this condition was present  
28

1 from my initial meeting with her in May of 2012, and has  
2 persisted until the present time.

3 In April of 2014, I repeated the Millon Clinical Multy-  
4 Axial Inventory to ascertain Ms. Harder's level of functioning.  
5 She displays very high scores on depression, Posttraumatic  
6 Stress Disorder and anxiety, indicating consistency of her  
7 condition.

8 (AR 3983-84.)

9 25. Dr. Mahoney's March 21, 2014 letter stated:

10 Ms. Harder attends Turning Point Intensive Outpatient  
11 Psychiatric Program weekly since August 13, 2013. Ms. Harder  
12 is learning effective coping skills to manage symptoms  
13 associated with anxiety, depression and cumulated stress  
14 reportedly from prior work. Ms. Harder continues to present  
15 with intense levels of anxiety, bouts of crying, difficulty  
16 focusing on tasks, and feeling panicked when triggered, with  
17 excessive rumination and worry. Ms. Harder reports that when  
18 faced with having to do tasks, such as "phone calls, paperwork,  
19 documentation or opening mail" that she is often flooded with  
20 emotions and "reliving past work trauma related to years of  
21 trying to obtain unrealistic work demands." Ms. Harder receives  
22 support in regaining task management skills, with emphasis on  
23 emotion regulation and decreasing panic, when feeling flooded.

24 Ms. Harder reports that her chronic pain, "due to prior  
25 work related injuries, such as bilateral knee pain with instability  
26 and back pain" increases her anxiety and limits her coping  
27 mechanisms. Ms. Harder is receiving support to learn  
28 alternative, safe coping skills to effectively manage mood related

1 symptoms associated with her pain and subsequent physical  
2 limitations.

3 Based upon our clinical observations of Ms. Harder's  
4 fragility under stressful situations, returning to work may  
5 exacerbate her symptoms and contribute to a decline in the  
6 progress she is currently making. It is my recommendation, at  
7 this time, that Ms. Harder not return to work and be reinstated  
8 for long term disability.

9 (AR 3977.)

10 26. In considering Harder's second appeal, Aetna obtained paper reviews from Dr.  
11 Alison Netski, a psychiatrist, and Angela Stillwagon, D.O., who specializes in physical  
12 medicine and rehabilitation. Dr. Elana Mendelssohn, an Aetna in-house psychologist,  
13 participated on Aetna's appeal committee and also reviewed the file.

14 27. According to Dr. Netski, "[b]ased on the record provided for review,  
15 restrictions and limitations from occupational functioning are supported from 4/12/13  
16 through 3/7/14." (AR 3930.) Dr. Netski also stated that "[t]he severity of symptoms have  
17 necessitated intensive outpatient treatment/partial hospitalization. The claimant does not  
18 have the persistence and pace needed for occupational functioning and lacks emotional  
19 control." (Id.) Dr. Netski concluded that she was "in agreement with the opinion of the  
20 treating provider that she is unable to function in the occupational setting during this  
21 timeframe." (Id.)

22 28. From a physical standpoint, Dr. Stillwagon opined that from "6/27/09 to  
23 present, restrictions in regards to musculoskeletal complaints would include: no repetitive  
24 kneeling, squatting, crawling or climbing. No other restrictions would be permanent." (AR  
25 3921.) Dr. Stillwagon did not address "restrictions for her psychological complaints . . . as  
26 this is outside my realm of expertise." (Id.)

27 29. Dr. Mendelssohn and Aetna's appeal committee noted, on July 24, 2014, that  
28 the last medical record on file was dated April 21, 2014, which would make sense because

1 Harder filed her appeal on April 24, 2014. (AR 771.) Dr. Mendelssohn concluded that the  
2 information in Harder’s record “would support a functional impairment from a mental health  
3 perspective 04/01/13-05/01/14.” (Id.)

