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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA WHITE,)
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Plaintiff(s),)
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v.)
)
COBLENTZ, PATCH AND BASS LLP)
LONG TERM DISABILITY)
INSURANCE PLAN, et al.,)
)
)
Defendant(s).)
)
_____)

No. C 10-1855 BZ

FINDINGS AND CONCLUSIONS

While working as a legal secretary at Coblentz, Patch, Duffy & Bass LLP, plaintiff Patricia White participated in an ERISA welfare benefit plan (the "Plan") sponsored by Coblentz and insured by Prudential Insurance Company of America.¹ In this action, plaintiff claims that Prudential's denial of her long-term disability benefits was unlawful because she was
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¹ This Ruling constitutes the findings of fact and conclusions of law required by FRCP 52.

1 disabled under the "any occupation" standard of the Plan.²

2 **I. BACKGROUND**

3 Plaintiff's medical problems began in November 1999 when
4 she stopped working at Coblenz due to pain in her hands,
5 wrists, forearms, and elbows. Several months later,
6 plaintiff returned to work on a part-time schedule, but her
7 pain reemerged and she stopped working permanently.

8 Plaintiff filed a claim for long-term disability benefits
9 under the "own occupation" standard of the Plan. Prudential
10 approved plaintiff's claim and she received benefits from
11 March 2000 through April 2004. Prudential then terminated
12 plaintiff's benefits as of May 2004 based on a medical
13 evaluation it conducted. Plaintiff appealed this decision,
14 but Prudential upheld its determination that she was no
15 longer disabled.

16 In 2005, plaintiff filed a lawsuit in this court
17 claiming that Prudential's termination of her benefits was
18 improper. The Honorable Martin J. Jenkins first ruled that
19 the appropriate standard of review was de novo review. After
20 denying both parties' cross motions for summary judgment,
21 Judge Jenkins conducted a short bench trial in March 2007.
22 He analyzed plaintiff's medical history and the conflicting
23 medical opinions regarding her condition, and concluded that
24 plaintiff "has demonstrated that she is disabled under the
25 terms of the Plan as to her 'own occupation' of legal

26
27 ² All parties have consented to my jurisdiction for all
28 proceedings including entry of final judgment, pursuant to 28
U.S.C. § 636(c).

1 secretary and is entitled to LTD benefits from May 1, 2004
2 through [March 2005]." Administrative Record (AR) 508.
3 Judge Jenkins did not reach the issue of whether plaintiff
4 was disabled under the terms of the Plan as to "any
5 occupation" which would allow her to receive benefits beyond
6 March 2005.

7 After Judge Jenkins' decision, plaintiff filed a claim
8 with Prudential to continue her benefits under the "any
9 occupation" standard. Prudential denied this claim in May
10 2008 and also denied plaintiff's subsequent appeals. In
11 April 2010, plaintiff filed this lawsuit alleging that
12 Prudential's decision to deny her benefits under the "any
13 occupation" standard was unlawful under ERISA.

14 **II. ANALYSIS**

15 A challenge to the denial of benefits under an ERISA
16 plan is reviewed de novo "unless the benefit plan gives the
17 administrator or fiduciary discretionary authority to
18 determine eligibility for benefits or to construe the terms
19 of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S.
20 101, 115 (1989). Here, both parties agree that de novo
21 review applies. Under this standard, the court "does not
22 give deference to the claim administrator's decision, but
23 rather determines in the first instance if the claimant has
24 adequately established that he or she is disabled under the
25 terms of the plan." Muniz v. Amec Const. Mgmt., Inc., 623
26 F.3d 1290, 1295-96 (9th Cir. 2010). Generally, the court's
27 review is limited to the evidence contained in the
28 administrative record and extrinsic evidence can only be

1 considered under certain limited circumstances. Opeto v.
2 Northwest Airlines Pension Plan for Contract Employees, 484
3 F.3d 1211, 1217 (9th Cir. 2007).

