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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
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12 LASHAUN THOMAS,

13 Plaintiff,

14 v.

15 AETNA LIFE INSURANCE COMPANY,
16 a corporation; FEDEX GROUND,
17 a corporation; DOES 1 through
18 10, inclusive,

Defendants.

No. 2:15-cv-01112-JAM-KJN

**ORDER DENYING PLAINTIFF'S AND
DEFENDANTS' MOTIONS FOR SUMMARY
JUDGMENT**

19 Plaintiff Lashaun Thomas ("Thomas") alleges that she was
20 entitled to short-term disability ("STD") benefits under the
21 Employee Retirement Income Security Act ("ERISA")-governed self-
22 funded disability plan (the "Plan") put in place by her employer
23 defendant FedEx Ground ("FedEx"). Defendant Aetna Life Insurance
24 Company ("Aetna"), which was designated as the Plan
25 Administrator, denied her request for STD benefits. The case is
26 now before this Court because ERISA permits an insured to sue "to
27 recover benefits due to him under the terms of his plan." 29
28 U.S.C. § 1132(a). Both parties seek summary judgment in their

1 favor. For the reasons stated below, the Court denies both
2 motions for summary judgment and finds that there is a genuine
3 issue of material fact as to whether Thomas adequately
4 demonstrated that she was entitled to STD benefits.

5
6 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

7 On September 19, 2012, Thomas was traveling for work with
8 her boss when their car was rear-ended. Defendants' Response to
9 Plaintiff's Statement of Undisputed Facts ("P SUF") (Doc. #20-1)

10 #1. Two days later, Thomas went to Elk Grove urgent care ("Elk
11 Grove") and complained of back pain caused by the accident. Id.

12 #2. Thomas saw Dr. Allen Lin Do, who observed spasm and
13 tenderness of the paraspinal muscles and prescribed pain
14 medication. Id. On October 8, 2012, Thomas received an x-ray at
15 Elk Grove that revealed no fracture and that her disc spaces
16 appeared normal. Plaintiff's Response to Defendants' Statement
17 of Undisputed Facts ("D SUF") (Doc. #22-1) #13. On November 3,
18 2012, Thomas was reevaluated at Elk Grove and was diagnosed with
19 a back strain that was worse with movement. D SUF #14. On
20 February 4 and February 7, 2013, Thomas again went to Elk Grove
21 and it was noted that there were no neurological deficits. D SUF
22 #15. Thomas was referred to physical therapy. Id.

23 On February 21, 2013, Thomas began receiving physical
24 therapy treatment at Laguna Physical Therapy. P SUF ## 4-5. She
25 received this treatment until April 10, 2013. Id. Thomas'
26 physical therapist noted that Thomas had tenderness in her right
27 shoulder girdle and her cervical paraspinal region. Id. #4. Her
28 pain was rated as between 5 and 7 out of 10 and was aggravated by

1 driving, prolonged sitting, and various other activities. Id.

2 On June 18, 2013, Thomas underwent two MRIs: a lumbar spine
3 MRI and a cervical spine MRI. Id. #6. The MRIs showed she had
4 broad based disc bulges with osteophytic spurring at C4-5, C5-6,
5 and C6-7. Id. The MRIs also showed that she had a disc
6 protrusion/herniation with right foraminal encroachment on the
7 C5-6 level and a C6 root compression. Id. The MRIs also showed
8 that on the C6-7 level there was a central protrusion or
9 herniation with flattening of the ventral thecal sac. Id. In
10 the MRI, the craniocervical junction appeared unremarkable; the
11 spinal cord was not enlarged; no bony destructive lesion or
12 cervical soft tissue mass was seen; and the anterior and
13 posterior ligament groups appeared intact. D SUF #16. The
14 lumbar spine MRI revealed no neural compression, unlike the
15 cervical MRI. Id. #17.

16 On August 25, 2013, Dr. Truong at Elk Grove excused Thomas
17 from work from August 26, 2013 through August 30, 2013. P SUF
18 #7. Dr. Truong again excused Thomas from work for 30 days on
19 September 16, 2013. Id. #8. Dr. Truong excused Thomas from work
20 for 45 days on September 18, 2013. Id. #9. On September 26,
21 2013, Thomas contacted Aetna to open a claim for short-term
22 disability benefits. Id. #10. On October 1, 2013, Dr. Truong
23 filled out an Attending Physician Statement (APS) stating that
24 Thomas was disabled from work from August 24, 2013 through
25 October 16, 2013, and that after October 16, 2013, Thomas could
26 return to work only on modified duty with occasional sitting,
27 driving, computer use, hand grasping and reaching, and no
28 lifting, pushing, pulling, bending, or stooping. Id. #11.