4 30. In a July 24, 2014 letter, Aetna “partially overturned” the original decision to  
5 terminate Harder’s disability benefits effective April 1, 2013. (AR 982.) According to  
6 Aetna’s letter:

7 [T]he Aetna Appeals Committee . . . have determined that from a  
8 mental health perspective there is clinical data that would have  
9 prevented Ms. Harder from performing the material duties of her  
10 own occupation from April 01, 2013 through May 01, 2014,  
11 only. However, there is a lack of medical information (i.e.  
12 progress notes documenting abnormal physical exam supporting  
13 a functional impairment that would have prevented her from  
14 performing work at any reasonable occupation as of May 01,  
15 2014 only. LTD benefits will remain terminated effective May  
16 02, 2014. According to [Harder’s] group plan, this decision is  
17 final and is not subject to further review.

18 (AR 984.)

19 31. Harder commenced an action, Case No. CV 14-6922 PA (SHx), in this Court  
20 on September 5, 2014, in which she sought relief from Aetna’s decision to terminate benefits  
21 effective May 1, 2014.

22 32. After reviewing the parties’ Joint 26(f) Report in Case No. CV 14-6922, the  
23 Court ordered the parties to show cause why the matter should not be remanded to the  
24 ERISA administrator because Aetna’s July 24, 2014 decision was based on different facts  
25 and conclusions than its March 2013 termination decision, and Harder had not had an  
26 opportunity to administratively appeal the July 2014 decision. (Docket No. 22 in Case No.  
27 CV 14-6922.)

28

1           33.     In response to the Court’s order to show cause, the parties stipulated to dismiss  
2 Case No. CV 14-6922 without prejudice. (Docket No. 24 in Case No. CV 14-6922.)

3           34.     Pursuant to the agreement of the parties, Harder’s counsel filed an appeal in  
4 July 2015 of Aetna’s July 24, 2014 decision to terminate Harder’s benefits. (AR 3853-57.)  
5 That appeal was supported by approximately 882 pages of documents. (Id.)

6           35.     On November 5, 2015, Aetna issued a decision in which it “agreed with the  
7 original decision to terminate the benefit as of May 2, 2014.” (AR 1004.) According to  
8 Aetna’s November 5, 2015 denial of Harder’s appeal:

9                     When we approved Ms. Harder’s LTD benefits through May 1,  
10                     2014, we had medical information that supported functional  
11                     impairments that would prevent Ms. Harder from performing the  
12                     material duties of her own and any reasonable occupation due to  
13                     a mental health condition. The level of symptoms reported  
14                     including poor stress intolerance, high anxiety, and insomnia  
15                     necessitate an elevated level of care with intensive  
16                     outpatient/partial hospitalization programs. However, more  
17                     recent medical information has been reviewed which does not  
18                     demonstrate the same level of impairment as previously  
19                     reported.

20 (AR 1005.)

21           36.     In support of its conclusion, Aetna cited, among other records, treatment notes  
22 from the Mission Community Hospital Turning Point Intensive Outpatient Psychiatric  
23 Program from July 25, 2014,<sup>1/</sup> letters and reports from Dr. Mahoney dated January 22, 2015,  
24 February 12, 2015, March 19, 2015, April 30, 2015, May 12, 2015, May 28, 2015, June 9,

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27 <sup>1/</sup>           Aetna’s letter wrongly states that Harder started attending the outpatient program on  
28 July 15, 2014. (AR 1005.) Harder actually started attending that program in August 2013.  
(AR 3977.)

1 2015, and July 15, 2015, and notes from Dr. Schuster dated December 11, 2014, and March  
2 10, 2015. (AR 1005-06.)

3 37. Aetna's letter states:

4 The treatment notes do not describe psychiatric  
5 symptomatology based on behavioral observations other than  
6 that she is noted to be depressed and anxious, however, there is  
7 no information regarding frequency, intensity or duration  
8 provided. It is noted that she had some difficulties in performing  
9 specific tasks such as driving in heavy traffic or reading and  
10 following directions which is based on her self-report but there  
11 is no support based or clinical evidence provided.

