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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 GORDON ERSPAMER,

No. C-08-4692 MMC

12 Plaintiff,

**ORDER AFFORDING PARTIES LEAVE
TO FILE SUPPLEMENTAL BRIEFING;
CONTINUING HEARING**

13 v.

14 MORRISON & FOERSTER LLP LONG
15 TERM DISABILITY PLAN,16 Defendant
17 _____/

18 Before the Court are two motions: (1) plaintiff Gordon Erspamer's Motion for
19 Judgment Pursuant to Federal Rule of Civil Procedure 52, filed November 6, 2009, and
20 (2) defendant Morrison & Foerster LLP Long Term Disability Plan's Cross-Motion for
21 Judgment Pursuant to Federal Rule of Civil Procedure 52, filed November 25, 2009; both
22 motions are currently noticed for hearing on January 22, 2010. Upon further consideration
23 of the papers filed in support of and in opposition to the motions, the Court finds a hearing
24 would be more productive after the parties have had the opportunity to address in advance
25 two issues not fully addressed in the parties' respective papers.

26 **A. Loss of Monthly Earnings**

27 The subject plan provides, inter alia, that a claimant seeking long-term disability
28 benefits must establish he has a "20% or more loss in [his] indexed monthly earnings due

1 to [the claimed] sickness or injury” (see Administrative Record (“AR”) 46), and provides a
2 definition for the terms “monthly earnings” and “indexed monthly earnings” (see AR 47-48,
3 64). The plan further provides that the claimant must provide “appropriate documentation
4 of [his] monthly earnings.” (See AR 58.)¹

5 Where, as here, a court reviews a denial of benefits de novo, “the court simply
6 proceeds to evaluate whether the plan administrator correctly or incorrectly denied
7 benefits,” and, specifically, determines “whether [the claimant] was entitled to benefits
8 based on the evidence in the administrative record and other evidence as might be
9 admissible.” See Opeta v. Northwest Pension Plan for Contract Employees, 484 F.3d
10 1211, 1217 (9th Cir. 2007) (internal quotations, citations, and alteration omitted).

11 In his motion, plaintiff does not identify evidence in the administrative record that
12 documents his monthly earnings, much less evidence to support a finding that he has
13 incurred a 20% or more loss in such monthly earnings. Rather, plaintiff cites to evidence
14 outside the administrative record. Further, such evidence is cited to show plaintiff’s annual
15 income over the course of several years, and plaintiff has not endeavored to explain how
16 such evidence demonstrates his “monthly earnings” under the plan’s definition thereof
17 and/or reflects a “20% or more loss in [plaintiff’s] indexed monthly earnings.”

18 Accordingly, the Court finds it appropriate to afford plaintiff leave to identify any
19 evidence in the administrative record supporting a finding that, under the plan’s definition of
20 “monthly earnings,” there has been a “20% or more loss in [plaintiff’s] indexed monthly
21 earnings,” and, additionally or alternatively, to explain how the cited evidence outside the
22 record, if admissible, supports such a finding.

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25 ¹The Court notes that the plan also provides that a claimant is not considered
26 “disabled” unless he is “under the regular care of a doctor.” (See AR 46.) Although the
27 parties, in their respective filings, acknowledge such requirement, neither party addresses
28 the question of whether the administrative record includes sufficient evidence to support a
finding that plaintiff is “under the regular care of a doctor.” Consequently, the Court
assumes there is no dispute that plaintiff has satisfied the “regular care of a doctor”
requirement.

1 **B. Date of Alleged Disability**

2 As noted above, the court, in reviewing a denial of benefits de novo, looks, in the
3 first instance, to the administrative record. Here, neither party has identified where in the
4 administrative record the claim can be located; as a result, the specific claim made and
5 denied, and, in particular, the date on which plaintiff asserted entitlement to payment of
6 long-term disability benefits, is unclear.² As discussed below, the parties, in their
7 respective motions, do not resolve the ambiguity.

8 In his complaint, as well as in his motion for judgment, plaintiff seeks a finding that
9 he is entitled to long-term disability benefits “from September 12, 2007.” (See Compl. at
10 5:2-3; Pl.s Mot. at 2:6-7.) Although these filings may suggest plaintiff sought, from
11 defendant, long-term benefits beginning on September 12, 2007, plaintiff neither asserts he
12 submitted such a claim to defendant, nor points to any evidence in the administrative
13 record reflecting such date.

14 Moreover, defendant, in its cross-motion, seeks a finding that “[p]laintiff did not prove
15 that as of March 15, 2007, he was [disabled].” (See Def.’s Cross-Mot. at 20:2-3.) As noted
16 above, plaintiff does not seek by the instant action a finding of entitlement to long-term
17 disability benefits beginning March 15, 2007. Further the record appears to support a
18 finding that defendant did find plaintiff was disabled, at least for purposes of short-term
19 disability benefits, as of March 15, 2007. (See AR 881.) To the extent defendant may be
20 arguing, for reasons of eligibility or otherwise, that an inability to establish entitlement to
21 benefits as of March 15, 2007 constitutes a bar to plaintiff’s claim for long-term disability
22 benefits as of September 12, 2007, defendant has failed to explain the basis for any such
23 argument.

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25 ²In its initial decision denying plaintiff’s claim for long-term disability benefits,
26 defendant did not set forth the date on which plaintiff alleged he was entitled to begin to
27 receive long-term disability benefits, but noted that it had approved plaintiff’s claim for
28 short-term disability benefits through the date of May 27, 2007. (See AR 404.) In its
decision denying plaintiff’s appeal of the initial denial, defendant stated the alleged “date of
disability” was March 15, 2007 (see AR 1184), but did not indicate whether the benefits
sought as of that date were long-term or short-term.

1 Accordingly, the Court finds it appropriate to afford plaintiff an opportunity to identify
2 where, in the administrative record, the Court can locate the claim made and denied, as
3 well as an opportunity to clarify the significance of the date of September 12, 2007.
4 Further, the Court finds it appropriate to afford defendant an opportunity to clarify the
5 significance of the date of March 15, 2007 with respect to plaintiff's claimed entitlement to
6 long-term disability benefits.

7 **C. Schedule**

8 The Court sets the following schedule for the parties' supplemental briefing on the
9 issues identified above:

10 1. Plaintiff's supplemental brief shall be filed no later than February 26, 2010, and
11 shall not exceed ten pages in length.

12 2. Defendant's responsive supplemental brief shall be filed no later than March 19,
13 2010, and shall not exceed ten pages in length.

14 3. Plaintiff's supplemental reply brief shall be filed no later than April 2, 2010, and
15 shall not exceed five pages in length.

16 4. The hearing on the motions is hereby CONTINUED to April 23, 2010, at 9:00
17 a.m.

18 **IT IS SO ORDERED.**

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20 Dated: January 21, 2010

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22 MAXINE M. CHESNEY
23 United States District Judge
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