1 On October 4, 2013, Aetna informed Thomas that FedEx
2 retained it to administer the STD Plan and that a clinical review
3 of the appropriateness of her work absence was required. D SUF
4 #19. Dr. Truong wrote another note on October 9, 2013, stating
5 that Thomas should remain off work from October 16, 2013 through
6 November 29, 2013. Id. #20.

7 On November 6, 2013, Aetna informed Thomas that it concluded
8 she did not meet the definition of disabled and explained why.
9 D SUF #21; Administrative Record ("AR") 324-325. The letter
10 explained that Thomas could appeal the decision and provided a
11 list of items she could provide that may help prove her claim.
12 Id. #22. Thomas later appealed the denial. Id. #23-24. On
13 December 16, 2013, the Aetna Appeals Specialist evaluating
14 Thomas's appeal conducted a telephone interview with Thomas in
15 which Thomas stated that Dr. Truong had released her back to work
16 but that her employer was unable to accommodate her because of
17 the medications she was taking. Id. #25. The Appeals Specialist
18 also explained the reason for denying the claim and the type of
19 information Thomas could provide to assist the review. Id. #26.
20 The Appeals Specialist reduced the conversation to writing and
21 confirmed that Thomas's current condition was displacement of
22 lumbar intervertebral disc without myelopathy. Id. #27.

23 Aetna then requested a peer review from Dr. Martin
24 Mendelssohn, who specializes in orthopedic surgery. D SUF #28.
25 Dr. Mendelssohn attempted a peer-to-peer consultation with Dr.
26 Heune and Dr. Truong but was unable to get in touch with them.
27 Id. ##29-30. Dr. Mendelssohn conducted a consultation with Dr.
28 Wilson, who said Thomas was in a car accident and could not work

1 because of her symptoms, but admitted that he had only seen
2 Thomas once and could not provide any evidence of any functional
3 or neurological deficits. Id. #31. Dr. Mendelssohn reported
4 that "a comprehensive history and physical examination supporting
5 diagnostic studies that would indicate a functional impairment
6 from her regular occupation as a field contractor REL specialist,
7 which is sedentary from 8/26/13 through 1/6/14 cannot be
8 substantiated." Id. #32. Dr. Mendelssohn opined that Thomas was
9 able to return to her position without restrictions from August
10 26, 2013 through January 6, 2014. Id. #33.

11 On January 15, 2014, Aetna again tried to contact Dr. Truong
12 and Dr. Heune, but was unable to reach them. Id. #34. That same
13 day, Aetna wrote to Thomas explaining that the appeal review
14 needed more time because Aetna could not reach the two doctors.
15 Id. #35.

16 On January 30, 2014, Thomas was seen by Dr. Thomas J.
17 O'Laughlin, who performed an examination on Thomas. P SUF #13.
18 Dr. O'Laughlin's initial evaluation is presented in AR pages 513-
19 517. Dr. O'Laughlin noted that the June 18, 2013 MRI of the
20 cervical spine disclosed a broad-based disc bulge at C5 with
21 osteophytic spurring and right paracentral disc osteophyte with
22 mild neuroforaminal narrowing and that the lumbar spine MRI was
23 unremarkable. D SUF #36. Dr. O'Laughlin also reported that
24 Thomas had evidence of some underlying cervical degenerative disc
25 disease of varying degrees at C5-C6, C4-C5, and C5-C6. Id. #37.
26 He stated that Thomas "seems to have aggravated her underlying
27 degenerative cervical changes and appears to have some
28 superimposed disc protrusion that is continuing to promote

1 intractable cervicospicular myofascial pain and chronic
2 cervicogenic headache." Id. He agreed with keeping Thomas off
3 work because the stressors of work and the psychosocial pressures
4 would prevent her from improving. Id. #39.