4 Accordingly, to prevail in this action, plaintiff must
5 establish that she was disabled under the "any occupation"
6 standard of the Plan. The Plan provides that a claimant is
7 disabled when due to sickness or accidental injury she is (1)
8 not able to perform for wage or profit the material and
9 substantial duties of any job for which she is reasonably
10 fitted by her education, training or experience; (2) not
11 working at any job for wage or profit; and (3) under the
12 regular care of a doctor. AR 1203. While the Court reviews
13 the entire administrative record in determining whether
14 plaintiff was disabled, the parties agree that the relevant
15 time period on which the Court should focus, is from March 3,
16 2005 (when plaintiff became eligible for benefits under the
17 "any occupation" standard) to May 22, 2008 (when Prudential
18 first denied plaintiff's claim for benefits under that
19 standard). See Docket No. 83 at 10-13.

20 A threshold issue is the extent to which Judge Jenkins'
21 previous findings and conclusions apply to this lawsuit.
22 Prudential is correct that I cannot automatically rule that
23 plaintiff is disabled based on Judge Jenkins' earlier
24 decision because the current dispute is for a different time
25 period and requires a determination under the "any
26 occupation" standard rather than the "own occupation"
27 standard. But this does not mean that Judge Jenkins'
28 decision is immaterial. Judge Jenkins ruled after thoroughly

1 reviewing plaintiff's medical condition and functional
2 capacity from 1999 to 2005 and neither party appealed from
3 his ruling. Because many of the issues present here have
4 already been litigated by the parties, there is no reason for
5 me to revisit those issues. Rather, Judge Jenkins' findings
6 and conclusions as they relate to the "own occupation"
7 standard, become the starting point for my analysis. Thus,
8 as of March 2005, it is established that plaintiff had a
9 repetitive stress injury in her upper extremities that
10 limited her functional capacity and prevented her from
11 working as a legal secretary. The questions now before the
12 Court are whether after March 2005 plaintiff's medical
13 condition changed and whether she could work in any
14 occupation with her condition.

15 In support of her claim, plaintiff submitted medical
16 documentation to Prudential that she argues shows that her
17 functional capacity remained limited after 2005 and prevented
18 her from working in any occupation. One medical report is
19 from Dr. Dickie Hill, a licensed osteopathic physician and
20 surgeon, whom plaintiff consulted on several occasions in
21 December 2009 and January 2010. After examining plaintiff
22 and reviewing her medical records, Dr. Hill explained that
23 plaintiff's soft tissue pain has remained chronic and
24 "exceed[s] the ability of her body to recover" from such
25 pain. AR 381. Dr. Hill concluded that because plaintiff's
26 soft

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1 tissue problems could flare up and cause excruciating pain
2 with just the limited use of her upper extremities, she was
3 disabled from working in any occupation. Id.³

4 Additionally, plaintiff consulted with Dr. Mohinder
5 Nijjar in December 2009. Dr. Nijjar, a board certified
6 orthopedic surgeon, reviewed plaintiff's medical history and
7 physically examined her. While Dr. Nijjar was definitive
8 about plaintiff's condition having not changed since 2005,
9 his other conclusions are ambiguous. It is not clear whether
10 his medical opinion is that plaintiff is unable to work only
11 in her "own occupation" or in "any occupation." See AR 400-
12 401. At one point in Dr. Nijjar's report, he agrees with
13 earlier opinions that plaintiff is unable to work as a
14 secretary and lists reasons why she cannot work in this
15 capacity. Id. But in his list of reasons, Dr. Nijjar writes
16 that (1) plaintiff experiences moderate pain after 30 to 45
17 minutes of sitting, walking, or standing; (2) "there is no

19 ³ Prudential objects to the admission of Dr. Hill's
20 report, arguing that his medical practice focuses mainly on
21 cosmetic procedures and there "is no evidence that he has any
22 particular background or experience treating repetitive stress
23 disorders, fibromyalgia, or arthritis." Docket No. 39 at 10.
24 In the Ninth Circuit, evidence outside of the administrative
25 record may be considered in limited circumstances, such as when
26 issues arise about the credibility of medical experts. See
27 Opete, 484 F.3d at 1217. Because Prudential has raised such an
28 issue, the Court finds that it is necessary to consider Dr.
Hill's supplemental declaration which explains his medical
background. In this declaration, Dr. Hill testifies that he is
the primary care physician for almost 1200 active patients and
he spends less than 1 percent of his time performing cosmetic
procedures. Docket No. 43 at ¶ 12. Further, he testifies that
he has treated hundreds of patients with repetitive stress
disorders and fibromyalgia. Id. Based on this testimony,
Prudential's objections with respect to Dr. Hill's report are
OVERRULED.