12 Ms. Harder has not undergone mental status examinations  
13 or objective assessments of cognitive functioning by a qualified  
14 professional. Mood was typically noted to be stable, with some  
15 episodes of tearfulness related to discussion of difficult or  
16 painful topics. The psychologist-reviewer opined there is no  
17 evidence in the documents submitted for review to support a  
18 conclusion of functional impairment for the time period, May 2,  
19 2014 forward. In the opinion of the psychologist-reviewer, the  
20 medical evidence submitted for review does not support a  
21 conclusion of severe impairment that precludes full-time  
22 employment. Ms. Harder appeared to be able to complete a daily  
23 routine effectively and is reported to be participating in a  
24 volunteer program providing equine experiences to autistic  
25 children, which is presumed to require patience, focus, stress  
26 tolerance, flexibility, and problem solving.

27 (AR 1006-07.)

28

1           38.     Aetna’s letter did not cite to scores of other treatment notes from the Mission  
2 Community Hospital Turning Point Intensive Outpatient Psychiatric Program from the April  
3 2014 through June 2015 time period in which Harder’s mood and affect were described as  
4 “sad,” “anxious,” “dysphoric,” “agitated,” and “tearful,” among other similar terms. (AR  
5 1312-1402 & 1965-2190.)

6           39.     In addition to the treatment notes from the outpatient program, Dr. Mahoney  
7 submitted a letter in support of Harder’s appeal, dated July 15, 2015, in which he states:

8                     I am writing on behalf of Ms. Julie Harder, who has been  
9                     under my care while attending Turning Point Intensive  
10                    Out-Patient Program since August 13, 2013. Ms. Harder  
11                    continues work on identifying triggers and applying coping  
12                    techniques to better manage her debilitating anxiety and panic  
13                    attacks related to PTSD, secondary to work stress and chronic  
14                    pain following work related injury. Ms. Harder reports that she  
15                    experiences severe anxiety and panic attacks when faced with  
16                    complex tasks, when needing to drive in heavy traffic and when  
17                    needing to address mail and phone calls. Ms. Harder becomes  
18                    distracted easily, unable to read without re-reading lines several  
19                    times. Her comprehension is also effected, making reading and  
20                    following written instructions to be anxiety producing.

21                    In both group therapy and in my private sessions, Ms.  
22                    Harder continues to demonstrate tearful episodes and flooding  
23                    when faced with complex tasks. Ms. Harder reports that she  
24                    becomes frozen, confused and overwhelmed if needing to  
25                    address any type of documentation, filling out forms and/or in  
26                    just completing serried tasks (including ADLs). Ms. Harder  
27                    continues to attend the Turning Point twice per week (Tues and  
28                    Thurs) where she attends six group therapy sessions/week

1 (including Stress management, Symptom Management,  
2 Dialectical Behavioral Therapy, Cognitive Behavior Therapy,  
3 Seeking Safety and Grief and Loss) and she meets with me  
4 monthly. Ms. Harder has a private Psychiatrist that she sees  
5 outside of Turning Point who manages her medications. Ms.  
6 Harder is working individually with her Case Manager, and  
7 within group therapy, to early identify anxiety triggers and to  
8 continue practice of coping skills to assist her in reaching her  
9 goal of returning to her best self and participating actively in life  
10 without restricting anxiety and panic.

11 It is my clinical opinion that Julie Harder should remain  
12 on disability at this time.

13 (AR 1311.)

14 40. Harder's counsel filed a second appeal on May 3, 2016. (AR 2798-13.) In  
15 support of that appeal, Harder's counsel submitted to Aetna 587 additional pages of records  
16 in support of the appeal in addition to the 882 pages of documents submitted in support of  
17 the July 2015 appeal. (AR 2789.)