5 The following day, Dr. O'Laughlin performed trigger-point
6 injections. P SUF #14. Dr. O'Laughlin saw Thomas five other
7 times between February 2014 and May 2014. Id. #15. On April 21,
8 2014, Dr. O'Laughlin wrote Aetna a letter on behalf of Thomas
9 stating that "after reviewing the medical records of Lashaun
10 Thomas, as well as performing a face-to-face medical examination,
11 it is my opinion that Ms. Thomas has been disabled and unable to
12 work since her accident on 9/19/2012." P SUF # 16; D SUF #43.

13 Aetna then hired Dr. Priya Swamy to complete a peer review.
14 D SUF #46. The scope of what Dr. Swamy reviewed is under
15 dispute, but the parties agree that Dr. Swamy reviewed some
16 records from between August 26, 2013 through March 24, 2014, the
17 MRIs from June 18, 2013, and records from July 31, 2013 and
18 August 19, 2013. Id. #47. The parties dispute how much of Dr.
19 O'Laughlin's records Dr. Swamy reviewed. Id. ## 48-50. Dr.
20 Swamy also attempted a peer-to-peer consultation with Dr.
21 O'Laughlin but was unable to reach him. Id. #51. Dr. Swamy
22 concluded that Thomas had no functional impairments from August
23 26, 2013 through March 24, 2014. Id. #52; AR 584-586.

24 Aetna wrote to Thomas on June 6, 2014, informing her that it
25 completed the appeal review of the denial of her STD benefits and
26 upheld the original decision to deny STD benefits effective
27 August 26, 2013. Id. #53; AR 581.

28 Thomas filed the complaint in this case, alleging that she

1 "was entitled to short-term disability, as well as other benefits
2 under the Plan." Compl. ¶ 4 (Doc. #1). Thomas alleges that
3 Defendants "arbitrarily and in bad faith refused to make payments
4 to [her] as required by the Disability Plan." Id. ¶ 6. Thomas
5 seeks the past and future benefits allegedly owed to her under
6 the LTD Plan and "a declaration by this court . . . that all
7 benefits provided to Plan participants while they are disabled
8 under the Plan . . . be reinstated retroactive to the date her
9 LTD benefits were terminated." Id. at 3. Thomas then filed a
10 motion for summary judgment (Doc. #16). Defendants opposed the
11 motion and filed a cross motion for summary judgment (Doc. #20).
12 Thomas opposed Defendants' cross motion (Doc. #22). The Court
13 heard argument on the cross motions for summary judgment on
14 August 9, 2016.

15 16 II. OPINION

17 A. Legal Standard

18 The preliminary issue the Court must decide is whether it
19 should review Aetna's determination that Thomas did not qualify
20 for STD benefits under a de novo standard of review or an abuse
21 of discretion standard of review. Thomas asks the Court to apply
22 de novo review, while Aetna argues that abuse of discretion is
23 the appropriate standard.

24 1. Proper Delegation

25 Thomas argues that the abuse of discretion standard would be
26 inappropriate here because Aetna was never unambiguously granted
27 discretion by the Benefits Committee. P Reply (Doc. #22) at 1.
28 Thomas concedes that the Benefits Committee was granted

1 discretion for its determination of whether Thomas was disabled
2 but contends that "there is no language in the Plan granting
3 Aetna discretion and Defendants have not cited anything
4 evidencing that the Benefits Committee expressly delegated its
5 discretion to Aetna." Id. In response, Defendants point to
6 section 5.1(d) of the Plan, which permits the Plan Administrator
7 to delegate its discretionary authority to a third party. D
8 Reply at 2 (Doc. #25) (citing AR 060). In response to
9 questioning from the Court during the August 9, hearing on the
10 cross motions, Defendants further noted that section 2.4 of the
11 Plan states that "Claims Paying Administrator" means Aetna and
12 that section 4.5(a) of the Plan states that the Claims Paying
13 Administrator is charged with "determin[ing] pursuant to the
14 terms of the STD Plan that a Total Disability exists."