1 job provided" where she would only be required to work for 30
2 to 45 minutes at a time; and (3) plaintiff "needs to use both
3 upper extremities for most of the work required, and without
4 that consideration, I think the patient is unable to be fully
5 employed with the condition of her neck and upper
6 extremities." Id.

7 Plaintiff also relies on Dr. Alan Zacharia's June 2006
8 declaration. Of the various medical reports in the record, I
9 found his the most helpful. Dr. Zacharia was the jointly
10 appointed orthopedic evaluator who examined plaintiff in 2001
11 for her worker's compensation claim. In 2001, he concluded
12 that plaintiff was a medically qualified injured worker due
13 to the repetitive stress injury in her upper extremities and
14 recommended that she rest until her injury became
15 asymptomatic. AR 709-10. Dr. Zacharia noted that it is rare
16 for such stress injuries to "persist longer than three to
17 five years because people, over an extended period of time,
18 develop protective self-modification protocols and learn to
19 avoid the kinds of activities that exacerbate the condition."
20 AR 710. Dr. Zacharia's 2006 declaration further clarified
21 his medical opinion, explaining that while most patients
22 adapt to their condition and are able to return to work,
23 "there are a significant number who cannot return to work"
24 and plaintiff's ability to work will depend on the frequency
25 and intensity of her flare-ups and whether or not there are
26 limitations. Docket No. 28-3 at ¶ 15.⁴ Dr. Zacharia's

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28 ⁴ Prudential objects to Dr. Zacharia's 2006 declaration because it is not in the administrative record and his 2001 report, when he actually examined plaintiff, is more reliable.

1 declaration also reiterated his clinical findings which
2 showed through x-rays that plaintiff had problems associated
3 with degenerative changes in her cervical anatomy and with
4 arthritic bone spurs on her cervical vertebrae (called
5 "foraminal impingement"). He noted that these problems are
6 likely to worsen with age, and that when combined with
7 repetitive motions, such as during work, they cause pain in
8 her extremities. Id. at ¶¶ 4-7.

9 Plaintiff's medical documentation included medical notes
10 from her doctor visits in Italy (where she moved in 2005) and
11 her 2010 letter to Prudential outlining her medical condition
12 and functional capacity. Plaintiff's records from Italy show
13 that she did not receive consistent treatment from doctors
14 with respect to her arm pain, but she did consult Italian
15 medical professionals occasionally in 2006 and 2007 and
16 sometimes complained about pain in her upper extremities
17 during these consultations. See AR 511-539. In her letter
18 to Prudential, Plaintiff explains that her activity level
19 remains minimal due to the constant pain she is experiencing.
20 AR 388. Her biggest concern is that even the slightest
21 activity, especially with her arms, may cause a flare-up that
22 would once again result in excruciating pain and swelling
23 which may take weeks or months to recover from. Id.

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27 This objection is **OVERRULED**. Regardless of whether it was
28 plaintiff's or Prudential's fault for the declaration not being
included in the administrative record, Prudential was aware of
about the declaration and Dr. Zacharia's explanatory testimony
because the declaration was filed (though not considered) in
the earlier action before Judge Jenkins.

1 Plaintiff contends that it is this pain and these concerns
2 that prevent her from working in any job. Id.

3 Having reviewed the record, I find that plaintiff has
4 shown that her medical condition has not improved since 2005
5 as she still suffers from a repetitive stress injury to her
6 upper extremities. Although plaintiff is at times able to
7 use her arms, this limited activity may later result in
8 flare-ups that cause her debilitating pain, such as the time
9 in 2000 when her return to work resulted in six months of
10 intensive treatment. The record also contains evidence that
11 her condition prevents her from working in any occupation.