18 41. On August 11, 2016, Aetna issued a decision on Harder's second appeal in  
19 which it "agreed with the original decision to terminate the benefit as of May 2, 2014." (AR  
20 1022.) According to Aetna, "the majority of the medical documentation submitted for  
21 consideration are with regards to her treatment protocol in 2013" (Id.) even though Harder  
22 submitted hundreds of pages concerning her treatment in 2014 and 2015. Aetna's letter  
23 conveyed the opinion of the psychology reviewer it retained, who opined that "[s]ymptoms  
24 are not of a severity that would impact work activity from May 02, 2014 through the present  
25 time" and "found no support for a functional impairment due to any mental or emotional  
26 diagnosis or symptoms." (Id.)

27 42. Having exhausted her administrative remedies for a second time, Plaintiff  
28 commenced this action on February 22, 2017.

1 **II. Conclusions of Law**

2 1. A “denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) is to be  
3 reviewed under a de novo standard unless the benefit plan gives the administrator or  
4 fiduciary discretionary authority to determine eligibility for benefits or to construe the terms  
5 of the plan.” Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956-  
6 57, 103 L. Ed. 2d 80 (1989); Saffon v. Wells Fargo & Co. Long Term Disability Plan, 522  
7 F.3d 863, 866 (9th Cir. 2008). Where the plan vests such discretionary authority in the  
8 administrator or fiduciary, the Court reviews the denial of benefits under the plan for an  
9 abuse of discretion. Firestone, 489 U.S. at 115, 109 S. Ct. at 957. However, in order for the  
10 abuse of discretion standard to apply, the Plan must unambiguously grant discretion to the  
11 administrator or fiduciary. Kearney v. Standard Ins. Co., 175 F.3d 1084, 1089 (9th Cir.  
12 1999).

13 2. The Plan confers discretionary authority on the administrator and Aetna. (AR  
14 5899 & 5967.)

15 3. Once the Court concludes that the policy vests discretionary authority in the  
16 administrator or fiduciary, the Court must determine whether the administrator or fiduciary  
17 is operating under a conflict of interest. In recent decisions, first the Ninth Circuit, and then  
18 the Supreme Court, determined that the abuse of discretion standard still applies even when  
19 the administrator has a conflict of interest. See Metro. Life Ins. Co. v. Glenn, 128 S. Ct.  
20 2343, 2346, 171 L. Ed. 2d 299 (2008) (“Often the entity that administers the plan, such as an  
21 employer or an insurance company, both determines whether an employee is eligible for  
22 benefits and pays benefits out of its own pocket. We here decide that this dual role creates a  
23 conflict of interest; that a reviewing court should consider that conflict as a factor in  
24 determining whether the plan administrator has abused its discretion in denying benefits; and  
25 that the significance of the factor will depend upon the circumstances of the particular  
26 case.”); Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 965 (2006) (“Abuse of  
27 discretion review applies to a discretion-granting plan even if the administrator has a conflict  
28

1 of interest. But Firestone also makes clear that the existence of a conflict of interest is  
2 relevant to how a court conducts abuse of discretion review.”).

3 4. “What the district court is doing in an ERISA benefits denial case is making  
4 something akin to a credibility determination about the insurance company’s or plan  
5 administrator’s reason for denying coverage under a particular plan and a particular set of  
6 medical and other records.” Abatie, 458 F. 3d at 969. In other words, “[a] district court,  
7 when faced with all the facts and circumstances, must decide in each case how much or how  
8 little to credit the plan administrator’s reason for denying insurance coverage.” Id. at 968;  
9 Saffon, 522 F.3d at 868-69. “The district court may, in its discretion, consider evidence  
10 outside the administrative record to decide the nature, extent, and effect on the  
11 decision-making process of any conflict of interest; the decision on the merits, though, must  
12 rest on the administrative record once the conflict (if any) has been established, by extrinsic  
13 evidence or otherwise.” Abatie, 458 F.3d at 970.