15 On this issue, the Court agrees with Defendants. The Plan
16 clearly states that Aetna, as the Claims Paying Administrator,
17 was charged with deciding whether Thomas was disabled under the
18 terms of the Plan. The Plan contains a discretionary clause that
19 provides the Plan Administrator with "the discretion and
20 authority to interpret and construe the provisions of the STD
21 plan . . . [and] decide any dispute which may arise with regard
22 to the rights of Participants entitled to benefits." AR 060.
23 Read as a whole, the Plan sufficiently delegates the Plan
24 Administrator's discretionary authority to Aetna. The Court will
25 not apply de novo review on the basis of Thomas's argument that
26 Aetna was not properly delegated discretion.

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1 2. ERISA Preemption of Section 10110.6

2 The crux of the dispute over the proper standard of review
3 is whether ERISA preempts the application of California Insurance
4 Code section 10110.6 ("section 10110.6") to self-funded plans,
5 such as the one at issue in this case. Defendants argue that
6 ERISA preempts section 10110.6 because section 10110.6 "has an
7 impermissible connection with a key facet of ERISA plan
8 administration." Opp. at 15. Thomas argues that all previous
9 courts that have ruled on this issue have determined that ERISA
10 does not preempt section 10110.6, whether or not the plan is
11 self-funded. P Reply at 2.

12 ERISA permits a benefits plan participant to bring a civil
13 case in federal court to recover benefits allegedly owed to him
14 under a benefits plan. 29 U.S.C. § 1132(a)(1). A district court
15 is then charged with reviewing the plan administrator's decision
16 denying benefits to the participant. The default standard of
17 review in such cases is de novo. Standard Ins. Co. v. Morrison,
18 584 F.3d 837, 846 (9th Cir. 2009) ("[D]e novo review is the
19 default standard of review in an ERISA case."). However, "[i]f
20 an insurance contract has a discretionary clause, the decisions
21 of the insurance company are reviewed under an abuse of
22 discretion standard." Id. at 840; Firestone Tire & Rubber Co. v.
23 Bruch, 489 U.S. 101, 115 (1989) ("a denial of benefits challenged
24 under § 1132(a)(1)(B) is to be reviewed under a de novo standard
25 unless the benefit plan gives the administrator or fiduciary
26 discretionary authority to determine eligibility for benefits or
27 to construe the terms of the plan").

28 Here, the Plan contains a discretionary clause: "[t]he Plan

1 Administrator shall have the discretion and authority to
2 interpret and construe the provisions of the STD plan, determine
3 the entitlement of any Participant to benefits hereunder, and
4 decide any dispute which may arise with regard to the rights of
5 Participants entitled to benefits." AR 060. Thus, based solely
6 on the presence of this discretionary clause, the Court would
7 have to apply an abuse of discretion standard.

8 However, California law renders such discretionary clauses
9 void and unenforceable. Section 10110.6 states that

10 [i]f a policy, contract, certificate, or agreement
11 offered, issued, delivered, or renewed, whether or not
12 in California, that provides or funds life insurance
13 or disability insurance coverage for any California
14 resident contains a provision that reserves
15 discretionary authority to the insurer, or an agent of
16 the insurer, to determine eligibility for benefits or
coverage, to interpret the terms of the policy,
contract, certificate, or agreement, or to provide
standards of interpretation or review that are
inconsistent with the laws of this state, that
provision is void and unenforceable.

17 If section 10110.6 applies in this case, then the discretionary
18 clause in the Plan is void, and the default de novo standard of
19 review would apply.

20 Defendants argue that section 10110.6 cannot apply in this
21 case because ERISA preempts its application. ERISA is meant to
22 "supersede any and all State laws insofar as they . . . relate to
23 any employee benefit plan." 29 U.S.C. § 1144(a). However, the
24 so-called "Savings Clause" states that ERISA "shall not be
25 construed to exempt or relieve any person from any law of any
26 State which regulates insurance, banking, or securities." 29
27 U.S.C. § 1144(b)(2)(A). The so-called "Deemer Clause" then
28 states that an "an employee benefit plan described in section

1 1003(a) of this title, which is not exempt under section 1003(b)
2 of this title . . . shall [not] be deemed to be an insurance
3 company . . . or to be engaged in the business of insurance or
4 banking for purposes of any law of any State purporting to
5 regulate insurance companies, insurance contracts, banks, trust
6 companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B).

7 The United States Supreme Court recently summarized ERISA
8 preemption by stating that ERISA preempts two categories of state
9 laws. ERISA preemption exists (1) where a state's law acts
10 immediately and exclusively upon ERISA plans and (2) where a
11 state law has an "impermissible connection" with ERISA plans.
12 Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016).

