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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YOLANDA EVANS,  
Plaintiff,

No. C 11-06271 WHA

v.

**ORDER DENYING MOTIONS  
FOR SUMMARY JUDGMENT**

BANK OF AMERICA CORPORATION  
LONG TERM DISABILITY PLAN,  
Defendant.

**INTRODUCTION**

In this ERISA disability action, both parties move for summary judgment on the administrative record. For the reasons stated below, the motions are **DENIED**.\*

**STATEMENT**

Defendant Bank of America Corporation Long Term Disability Plan was an ERISA plan. Aetna Insurance Corporation, which is not a named party in this action, was the insurer and administrator of the plan.

From 2006 to 2009, plaintiff Yolanda Evans, a 53-year-old woman, worked at Bank of America Corporation as an assistant vice president and cash management treasurer analyst. According to Bank of America, Evans’s job duties included “sitting for hours, frequent visits to

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\* Although defendant’s motion is titled as a Rule 52 judgment of partial findings, it is properly adjudicated as a motion for summary judgment on the administrative record. *Zurndorfer v. Unum Life Ins. Co. of America*; 543 F.Supp.2d 242, 255 (S.D.N.Y. 2008); *see also Stephan v. Unum Life Ins. Co. of America*, — F.3d —, 2012 WL 3983767, at \*10 (9th Cir. Sept. 12, 2012).

1 clients, [and carrying] a laptop and documents” (AR 130). As will be important for reasons  
2 discussed later, Evans was required to drive a car to meet her clients (*see* AR 300, 424, 434). In  
3 July 2009, Evans left her job due to alleged back pain (AR 150).

4 **1. MEDICAL REPORTS PRIOR TO AND INCLUDING JANUARY 4, 2010.**

5 Shortly after Evans left her job, she was diagnosed by her treating physicians, Drs. Alfred  
6 Rothman and Michael Park, with lumbar disc displacement and cauda equina syndrome, a  
7 neurologic condition with compression of spinal cord nerves. These diagnoses were based on an  
8 MRI and examination findings of numbness and pain in her back and right leg (AR 189–91, 470,  
9 475, 499). A month later, Evans fell while getting into the bathtub and afterward began to lose  
10 feeling in her bowel and pelvic area. This exacerbation of her preexisting condition necessitated  
11 surgery. In August 2009, Dr. Ronnie Mimran, a neurosurgeon, performed a laminectomy, which  
12 is surgery that relieves pressure on the nerves by removing vertebral bone, to treat Evans’s acute  
13 condition (AR 195–98). In a post-op visit two weeks after surgery, Dr. Mimran opined that  
14 Evans would not be able to return to work until October 2009 (AR 189). In early October,  
15 however, Dr. Mimran extended Evans’s return to work date to November 2009 and prescribed  
16 physical therapy (AR 237, 242). By the end of October, Dr. Mimran opined that Evans had  
17 improved to “[m]oderate limitation of functional capacity/capable of light work,” and that she  
18 could return to full duty by January 2010 (AR 245–47).

19 On January 4, 2010 (an important date in this action), Dr. Mimran examined Evans and  
20 wrote the following to Dr. Rothman, Evans’s primary care physician (AR 323):

21 [Evans] has not returned to work, nor does she feel like she is  
22 currently able to. She continues to walk with a cane, despite her  
23 [physical] therapist indicating that she probably does not need it  
24 any more. I have talked to her about starting to liberalize her  
25 activities and advance her tolerance. She seems to have a  
hesitancy to do so. I have told her that in order to go back to work  
it is going to be important for her to give it a try and start to  
explore what she is able to do, and she is not going to know this  
until she starts to go back.

26 Dr. Mimran opined that while Evans still had “some patches of numbness” on the right side in  
27 the buttock and lower leg, “most of the motor strength has returned” (AR 323). Dr. Mimran did  
28

1 not give another return to work date and he did not examine Evans again after January 4, 2010  
2 (AR 322).