14 5. Here, Aetna is not the funding source for the plan. It therefore does not  
15 operate under a structural conflict of interest. Nevertheless, it promised to apply, “to the  
16 extent applicable,” its “normal claim determination, payment and audit procedures, and cost  
17 control standards in a manner consistent with the terms of the Plan, the Services Agreement,  
18 and applicable law.” (AR 5957.) Although the Court’s ultimate determination would be the  
19 same even if it applied no skepticism at all to Aetna’s decision to terminate Harder’s  
20 benefits, the Court concludes that a minimal level of skepticism is appropriate in these  
21 circumstances to inform its review of Aetna’s determinations under the abuse of discretion  
22 standard.

23 6. “[T]he test for abuse of discretion in a factual determination (as opposed to  
24 legal error) is whether ‘we are left with a definite and firm conviction that a mistake has  
25 been committed,’ and we may not merely substitute our view for that of the fact finder. To  
26 do so, we consider whether application of a correct legal standard was ‘(1) illogical, (2)  
27 implausible, or (3) without support in inferences that may be drawn from the facts in the  
28 record.’ That standard makes sense in the ERISA context, so we apply it, with the

1 qualification that a higher degree of skepticism is appropriate where the administrator has a  
2 conflict of interest.” Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 676 (9th  
3 Cir. 2011) (quoting United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)).  
4 “Applying a deferential standard of review does not mean that the plan administrator will  
5 prevail on the merits. It means only that the plan administrator’s interpretation of the plan  
6 ‘will not be disturbed if reasonable.’” Conkright v. Frommert, 559 U.S. 506, 521, 130 S. Ct.  
7 1640, 1651, 176 L. Ed. 2d 469 (2010) (quoting Firestone, 489 U.S. at 111, 109 S. Ct. at  
8 954)). The deference accorded to administrators “does not suddenly disappear simply  
9 because a plan administrator has made a single honest mistake.” Id. at 518, 130 S. Ct. at  
10 1649.

11 7. “[C]onditioning an award on the existence of evidence that cannot exist is  
12 arbitrary and capricious.” Salomaa, 642 F.3d at 678. The “continual shifting” of a plan’s  
13 grounds for denial may “also suggest abuse of discretion.” Id. at 679.

14 8. Where an administrator denies a claim for benefits “based on absence of some  
15 sort of medical evidence or explanation,” the administrator is “obligated to say in plain  
16 language what additional evidence it needed and what questions it needed answered in time  
17 so that the additional material could be provided.” Id. at 680. “An administrator does not do  
18 its duty under the statute and regulations by saying merely ‘we are not persuaded’ or ‘your  
19 evidence is insufficient.’ Nor does it do its duty by elaborating upon its negative answer  
20 with meaningless medical mumbo jumbo.” Id.

21 9. “[T]he burden of proof continues to lie with the plaintiff when disability  
22 benefits are terminated after an initial grant. . . . That benefits had previously been awarded  
23 and paid may be evidence relevant to the issue of whether the claimant was disabled and  
24 entitled to benefits at a later date, but that fact should not itself shift the burden of proof.”  
25 Muniz v. Amec Constr. Mgm’t, Inc., 623 F.3d 1290, 1296 (9th Cir. 2010).

### 26 **III. Analysis**

27 The Court concludes, after reviewing the Administrative Record, and considering the  
28 arguments and Trial Briefs submitted by the parties, that Plaintiff satisfied her burden to

1 establish that she remained totally disabled as defined by the Plan beyond May 1, 2014, and  
2 that Aetna's decision to terminate benefits as of May 2, 2014, was arbitrary and capricious.

3       Specifically, by concluding that its July 24, 2014 decision "partially overturning" its  
4 termination of benefits was based on "a lack of medical information (ie. progress notes  
5 documenting abnormal physical exam supporting a functional impairment that would have  
6 prevented her from performing work at any reasonable occupation as of May 01, 2014 only,"  
7 Aetna abused its discretion. (AR 984.) That determination is illogical because Harder  
8 submitted her appeal and supporting documentation on April 24, 2014. (AR 3941-55.) As a  
9 result, it was impossible for Harder to submit evidence to support her continued disability  
10 beyond May 1, 2014.