13 An "impermissible connection" "mean[s] a state law that 'governs
14 a central matter of plan administration or 'interferes with
15 nationally uniform plan administration.'" Id. at 943.

16 Defendants argue that section 10110.6 is preempted under the
17 second category of state law identified in Gobeille. Citing
18 Gobeille, Defendants argue that section 10110.6 "has an
19 impermissible connection with a key facet of ERISA plan
20 administration" because "[v]oiding language conferring
21 discretionary authority to plan administrators disrupts the
22 uniform administration of plans and forces administrators to
23 master the laws of all 50 states." Opp. at 14.

24 Defendants' citation to Gobeille in support of their pre-
25 emption argument is unavailing. Gobeille considered a Vermont
26 disclosure statute that required health insurers to report
27 payments relating to health care claims to a state agency that
28 would compile the payments in a database. Under the statutory

1 scheme at issue in Gobeille, entities covered by the Vermont
2 statute that failed to comply with the reporting requirements
3 would be fined. Thus, Gobeille considered a state law that added
4 a new requirement for administrators of benefits plans, thereby
5 creating a whole new cause of action. That case is significantly
6 different than cases involving state laws, such as section
7 10110.6, that simply void discretionary clauses and therefore
8 only impact the procedures by which a party can challenge a plan
9 administrator's determination in a federal district court.

10 In fact, the Ninth Circuit has concluded that state laws
11 that bar discretionary clauses (such as section 10110.6) are not
12 preempted by ERISA because they do not "authorize any form of
13 relief in state courts nor serve as an alternative enforcement
14 mechanism outside of ERISA's civil enforcement provisions."
15 Standard Ins. Co., 584 F.3d at 846 (rejecting claim that ERISA
16 preempted a policy implemented by the Montana insurance
17 commissioner of disapproving any insurance contract containing a
18 discretionary clause). In Standard Ins. Co., the court reasoned
19 that these policies "merely force[] ERISA suits to proceed with
20 their default standard of review," which is de novo, and
21 therefore do not "duplicate, supplement, or supplant the ERISA
22 remedy." Id. The court distinguished these policies from
23 policies at issue in cases such as Gobeille that involve a
24 state's attempt "to meld a new remedy to the ERISA framework."
25 Id. Multiple California district courts have similarly concluded
26 that section 10110.6 is not preempted by ERISA. See, e.g.,
27 Polnick v. Liberty Life Assurance Co. of Bos., 999 F. Supp. 2d
28 1144, 1150 (N.D. Cal. 2013); Gonda v. Permanente Med. Grp., Inc.,

1 10 F.Supp.3d 1091, 1094 (C.D. Cal. 2014). Defendants also could
2 not provide this Court with any case in which a California
3 district court has concluded that section 10110.6 is preempted
4 and unenforceable.

5 Defendants attempt to distinguish this case from the
6 overwhelming weight of authority in this Circuit that has
7 concluded that section 10110.6 is not preempted by arguing that
8 self-funded plans should be treated differently. Defendants
9 argued at the hearing that the Deemer Clause prevents courts from
10 applying section 10110.6 to self-funded plans. And Defendants
11 believe that section 10110.6 treats self-funded plans as if they
12 are insurance.

13 During the hearing, however, Defendants conceded that the
14 only court that has directly addressed the issue of whether the
15 application of section 10110.6 to self-funded plans is preempted
16 by ERISA concluded that there is no preemption. Williby v. AETNA
17 Life Insurance Company, 2015 WL 5145499, *5 (C.D. Cal. Aug. 31,
18 2015).¹ The defendant in Williby argued just as Defendants argue
19 in this case "that the insurance code does not apply because (1)
20 the STD benefits are self-funded . . . and (2) Aetna is granted
21 discretion by the Plan, which is not an insurance policy, and
22 thus, not regulated by the insurance code." Id. at *5. The
23 Williby court rejected this argument.

24 By its plain language, section 10110.6 applies to contracts.
25 Cal. Ins. Code § 10110.6(a) ("If a policy, *contract*, [or]

26 ¹ Defendants argue that Williby was incorrectly decided and note
27 that the case has been or will be appealed. Until the Ninth
28 Circuit takes up this issue, however, this Court is free to agree
with Williby.