12 Prudential's arguments against plaintiff's showing are
13 not persuasive. It first relies on the medical reports of
14 two doctors it hired to review plaintiff's file. Both
15 reports fail to provide a comprehensive review of plaintiff's
16 medical condition because they do not address the issues and
17 concerns raised by plaintiff's doctors. Though this was one
18 of the reasons Judge Jenkins ruled in favor of plaintiff in
19 the earlier action, Prudential continues to employ the same
20 practice. See e.g., AR 507 at ¶ 73. ("Dr. Stevens
21 [Prudential's medical reviewer] never acknowledges or
22 reconciles several key pieces of evidence with his opinion
23 that Plaintiff can perform certain activities. Specifically,
24 Dr. Stevens never acknowledges Plaintiff's attempt to return
25 to work for twenty hours per week and the resulting flare-up
26 and six months of intensive treatment...").

27 After Prudential received Dr. Hill's and Dr. Nijjar's
28 reports, it hired Dr. Ephraim Brenman to conduct a medical

1 review of plaintiff's file. Rather than addressing
2 plaintiff's doctors' concerns about her medical condition,
3 Dr. Brenman simply concluded that plaintiff's claim was
4 baseless because it consisted of mainly self-reported
5 complaints without any clinical findings to support them. AR
6 376-77. Dr. Brenman found that the "claimant has no
7 restrictions or limitations in terms of the ability to sit,
8 stand, walk, reach, lift, carry, and perform repetitive upper
9 extremity activities". AR 377. Dr. Brenman did not attempt
10 to explain why Dr. Hill or Dr. Nijjar's conflicting
11 conclusions, that plaintiff could not perform these
12 activities, were wrong. Even more troubling, Dr. Brenman did
13 not acknowledge that Judge Jenkins specifically ruled that
14 plaintiff had a limited functional capacity in 2005. Judge
15 Jenkins' decision was based on previous functional capacity
16 examinations that found plaintiff did have physical
17 restrictions, such as her being unable to type for longer
18 than ten minutes. AR 507; see also AR 878-89 (after
19 conducting a physical examination, Dr. Chu concluded that
20 plaintiff suffers from repetitive stress injury and may have
21 difficulty reaching in all directions and with gross and fine
22 manipulation). Nor did Dr. Brenman acknowledge that previous
23 examiners had noted that plaintiff's extremities were swollen
24 which is objective evidence that she did have some form of
25 stress injury. See, e.g., AR 712 (Dr. William Billings,
26 plaintiff's former treating physician, remarked that on
27 February 28, 2005 he observed plaintiff "with very
28 significant pain, swelling, and warmth of the upper one half

1 of both forearms"); AR 565 (Dr. Billings reported in May 2004
2 that he has treated plaintiff actively since 2000 for
3 bilateral upper extremity pain, swelling, muscle firmness,
4 and dysfunction); Zacharia Declaration at Docket No. 28-3. I
5 attach little weight to Dr. Brenman's report, since it
6 ignores these findings and conclusions.

7 The same is true for Dr. Trenton Gause's 2008 medical
8 review of plaintiff's file. Dr. Gause concluded that while
9 plaintiff has a mild impairment that is not likely to
10 improve, she "can use her hands for reaching, grasping,
11 gripping, holding, punching, and seizing in an unrestricted
12 fashion." AR 472-73. Dr. Gause made no attempt to explain
13 why other doctors determined that plaintiff had a limited
14 functional capacity and never addressed Judge Jenkins holding
15 that she could not work as a legal secretary because she
16 could not perform these very activities (i.e. reaching,
17 grasping, gripping, etc.).⁵

18 Prudential also fails to support its position that
19 "clinical findings" such as "functional examination findings"
20 are necessary for plaintiff to prevail on her claim. See AR
21 377. Prudential does not point to any language in the Plan,
22 which governs the agreement between plaintiff and Prudential,
23 that requires such "clinical findings." Courts in this
24 District have previously held that insurer defendants in

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26 ⁵ Dr. Brenman only charged Prudential \$1,023.75 for his
27 entire review of plaintiff's medical file and a number of
28 litigation records. AR 363. Dr. Gause's review only cost
Prudential \$1,155.00. AR 463. Considering that plaintiff's
file consisted of about 10 years' worth of documents, these low
charges suggest that the reviews may have been less than
thorough.