11       As Aetna's decision "partially overturning" its previous termination of benefits  
12 acknowledges, the evidence submitted by Harder as of that date supports the conclusion that  
13 her disability continued at least through May 1, 2014. At the time Aetna terminated her  
14 benefits beginning on May 2, 2014, Aetna was not in possession of any evidence that  
15 Harder's condition had improved after the submission of her appeal on April 24, 2014.  
16 Aetna's abuse of discretion is compounded by the fact that although it overturned its  
17 previous termination of benefits beginning on April 1, 2013, it originally provided her with  
18 no opportunity to appeal its new decision to terminate her benefits as of May 1, 2014.

19       Aetna's decisions in the second round of appeals, issued on November 5, 2015, and  
20 August 11, 2016, affirmed the original July 24, 2014 decision. Although those decisions did  
21 provide Harder with an opportunity to provide additional evidence in support of her  
22 contention that she remained disabled beyond May 1, 2014, and Aetna and its reviewers did  
23 consider at least most of that additional evidence, those reviews did not cure the arbitrariness  
24 of the original July 24, 2014 decision. Aetna's selective reliance on a small number of the  
25 voluminous treatment notes submitted by Harder's mental health providers, and particular  
26 reliance on notes and letters from December 11, 2014, January 22, 2015, February 12, 2015,  
27 March 10, 2015, March 19, 2015, April 30, 2015, May 12, 2015, May 28, 2015, June 9,  
28 2015, and July 15, 2015 (AR 1005-06), may provide some support for a conclusion that

1 Harder was not totally disabled by sometime in late 2014 or mid-2015,<sup>2/</sup> but that evidence  
2 does little to support Aetna's conclusion that Harder was no longer disabled as of May 2,  
3 2014. Moreover, the erroneous statements by Aetna and its reviewers concerning the dates  
4 during which Harder participated in the Mission Community Hospital Turning Point  
5 Intensive Outpatient Psychiatric Program, and her ability to maintain full-time employment  
6 while receiving treatment twice each week for "her debilitating anxiety and panic attacks  
7 related to PTSD, secondary to work stress and chronic pain following work related injury"  
8 confirms Aetna's decisions on appeal were arbitrary and capricious. The reasons for  
9 Aetna's denials, and the type of evidence Aetna deemed important, also shifted as Harder's  
10 counsel responded in the appeals to the stated bases of the prior denials. The Court therefore  
11 concludes that Aetna abused its discretion when it terminated Harder's benefits beginning on  
12 May 2, 2014.

### 13 **Conclusion**

14 For all of the foregoing reasons, the Court concludes that Plaintiff has met her burden  
15 of proof to establish that the Plan's termination of her disability benefits beginning on May  
16 2, 2014, was arbitrary and capricious. Plaintiff is therefore entitled to reinstatement of her  
17 long-term disability benefits under the Plan beginning on May 2, 2014. Plaintiff shall  
18 submit a proposed Judgment by no later than December 13, 2017. Defendant's objections to  
19 the proposed Judgment, if any, shall be filed no later than December 20, 2017. The Court  
20 will issue a separate order with the deadlines and procedures for the filing of a Motion for  
21 Attorneys' Fees.

22 IT IS SO ORDERED.

23 DATED: December 6, 2017

24   
25 \_\_\_\_\_  
26 Percy Anderson  
27 UNITED STATES DISTRICT JUDGE

28 <sup>2/</sup> Because the only issue before the Court is whether Aetna abused its discretion by terminating Harder's disability benefits beginning on May 2, 2014, the Court makes no determination whether Harder ceased being disabled under the Plan at some later date.