3 By the end of January 2010, Aetna had requested two independent medical reviews of  
4 Evans’s medical file. Both reviewers, Drs. Eugene Collins and Deppak Awasthi, opined that  
5 Evans was no longer disabled as of November 2009 (AR 333–35, 342–46). Both reviewers  
6 based their opinion on a lack of evidence of functional impairment. Dubiously, one of Aetna’s  
7 reviewers, Dr. Awasthi, conducted his evaluation in November 2009 but somehow opined that  
8 there was no evidence to support function impairment up to January 2010, three months *after* his  
9 review (AR 335). This, of course, raises serious doubts as to the reliability of Dr. Awasthi’s  
10 report. For unexplained reasons, Aetna rejected the opinions of these two independent medical  
11 reviewers and instead found that Evans *was* disabled up to January 3, 2010 (AR 417–18). Thus,  
12 Evans received short-term disability benefits from the time she left her job in July 2009 until  
13 January 2010.

14 **2. MEDICAL REPORTS AFTER JANUARY 4, 2010.**

15 In February 2010, Dr. Park, a specialist in spinal rehabilitation who had been treating  
16 Evans since she left work, opined that Evans continued to experience sciatic pain down her right  
17 leg, pain in her L5 spine, and numbness in her lateral calf on right side. He concluded that she  
18 was not able to return to work due to the pain and because repetitive activities caused her  
19 aggravation (AR 349–50). Based on his assessment, Dr. Park indicated that Evans would not be  
20 able to return to work until September 2010 (AR 460).

21 In January 2010, Evans’s physical therapist noted that she was “very slowly nearing the  
22 goals” with “pain being the limiting factor” (AR 360). Her physical therapist also noted that she  
23 still required a “cane/handrails and all movements limited and painful” (*ibid.*). By March 2010,  
24 after many sessions, Evans’s physical therapist noted that she continued to be symptomatic with  
25 “neural tension and sensory changes [in lower right extremities]” (AR 361).

26 In April 2010, Aetna requested another independent medical review from yet another  
27 physician, Dr. Eugene Collins. Again, Aetna’s independent reviewer only evaluated Evans’s  
28 medical file without conducting an in-person examination. Dr. Collins reviewed Evans’s

1 physical therapy notes and Dr. Park's reports. Dr. Collins spoke with Dr. Mimran, Evans's  
2 surgeon, but did not speak with Dr. Park. After reviewing Evans's medical history, Dr. Collins  
3 credited the January 4 opinion of Dr. Mimran and concluded that Evans was not disabled after  
4 January 4, 2010. Again, recall that Dr. Mimran saw Evans on January 4 and suggested that she  
5 should try returning to work. Dr. Collin also found a lack of "documented information that  
6 reveals a major anatomical or neurological deficit that would be of functional significance" (AR  
7 371). Dr. Collins rejected Dr. Park's February 2010 opinion that Evans could not return to work  
8 (AR 368-72). In doing so, Dr. Collins did not address Dr. Park's findings of sciatic pain down  
9 Evans's right leg, pain in her L5 spine, and numbness in her lateral calf on right side. Nor did  
10 Dr. Collins address whether Evans's physical impairments would prevent her from fulfilling the  
11 functions of her prior job, where she had to driving back and forth to see clients. Nor did  
12 Dr. Collins evaluate whether Evans's pain narcotics limited her ability to drive or perform other  
13 cognitive abilities associated with her prior job as assistant vice president. Dr. Collins merely  
14 noted that Evans was not disabled because she would be able to perform a "light level position"  
15 because she was "capable of lifting and carrying 20-pounds occasionally and up to 10-pounds  
16 frequently" (AR 371).

17 In June 2010, Aetna advised Evans that her claim for long-term benefits was denied,  
18 effective January 4, 2010 (the day after termination of her short-term benefits) (AR 412-14).  
19 This denial was based on Dr. Collin's paper-only review, and Dr. Mimran's January 4 statement  
20 that Evans could try going back to work.