1 ERISA actions cannot deny claims based on standards that are
2 not contained in the policy. See e.g., Duncan v. Continental
3 Casualty Co., 1997 WL 88374 at *4 (N.D. Cal. 1997)(holding
4 that the defendant insurer could not exclude plaintiff's
5 ERISA claim for lack of objective medical evidence unless
6 that standard was clearly articulated in the policy).

7 Moreover, as highlighted earlier, there were clinical
8 findings in 2004 and 2005 and there is no indication that
9 plaintiff's condition has drastically changed to the point
10 that such findings are now irrelevant.

11 Prudential criticizes plaintiff's medical evidence,
12 claiming that the only clinical findings are the swellings
13 observed by several doctors. Prudential does not deny these
14 findings and does not explain why it did not conduct its own
15 physical examination of plaintiff. Under the Plan,
16 Prudential has specifically reserved the right to physically
17 examine plaintiff "as often as is reasonable." AR 1214.
18 Notably, when evaluating plaintiff's "own occupation" claim,
19 Prudential required plaintiff to submit to physical
20 examinations, including a functional capacity examination.
21 If Prudential believed that plaintiff's subjective complaints
22 after March 2005 were false, it could have again required her
23 to submit to such procedures. Instead, Prudential chose to
24 overlook plaintiff's complaints and her doctor's observations
25 and now argues that plaintiff's claims are not supported by
26 "functional findings."

27 The reality in this case is that plaintiff's medical
28 condition is interrelated to her subjective complaints of

1 pain, which is not grounds for rejecting her claim. In
2 Saffon v. Wells Fargo & Company Long Term Disability Plan,
3 the Ninth Circuit discussed the relevance of subjective pain
4 by referring to its previous opinions on the topic in Social
5 Security disability cases. 522 F.3d 863, 872-73 (9th Cir.
6 2008)(noting that "individual reactions to pain are
7 subjective and not easily determined by reference to
8 objective measurements"); see also Patrick v. Hewlett-Packard
9 Co. Emp. Benefits Org. Income Protection Plan, 638 F.Supp.2d
10 1195, 1215 (S.D. Cal. 2009)(ERISA insurer's approach of
11 "disregarding subjective evidence of pain is disapproved in
12 Ninth Circuit precedent")(internal citations and quotations
13 omitted). In the Social Security context, the claimant's
14 "pain need not be corroborated by objective medical findings,
15 but some impairment must be medically ascertained." See
16 e.g., Bunnell v. Sullivan, 947 F.2d 341, 347-48 (9th Cir.
17 1991). That is the case here. Plaintiff has had multiple
18 doctors, such as Dr. Zacharia, Dr. Billings, Dr. Chu, Dr.
19 Nijjar, and Dr. Hill, explain to Prudential that she suffers
20 from a repetitive stress injury to her upper extremities.
21 Thus, an "impairment [has been] medically ascertained" by
22 medical professionals and the concern that plaintiff does not
23 suffer from any medical problem is negated. There is no
24 further requirement that plaintiff's subjective pain be
25 corroborated by objective evidence.

26 Prudential's other arguments similarly miss the mark.
27 While Prudential is correct that the Plan requires plaintiff
28 to be under the regular care of a doctor, this does not lead

1 to the denial of plaintiff's benefits. Plaintiff followed
2 Dr. Zacharia's medical advice that the most important part of
3 her treatment was to rest until her symptoms went away. In
4 any event, plaintiff still consulted with doctors
5 periodically between 2005 and 2008, even while she was in
6 Italy.