1 certificate . . . that provides or funds life insurance or
2 disability insurance coverage for any California resident
3 contains a provision that reserves discretionary authority . . .
4 to determine eligibility for benefits or coverage . . . that
5 provision is void and unenforceable.") (emphasis added). "An
6 ERISA plan is a contract." LeGras v. AETNA Life Ins. Co., 786
7 F.3d 1233, 1240 (9th Cir. 2015), cert. denied, 136 S. Ct. 1448,
8 194 L. Ed. 2d 549 (2016). Thus, as the Williby court concluded,
9 a plain reading of section 10110.6 demonstrates that it applies
10 to contracts such as self-funded ERISA plans. This reading
11 accords with the purpose behind section 10110.6. As pointed out
12 in Williby, the legislative history of section 10110.6
13 demonstrates that the California legislature was concerned over
14 how a discretionary clause, even in a self-funded plan, "deprives
15 California insureds of the benefits for which they bargained,
16 access to the protections of the Insurance Code[,] and other
17 protections in California law." Id. at *5.

18 Defendants' concern that discretionary clauses "force[]
19 administrators to master the laws of all 50 states" is misplaced.
20 As pointed out above, the Ninth Circuit has already rejected this
21 argument. Standard Ins. Co., 584 F.3d at 846 (finding that state
22 laws that bar discretionary clauses merely enforce the
23 application of the default standard of review and do not
24 "duplicate, supplement, or supplant" ERISA). Implicit in this
25 argument is the recognition that the initial decision made by a
26 plan administrator to deny or grant disability benefits is a
27 technical medical decision based on the evidence before the
28 administrator. Whether that decision will be subject to de novo

1 or discretionary review should not impact the administrator's
2 decision. And so it's not clear how state laws that only impact
3 the standard of review will "force[] administrators to master the
4 laws of all 50 states." Plainly, state laws such as section
5 10110.6, whether applied to self-funded plans or not, do not
6 "govern[] a central matter of plan administration or interfere
7 with nationally uniform plan administration." Gobeille, 136. S.
8 Ct. at 943. Nor do they "authorize any form of relief in state
9 courts [or] serve as an alternative enforcement mechanism outside
10 of ERISA's civil enforcement provisions." Standard Ins. Co., 584
11 F.3d at 846. Section 10110.6 and similar state laws simply
12 enforce the default de novo standard of review, and therefore are
13 not preempted by ERISA under Gobeille.

14 Discretionary clauses are controversial. "The use of
15 discretionary clauses, according to National Association of
16 Insurance Commissioners, may result in insurers engaging in
17 inappropriate claim practices and relying on the discretionary
18 clause as a shield." Standard Ins. Co., 584 F.3d at 840. At the
19 same time, "insurers . . . argue [discretionary clauses] keep
20 insurance costs manageable . . . and that the wide ranging nature
21 of de novo review will lead to increased per-case costs." Id. at
22 841. The Court recognizes the competing interests in the
23 application of state laws that bar discretionary clauses. Absent
24 further direction from the Ninth Circuit, the Court is reluctant
25 to forge a new path through case law that has unanimously
26 concluded that the application of section 10110.6 to disability
27 plans, whether insured or self-funded, is not preempted by ERISA.

28 For these reasons, the Court concludes that section 10110.6

1 applies to self-funded plans in the same way it applies to
2 insured plans and effectively bars the Court from applying the
3 abuse of discretion standard of review. The Court will therefore
4 review Aetna's decision on a de novo basis.

5 B. Analysis

6 To resolve the summary judgment motion, the Court must
7 determine whether there is a genuine issue of material fact as to
8 whether Thomas was disabled under the Plan. Since the Court
9 applies de novo review, the Court may not defer to Aetna's
10 determination that Thomas was not entitled to STD benefits.

11 Under the Plan, disability is defined as "the inability of a
12 Participant, because of a medically-determinable physical
13 impairment or mental impairment, to perform the duties of his
14 regular occupation." AR 051. Additionally, the Participant is
15 not considered disabled "unless he is, during the entire period
16 of Disability Absence, under the direct care and treatment of a
17 Physician and such disability is substantiated by significant
18 objective findings which are defined as signs which are noted on
19 a test or medical exam and which are considered significant
20 anatomical, physiological, or psychological abnormalities which
21 can be observed apart from the individual's symptoms." AR 051.