### 21 3. APPEAL.

22 Evans appealed the initial denial and submitted new medical opinions in support of her  
23 disability. Below is a summary of the information submitted in support of disability and not  
24 previously reviewed by Aetna.

25 On January 5, 2010, Evans reported to Dr. Rothman, her primary care physician, that she  
26 was only able to sit up "for 1 hr" per day after which time her back and right leg would be  
27 "killing her." Dr. Rothman observed that Evans's right leg was swollen, and her back pain had  
28 increased. Dr. Rothman continued to prescribe daily gabapentin and vicodin, a pain narcotic

1 (AR 503). These physical findings were consistent with Dr. Rothman’s past observations of  
2 Evans’s disability (AR 502). In another visit in March 2010, Dr. Rothman wrote, in slightly  
3 difficult-to-read handwriting, that Evans was “still on disability” and continued to have “ankle  
4 pain” (AR 504).

5 In May 2010, Dr. Park again certified that Evans was still unable to go back to work due  
6 to sciatic pain that radiated down her right leg, right leg numbness, and lower back pain  
7 aggravated with repetitive activities (AR 430, *see also* AR456). A few months earlier, Dr. Park  
8 had noted that her “back [was] much better” (AR 354).

9 Evans subsequently moved to Texas, where she saw a new treating physician, Dr. Jeffrey  
10 Dehaan, an orthopedic surgeon. In August 2010, Dr. Dehaan opined that Evans could not return  
11 to work due to “unremitting back and lower extremity pain” (AR 512). On physical  
12 examination, Dr. Dehaan noted “pain reproduced with [straight leg raises] sign in the right leg,”  
13 which was a clinical test designed to elicit signs of nerve root compression, secondary to lumbar  
14 disc herniation. Dr. Dehaan also noted that Evans had absent ankle reflexes in the right ankle  
15 and she had weakness of the anterior tibia on the right ankle (*ibid*). These findings were  
16 consistent with the prior assessment by Evans’s physical therapist, who had also found positive  
17 straight leg raise tests (AR 439).

18 Evans herself wrote to Aetna that she continued to have two primary problems that  
19 prevented her from returning to work: right leg numbness and pain in her back. She wrote that  
20 these problems prevented her from sitting for eight hours per day and driving to see clients. She  
21 also wrote that she continued to take gabapentin and vicodin, both of which prevent her from  
22 driving (AR 424–25).

#### 23 4. DECISION ON APPEAL.

24 After receiving the new information on appeal, Aetna requested another independent  
25 medical review. This time, Dr. Robert Swotinsky, a specialist of occupational medicine,  
26 conducted a review of Evans’s medical history, including the additional materials submitted on  
27 appeal (AR 542–43). This again was a paper-only review without an in-person examination. As  
28 with Aetna’s prior independent medical reviewers, Dr. Swotinsky also concluded that Evans was

1 no longer disabled as of January 4, 2010. Dr. Swotinsky rejected the post-January 4 disability  
2 opinions by Evans’s treating physicians, Drs. Park, Rothman, and Dehaan. Dr. Swotinsky’s  
3 report will be discussed in greater detail below.

4 Because every treating physician who examined Evans after January 2010 reported that  
5 she still could not return to work, Aetna had to rely solely on Dr. Swotinsky’s medical judgment  
6 of non-disability on appeal. Aetna ultimately denied Evans’s claim due to a “lack of medical  
7 evidence” to support an inability to perform the material duties of Evans’s own occupation after  
8 January 4, 2010 (AR 522–24). This action followed.

9 **ANALYSIS**

10 **1. SUMMARY JUDGMENT ON AN ABUSE-OF-DISCRETION STANDARD.**

11 Our court of appeals recently summarized a court’s role on summary judgment in  
12 reviewing a plan administrator’s denial of disability under an abuse-of-discretion standard, with  
13 structural conflict of interest, as follows:

14 Under this deferential standard, a plan administrator’s decision will  
15 not be disturbed if reasonable. This reasonableness standard  
16 requires deference to the administrator’s benefits decision unless it  
is (1) illogical, (2) implausible, or (3) without support in inferences  
that may be drawn from the facts in the record.