7 To counter plaintiff's assertion that she cannot work in
8 any occupation, Prudential points to the vocational
9 assessment performed by its vocational rehabilitation
10 specialist in May 2008. Prudential's specialist concluded
11 that plaintiff may work in various sedentary positions, such
12 as the occupation of legal secretary. AR 1038-39. But this
13 assessment is not persuasive as it is based on Dr. Gause's
14 conclusion that plaintiff does not have any physical
15 restrictions besides not being able to carry more than 20
16 pounds. AR 1038. The assessment also does not address Judge
17 Jenkins' earlier ruling that plaintiff could not work as a
18 legal secretary.⁶

19 Based on this record, I find that plaintiff's medical
20 condition did not materially change after Judge Jenkins'
21 ruling. Plaintiff's repetitive stress injury causes her
22 severe pain in her extremities, and, of equal importance, she

24 ⁶ The only other vocational assessment conducted after
25 March 2005 was performed by the Social Security Administration
26 (SSA) in May 2005. While the plaintiff urges the Court to
27 adopt the SSA's finding of disability, the Court may only use
28 it as evidence in a de novo review. The SSA decision is based
on a different disability standard and concentrated on
plaintiff's degenerative disc disease and not her repetitive
stress injury. The Court, however, takes into account the
SSA's conclusion that plaintiff could not meet the demands of
basic work related activities on a sustained basis. AR 769.

1 faces the significant danger that limited activity may cause
2 her symptoms to flare-up and force her to deal with even more
3 debilitating pain. Due to this medical condition, I find
4 that she could not work in any occupation for which she was
5 reasonably fitted by her education, training or experience
6 and conclude that plaintiff's termination decision was
7 unlawful.

8 The last issue concerns plaintiff's separate claim for
9 prejudgment interest at a rate of ten percent pursuant to
10 California Insurance Code § 10111.2. Defendant argues that
11 plaintiff's Section 10111.2 claim is preempted by ERISA,
12 while plaintiff counters that it falls under the ERISA
13 savings clause, 29 U.S.C. § 1144(b)(2)(A). Plaintiff,
14 however, concedes that this District has previously addressed
15 this issue and ruled that Section 10111.2 is preempted by
16 ERISA. See, e.g., Turnispeed v. Educ. Mgmt. LLC's Emp.
17 Disability Plan, 2010 WL 140384 at *4 (N.D. Cal. 2010) ("In
18 sum, allowing plaintiff to proceed with a state law claim
19 under Section 10111.2 would effectively impose a mandatory
20 prejudgment interest rate of 10% on successful ERISA claims,
21 expanding the scope of ERISA damages and supplementing the
22 ERISA enforcement remedy. Therefore, the claim is preempted
23 by [ERISA]"); Minton v. Deloitte & Touche USA LLP Plan, 631
24 F.Supp.2d 1213, 1220 (N.D. Cal. 2009). I agree with these
25 decisions and it is immaterial that plaintiff's Section
26 10111.2 claim was separately pled. Thus, plaintiff's Section
27 10111.2 claim is preempted by ERISA.

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1 **III. CONCLUSION**

2 For the foregoing reasons, I conclude that plaintiff is
3 disabled under the terms of the Plan as to "any occupation."⁷
4 As requested by plaintiff, the parties are **ORDERED** to meet
5 and confer about the remaining issues in this matter, such as
6 the amount of benefits owed and the appropriate rate of
7 interest to be applied under ERISA. The parties shall file a
8 joint proposal for a judgment consistent with this Order by
9 **July 20, 2011**. If the parties are unable to reach a complete
10 agreement after meeting and conferring, they may file
11 separate proposals regarding the issues still in dispute.

12 Dated: June 24, 2011

13 

14 Bernard Zimmerman
United States Magistrate Judge

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25 ⁷ As explained earlier, defendant's objections to Dr.
26 Hill's declaration and Dr. Zacharia's declaration are
27 **OVERRULED**. To the extent that either party objects to other
28 submitted evidence that was not contained within the
administrative record, those objections are **GRANTED**. The Court
finds that such unnecessary evidence does not fall within the
limited circumstances outlined by the Ninth Circuit in which
evidence outside the administrative record may be considered in
a de novo review. See Opeto, 484 F.3d at 1217.