22 Here, Thomas was employed by FedEx as a Contractor Relations
23 Specialist. Thomas' job duties included ensuring contractors
24 complied with FedEx's business models and operation agreements,
25 providing guidance to independent contractors regarding FedEx's
26 operating agreements, investigating disputes between FedEx and
27 contractors, implementing business strategies, building business
28 relationships, recommending improvements for FedEx programs,

1 educating field operators about FedEx's business model,
2 performing temporary staffing audits, verifying business
3 documentation and compliance, and documenting communications
4 between contractors and FedEx. AR 436. The job description does
5 not list any physical demands as essential functions, but it does
6 state that standing is required 25%-50% of the time, sitting is
7 required 50%-75% of the time, and walking is required 25%-50% of
8 the time. AR 437. Bending, stooping, reaching, lifting,
9 carrying, pushing, and pulling are not essential functions and
10 are never required. AR 438. Travel is an essential function and
11 is required 50%-75% of the time. Id.

12 Under the Plan, Thomas has the burden to prove with
13 sufficient objective evidence that she was disabled because she
14 was unable to perform her regular occupation. Estate of Barton
15 v. ADT Sec. Servs. Pension Plan, 820 F.3d 1060, 1065 (9th Cir.
16 2016) ("[A] claimant may bear the burden of proving entitlement
17 to ERISA benefits" when "the claimant has better - or at least
18 equal - access to the evidence needed to prove entitlement.").
19 Thomas argues that she provided sufficient objective evidence,
20 Mot. at 11-13, while Defendants argue that her evidence was
21 faulty and that she did not meet her burden, Opp. at 16-18.

22 Taking into consideration the parties' arguments and
23 evidence, the Court concludes that there is a genuine issue of
24 material fact as to whether Thomas proved with objective evidence
25 that she was disabled. First, two doctors have concluded that
26 Thomas was disabled and two doctors have concluded that Thomas
27 was not disabled. Also, the MRI results count as objective
28 evidence because they are "signs which are noted on a test or

1 medical exam." AR 051. At least one doctor considered the MRI
2 in conjunction with other evidence to conclude that Thomas had
3 "significant anatomical, physiological, or psychological
4 abnormalities." Id. Consideration of the MRI means that Dr.
5 O'Laughlin's opinion was at least partly based on his
6 observations "apart from [Thomas'] symptoms." AR 051.
7 Defendants even admit that there are some pieces of objective
8 evidence. D Reply at 5 ("there are extremely limited medical
9 records providing objective, measurable evidence."). The mere
10 existence of such limited evidence means that summary judgment in
11 favor of Defendants would be inappropriate at this point. And
12 this evidence, along with other evidence, was enough for several
13 doctors to conclude that Thomas was unable to perform her regular
14 tasks.

15 On the other hand, Defendants provide multiple reasons why
16 this limited evidence is not sufficient to conclude that Thomas
17 was disabled. Their two records reviewer doctors reached the
18 exact opposite conclusion as Dr. O'Laughlin and opined that
19 Thomas was not disabled. Dr. O'Laughlin himself opined that the
20 MRI report was "very sparse." AR 511. And Dr. Swamy found that
21 there was no clinical evidence of any motor or sensory loss,
22 weakness, or gait dysfunction. AR 586. Moreover, the October 8,
23 2012 x-ray revealed no fracture and normal disc spaces and facet
24 joints. AR 340-345. Though the cervical spine MRI demonstrated
25 degenerative disc disease, the lumbar spine MRI revealed no
26 neural compression. AR 379.

27 At the summary judgment stage, the Court simply analyzes
28 whether there is a genuine issue of material fact that should be

1 reserved for trial. Here, there is some evidence to conclude
2 that Thomas was disabled and there is some evidence that Thomas
3 was not disabled. Resolution of the competing facts should be
4 reserved for a trier of fact.

5
6 III. ORDER

7 For the reasons set forth above, the Court DENIES Thomas's
8 and Defendants' motions for summary judgment.

9 IT IS SO ORDERED.

10 Dated: August 15, 2016

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13 JOHN A. MENDEZ,
14 UNITED STATES DISTRICT JUDGE
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