17 This abuse of discretion standard, however, is not the end of the  
18 story. Instead, the degree of skepticism with which we regard a  
19 plan administrator’s decision when determining whether the  
20 administrator abused its discretion varies based upon the extent to  
which the decision appears to have been affected by a conflict of  
interest.

21 \* \* \*

22 While not altering the standard of review itself, the existence of a  
23 conflict of interest is a factor to be considered in determining  
24 whether a plan administrator has abused its discretion. The weight  
25 of this factor depends upon the likelihood that the conflict  
26 impacted the administrator’s decisionmaking. Where, for example,  
27 an insurer has taken active steps to reduce potential bias and to  
28 promote accuracy, the conflict may be given minimal weight in  
reviewing the insurer's benefits decisions. In contrast, where  
circumstances suggest a higher likelihood that the conflict affected  
the benefits decision, the conflict should prove more important  
(perhaps of great importance).

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Traditional summary judgment principles have limited application in ERISA cases governed by the abuse of discretion standard. Where, as here, the abuse of discretion standard applies in an ERISA benefits denial case, a motion for summary judgment is, in most respects, merely the conduit to bring the legal question before the district court and the usual tests of summary judgment, such as whether a genuine dispute of material fact exists, do not apply.

*Stephan v. Unum Life Ins. Co. of America*, — F.3d —, 2012 WL 3983767, at \*8–10 (9th Cir. Sept. 12, 2012) (internal quotation marks and citations omitted).

Here, the parties agree that the abuse-of-discretion standard applies and that the Court’s review should be limited to the administrative record (Dkt. No. 10). Notably, Aetna had a structural conflict of interest because it both paid disability benefits and made disability determinations for the plan.

**2. PLAN TERMS FOR LONG-TERM DISABILITY AND SHORT-TERM DISABILITY BENEFITS.**

This action is a dispute over whether Evans qualified for long-term disability benefits after January 4, 2010. The plan terms regarding long-term disability stated (AR 4):

From the date that you first become disabled and until Monthly Benefits are payable for 18 months, you will be deemed to be disabled on any day if:

you are not able to perform the material duties of your own occupation solely because of: disease or injury; and

your work earnings are 80% or less of your adjusted predisability earnings.

After the first 18 months that any Monthly Benefit is payable during a period of disability, you will be deemed to be disabled on any day if you are not able to work at any reasonable occupation solely because of:

disease; or injury.

To summarize, in order for plan participants to receive long-term disability benefits for the first 18 months of disability, they had to show that they were not able to perform the material duties of their prior occupations. After 18 months of benefit payment, participants needed to show that they were not able to perform any reasonable occupation in order to qualify for continued benefits.

1 Under the plan terms, participants received short-term benefits for the first six months of  
2 disability if they were unable “to perform his or her essential occupation functions” (AR 107).  
3 Confusingly, this meant that the first six months of disability benefits were labeled “short-term  
4 disability” even though it overlapped with the plan’s definition of “long-term disability” for the  
5 first 18 months.

6 Importantly, Evans had received short-term benefits for the first six months of her  
7 disability, from July 2009 to January 2010. Aetna had determined that Evans qualified for  
8 short-term benefits because she was unable to perform her prior occupational functions until  
9 January 2010 (AR 417). Subsequently, Aetna denied long-term disability benefits due to “a lack  
10 of medical evidence” showing that she could not return to her former job. Because the plan’s  
11 disability criteria for short-term disability in the first six months and longer-term disability for  
12 the next 12 months are virtually identical, Evans would have necessarily qualified for disability  
13 benefits for 12 additional months, until January 2011, under the plan’s terms.

14 **3. PROBLEMS WITH ADOPTING DR. SWOTINSKY’S REVIEW.**

15 Aetna was required on appeal to consult with a physician to reject the disability opinions  
16 of Drs. Park, Rothman, and Dehaan. 29 C.F.R. 2560.503-1(h)(3). Aetna relied on the consulting  
17 opinion of Dr. Swotinsky, who concluded that Evans was not “completely disabled” (AR 547).

18 Dr. Swotinsky’s opinion of disability, however, was problematic for several reasons.  
19 *First*, he erroneously equated Evans’s inability to perform her prior occupation with “complete  
20 disability,” as defined in the Social Security Administration Blue Book. Specifically,  
21 Dr. Swotinsky determined that Evans’s medical condition did not satisfy the requirement for  
22 “complete disability from spine disorders, as defined by SSA Blue Book, [which] fall into three  
23 categories: Nerve root compression, spinal arachnoiditis, and lumbar spinal stenosis” (AR 546).  
24 Because Dr. Swotinsky determined that Evans did not have the medical diagnoses of nerve root  
25 compression, spinal arachnoiditis, or lumbar spinal stenosis, he concluded that she could return  
26 to her prior occupation (AR 546–47). This incorporation of social security disability  
27 requirements into Evans’s disability determination was wrong as a matter of law because “the  
28 rules and presumptions of our Social Security case law do not apply to ERISA benefits



1 determinations.” *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 873  
2 (9th Cir. 2008).

3         *Second*, Dr. Swotinsky did not understand Evans’s job responsibilities in her prior  
4 occupation. Dr. Swotinsky determined that her prior occupation “ha[d] essentially no physical  
5 requirements,” ignoring Bank of America’s and Evans’s description of her prior occupation as  
6 involving “sales, sitting for hours, fr[e]quent visits to clients, [and] has to carry a laptop and  
7 documents,” and driving to meet clients (*see* AR 130, 300, 424, 434). In fact, Dr. Swotinsky  
8 wrote, “the question of disability is about performing the essential duties of [Evans’s prior  
9 occupation], *not about driving a car*” (AR 547) (emphasis added). This was a factually incorrect  
10 statement about Evans’s prior job duties because she frequently drove to meet clients. *Third*,  
11 Dr. Swotinsky did not provide any justification for rejecting Dr. Rothman’s disability opinion.  
12 *Fourth*, Dr. Swotinsky did not provide any justification for rejecting Dr. Park’s disability opinion  
13 and his findings of sciatic pain down Evans’s right leg, pain in her L5 spine, and numbness in  
14 her lateral calf on right side. *Fifth*, Dr. Swotinsky did not provide any specific reasons for  
15 rejecting Dr. Dehaan’s findings of “unremitting back and lower extremity pain,” “pain  
16 reproduced with [straight leg raises] sign in the right leg,” and absence of reflexes in her right  
17 ankle (AR 512).

18             **4. AETNA’S SUMMARILY REJECTION OF DISABILITY**  
19             **OPINIONS BY TREATING PHYSICIANS WAS PROBLEMATIC.**

20         In addition to relying on Dr. Swotinsky’s problematic conclusion of non-disability, Aetna  
21 also summarily rejected disability opinions by Evans’s treating physicians. “Plan administrators,  
22 of course, may not arbitrarily refuse to credit a claimant’s reliable evidence, including the  
23 opinions of a treating physician.” *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834  
24 (2003).

25         *First*, in rejecting Dr. Park’s disability opinion, Aetna conclusory stated that “[Dr. Park]  
26 did not provide any abnormal examination findings that substantiated any physical deficits in  
27 your functioning” (AR 524). That was a demonstrably incorrect statement. Dr. Park, who had  
28 been treating Evans for nearly a year, consistently found numbness and pain on Evans’s lower  
right side, extending from her back to her foot. Before Evans’s surgery, Dr. Park noted an

1 abnormal MRI showing disc compression and herniation (AR 185, 349). After January 4, 2010,  
2 Dr. Park continued to report that Evans was still experiencing sciatic pain down her right leg,  
3 pain in her L5 spine, and the “same” numbness in her lateral calf on right side. Dr. Park  
4 concluded that Evans was disabled due to pain and because repetitive activities caused her  
5 aggravation (AR 349–50, 456). Aetna rejected these abnormal findings without explanation.

6 *Second*, Aetna did not address Dr. Rothman’s disability opinion. Dr. Rothman, who had  
7 been treating Evans for over a year, had also consistently found numbness and pain on Evans’s  
8 lower right side from her back extending to her foot. Before Evans’s surgery, Dr. Rothman  
9 noted that on physical examination, Evans had decreased sensation to light touch, decreased  
10 reflexes, and decreased range of motion due to pain (AR 472). After January 4, 2010, Dr.  
11 Rothman continued to find that Evans was “still on disability” and continued to have “ankle  
12 pain” (AR 504). Aetna gave no reason for rejecting Dr. Rothman’s physical findings.

13 *Third*, Aetna erroneously rejected Dr. Dehaan’s disability opinion. In August 2010,  
14 Dr. Dehaan wrote that Evans could not return to work due to “unremitting back and lower  
15 extremity pain” and inability to tolerate doing much activity (AR 512). Like Evans’s other  
16 treating physicians, he also noted “pain reproduced with [straight leg raises] sign in the right leg”  
17 and absence of ankle reflexes in the right ankle (*ibid*). Aetna did not give any reasons for  
18 rejecting Dr. Dehaan’s abnormal findings. Instead, Aetna discounted Dr. Dehaan’s disability  
19 opinion for an erroneous reason: At one point, Dr. Dehaan had written a short note that “Evans  
20 [was] unable to work because of back sciatica / caudia equina [syndrome] / arachnoiditis”  
21 (AR 515). Dr. Dehaan subsequently retracted his opinion that Evans suffered from arachnoiditis,  
22 which is an inflammation of the spinal membrane. Based *solely* on his partial retraction of  
23 finding arachnoiditis, Aetna rejected Dr. Dehaan’s entire disability opinion (AR 524). This was  
24 a factual misinterpretation of Dr. Dehaan’s opinion.

25 *Fourth*, Aetna erroneously concluded that “there was no documentation that [Evans was]  
26 suffering from any adverse affects [sic] to any prescribed medication” (AR 523). This erroneous  
27 statement ignored Evans’s letter to Aetna stating that her prescribed medications impaired her  
28 from driving to see clients, which was an essential duty of her prior occupation (AR 424). More

1 importantly, Aetna and its medical reviewers all failed to assess how Evans’s medical condition,  
2 which included lower right side numbness and lack of ankle reflex, would impact her ability to  
3 drive, which was an essential duty of her prior occupation.

4 *Fifth*, Aetna initially, and ultimately, denied Evans’s claim for a “lack of medical  
5 evidence” (AR 426–27, 522–24). However, Aetna failed to inform Evans what specific medical  
6 evidence it needed in order to assess her disability. In particular, Aetna did not provide Evans  
7 with even one of the four medical reports by Aetna’s independent reviewers. As our court of  
8 appeals has held, “the administrator was obligated to say in plain language what additional  
9 evidence it needed and what questions it needed answered in time so that the claimant could  
10 provide the additional material could be provided.” *Salomaa v. Honda Long Term Disability*  
11 *Plan*, 642 F.3d 666, 680 (9th Cir. 2011). Aetna knew that Evans had been diagnosed with  
12 herniated disk, cauda equina syndrome, degenerative disk disease, and ankle swelling, but did  
13 not provide any guidance to Evans about what “medical evidence” was needed to show disability  
14 (AR 523).

15 It should also be noted that Aetna’s choice to conduct independent medical reviews  
16 solely on the papers rather than an in-person medical evaluation “raises questions about the  
17 thoroughness and accuracy of the benefits determination.” *Montour v. Hartford Life & Acc. Ins.*  
18 *Co.*, 588 F.3d 623, 634 (9th Cir. 2009). A paper-only review is especially problematic here,  
19 where Aetna has completely rejected Evans’s subjective complaints of pain as a basis for her  
20 functional impairment. Our court of appeals has held that complaints of pain cannot be  
21 disregarded without adequate explanation. Specifically, it is unreasonable to reject complaints of  
22 pain solely on the basis of lack of “objective proof of [claimant’s] pain level” or observations  
23 that the medical condition “should not cause [claimant] as much pain as he was reportedly  
24 suffering.” *Montour*, 588 F.3d at 634–35 (9th Cir. 2009). None of Evans’s treating physicians  
25 ever stated that her pain was unexplained, exaggerated, or somehow not to be believed. Only  
26 Dr. Swotinsky, who was paid by Aetna and who never examined Evans, found that her pain was  
27 of an “unclear” cause (AR 547).  
28

1           *Lastly*, Aetna failed to provide an adequate explanation for why it granted short-term  
2 disability until January 4, 2010, but then denied long-term disability after January 4, 2010, for  
3 “lack of medical evidence” (AR 524). Per the plan terms, there was no material difference  
4 between the criteria for short-term disability, “inability to perform his or her essential occupation  
5 functions,” and long-term disability for the first 18 months, “not able to perform the material  
6 duties of your own occupation” (AR 4, 107). Aetna apparently found sufficient medical  
7 evidence in the administrative record showing that Evans was not able to perform her prior job  
8 duties on January 3, 2010, but determined that the same medical evidence was insufficient the  
9 next day on January 4, 2010. The only change in the record on January 4, 2010, was Dr.  
10 Mimran’s letter to Dr. Rothman (AR 323):

11                         [Evans] has not returned to work, nor does she feel like she is  
12                         currently able to. She continues to walk with a cane, despite her  
13                         [physical] therapist indicating that she probably does not need it  
14                         any more. I have talked to her about starting to liberalize her  
15                         activities and advance her tolerance. She seems to have a  
16                         hesitancy to do so. I have told her that in order to go back to work  
17                         it is going to be important for her to give it a try and start to  
18                         explore what she is able to do, and she is not going to know this  
19                         until she starts to go back.

20           This letter did not indicate that Evans’s prior abnormal examination findings — numbness,  
21 absence of reflexes, and pain — had improved. This letter did not indicate that Evans was better  
22 controlled on her pain medication.

23           To review, Aetna’s initial denial of benefits rested almost entirely on Dr. Mimran’s letter  
24 and later communication with Dr. Collins (AR 413). Evans responded to Aetna’s initial denial  
25 by submitting additional evidence of disability from three treating physicians and her physical  
26 therapist. Aetna gave vague and demonstrably incorrect reasons for rejecting these new physical  
27 findings and opinions. Aetna then found that Evans could return to her prior occupation even  
28 though no physician opined that Evans was able to drive a car to see clients, a daily and frequent  
aspect of her prior occupation, despite her lower right side numbness and lack of ankle reflex.

## 29           **5.       DISCOVERY.**

30           Further discovery may provide answers absent in the administrative record: *First*, how  
31 does Aetna’s structural conflict of interest influence its hiring of “independent reviewing

1 physicians"? Do physicians hired by Aetna find non-disability in the vast majority of referrals?  
2 Does that percentage differ for in-person versus on-the-papers reviews? *Second*, how often do  
3 the four reviewing physician in this action find non-disability in favor of Aetna? *Third*, the  
4 details of Dr. Collin's hearsay statement that Dr. Mimran opined that Evans could return to  
5 work. *Fourth*, did Dr. Mimran understand that Evans had to drive a car as part of her prior  
6 occupation? Did any treating or reviewing physician? *Fifth*, how often did Evans have to drive  
7 in her prior occupation? *Sixth*, what did the MRI taken by Dr. Dehaan show? These are just  
8 some of the questions that could shed light on whether Evans received the full and fair review  
9 required by statute.

10 **CONCLUSION**

11 For the reasons stated above, the motions for summary judgment are **DENIED**. A case  
12 management scheduling order will be issued.

13  
14 **IT IS SO ORDERED.**

15  
16 Dated: October 25, 2012.

17   
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE