

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIZABETH HEALY,
Plaintiff,
v.
FORTIS BENEFITS INSURANCE
COMPANY, et al.,
Defendants.

Case No. [14-cv-00832-RS](#)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. INTRODUCTION

In this action brought under ERISA, 29 U.S.C. § 1132(a)(1)(B), plaintiff Lizabeth Healy challenges a determination that her right to receive benefits under a long term disability insurance policy provided by her former employer terminated as of December 2012. Healy contends, in essence, that the medical evidence supports the conclusion that her physical conditions worsened, or at least did not substantially improve from the time she first was found eligible for benefits in 2010, and that there was no basis for concluding she has not continued to suffer from a qualifying disability. Defendant argues that after two years of benefits were paid, the policy required Healy to show that she was disabled from working in any profession, not just her prior job, and that the medical evidence did not support such a conclusion.

Based on the parties' written submissions, oral argument, and the administrative record, the court finds that defendant erred in denying Healy's claim. This order comprises the findings

1 of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a).¹

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3 II. FINDINGS OF FACT

4 Plaintiff Lizabeth Healy was employed by Lighthouse Capital Partners, Inc. as the Director
5 of Contract Administration from 2004 through early 2011. Prior to that she had been employed in
6 similar positions with various employers since 1994. At the time of her disability claim, her
7 annual salary was \$110,500.

8 Healy's job required nearly continuous computer usage during the work day. She contends
9 that, as a result, she experienced "unbearable pain in her arms, neck and back, despite work
10 stations adjustments, including the use of a sit-stand station and dictation software." Regular
11 headaches interfered with her focus and concentration, as did her use of pain medications. After
12 attempting to "work through" these symptoms as they allegedly worsened, in September of 2010
13 Healy filed a long-term disability claim under the plan provided by her employer. Defendant
14 Union Security Insurance Company ("USIC") is the insurer and plan administrator.²

15 At the time of her initial claim, Healy reported neck and lower back pain, with spasms and
16 loss of mobility. Healy provided a report from a physician, Peter Barry, MD, whom she had
17 consulted in connection with a potential worker's compensation claim. Dr. Barry found Healy to
18 have cervical disc disease and a cervical sprain, rising to a Class 5 "severe" functional impairment,
19 and that she should be off work until at least October 1, 2010. USIC eventually approved the
20 disability claim through November 22, 2010. In December, USIC denied continued benefits.

21 Healy returned to work on January 3, 2011. After a half-day, she reported experiencing

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¹ To the extent that any conclusions of law are inadvertently labeled as findings of fact (or vice
24 versa), the findings and conclusions shall be considered "in [their] true light, regardless of the
25 label that the . . . court may have placed on [them]." *Tri-Tron International v. Velto*, 525 F.2d
26 432, 435-36 (9th Cir. 1975).

27 ² Healy refers to USIC by the name "Assurant," through which it apparently does business and
28 communicates with insureds.

1 pain that left her unable to continue working. Her employment was terminated as of January 4,
2 2011. Healy appealed the prior denial of continuing benefits, submitting documentation from Dr.
3 Jeffrey Stevenson. In considering the appeal, USIC arranged to have Healy undergo an
4 Independent Medical Examination, conducted by Dr. Corby Kessler. Dr. Kessler found evidence
5 of limited mobility, and recommended Healy limit her keyboarding to no more than three hours a
6 day, with frequent breaks. USIC determined the keyboarding restriction would preclude her from
7 performing her regular occupation, and approved her claim for further benefits.

8 Initially, USIC placed a “Special Conditions” limitation on the benefits, which would
9 preclude them from extending beyond 24 months. Healy appealed that finding. USIC referred the
10 file to Dr. Lee Fischer, who concluded that Healy’s conditions were not subject to the Special
11 Conditions limitation, and that determination was reversed.

12 Although Healy was not subject to the “Special Conditions” limitation, under the USIC
13 policy, once she had received 24 months of benefits, the conditions of eligibility changed. Prior to
14 that dividing line, which in Healy’s case passed at the end of July, 2012, the policy defined
15 disability as something that “prevents you from performing at least one of the material duties of
16 your regular occupation.” After 24 months, in contrast, the disability must be something that
17 “prevents you from performing at least one of the material duties of each gainful occupation for
18 which your education, training, and experience qualifies you.” In other words, for the first two
19 years Healy could receive disability payments for a condition that prevented her from returning to
20 her own job or a substantially similar job, but thereafter could continue receiving payments only if
21 her condition precluded full-time employment in any job for which she was qualified.

22 Accordingly, in April of 2012, at the same time it lifted the “Special Conditions”
23 limitation, USIC advised Healy it would be evaluating her eligibility for continued disability
24 payments beyond the 24 month mark. USIC’s investigation ultimately extended past the 24 month
25 mark, with the result that it paid benefits to Healy through December 18, 2012. At that point,
26 however, USIC terminated benefits, contending Healy had not shown that she was disabled under
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1 the narrower “any occupation” definition that had become effective in July of 2012. USIC had
2 conducted a Vocational Skills Assessment and a Labor Market Survey, in which it had identified
3 two specific job openings for which it believed Healy was qualified and could physically
4 perform.³

5 At the time USIC terminated Healy’s benefits in December of 2012, the medical evidence
6 in the record included the following:

7 (1) An August 2012 report from Healy’s primary care physician, Dr. Stevenson,
8 stating that her rehabilitation and recovery from shoulder surgery was continuing, and that
9 he would consider releasing her for a return to work after her next visit, but only for
10 “modified duty with extensive restrictions.” Dr. Stevenson’s “Work Status” report
11 generated from the August appointment included a checked box indicating she should be
12 “off work.”

13 (2) A September 2012 report from the surgeon who had operated on her shoulder,
14 Dr. Noah Weiss, stating that her recovery from that surgery was progressing well, such that
15 she could “probably” return to clerical work, with specified restrictions, insofar as her
16 shoulder recovery issues were implicated. Dr. Weiss noted, however, that in light of
17 “other significant neck issues,” any return to work decisions should be made by Dr.
18 Stevenson.

19 (3) A September 2012 report from a pain specialist, Dr. Ruben Kalra, who
20 examined Healy and her records on referral from Dr. Stevens. Dr. Kalra noted ongoing
21 neck pain, and referred Healy to Dr. Tracy Newkirk for an evaluation of possible Thoracic
22 Outlet Syndrome (“TOS”).

23 (4) A September 2012 report from Dr. Stevenson noting some improvements from
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25 ³ USIC later conceded one of the positions was slightly outside the 50 mile radius it generally
26 considers relevant.

1 certain treatments, but continuing to recommend Healy be off work completely.

2 (5) A November 2012 report from Dr. Stevenson recommending Healy return to
3 work no more than four hours a day, three days a week. Dr. Stevenson noted that he had
4 discussed with Healy the need to begin setting her sights on her “next carrier [sic, career],”
5 and he suggested focusing treatment on what she could do, rather than on what she could
6 not.

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8 In connection with evaluating whether benefits would be continued after the change in
9 definition date, USIC had Healy’s medical records reviewed by Dr. Lee Fischer. Dr. Fischer had
10 first become involved when USIC reassessed applicability of the “Special Conditions” limitation.
11 He supplemented and updated his report several times during 2012.

12 Dr. Fischer ultimately concluded that “the medical evidence in the file does not indicate
13 physical restrictions or limitations that would restrict or limit the claimant’s ability to work with
14 her hands including keyboarding frequently alone or in combination.” Dr. Fischer appears to have
15 reached this conclusion based on his understanding that the conditions observed in Dr. Kessler’s
16 IME in June of 2011 “would be expected to improve over time even if no treatment were
17 performed” and that “various physicians documented that [Healy’s] condition substantially
18 improved” after the treatments she received. Dr. Fischer also concluded that Healy’s chronic
19 cervical and lumbar spine degenerative disc disease did not preclude her from working full time.
20 The basis of that conclusion is unclear, but appears to reflect an assessment that Healy was
21 obtaining pain relief from treatments provided by Dr. Kalra.

22 Healy appealed the December 2012 termination of benefits. She advised USIC that by that
23 point in time she had seen Dr. Newkirk, and been diagnosed with TOS. She also submitted an
24 Agreed Medical Examiner’s report from Dr. Feinberg, which had been prepared in connection
25 with her Worker’s Compensation claim. Dr. Feinberg recommended work restrictions related to
26 Healy’s shoulder issues, including being precluded from repetitive use and overhead use. In light
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1 of her cervical/lumbar spine issues he also proscribed repetitive neck motions, and repetitive
2 bending or stooping. Dr. Feinberg opined Healy could not return to her prior job absent
3 “significant ergonomic modifications,” but did not suggest she could not work full time. Dr.
4 Feinberg rejected any suggestion, however, that Healy suffered from TOS, and specifically
5 recommended against a referral to Dr. Newkirk for an evaluation of that issue. Healy eventually
6 saw Dr. Newkirk at her own expense instead.

7 To evaluate Healy’s appeal, USIC provided her files to Dr. Elizabeth Engelhardt, a
8 Certified Independent Medical Examiner. Dr. Engelhardt concluded that “giving claimant the
9 benefit of doubt,” Healy had been disabled from performing any type of work through November
10 14, 2012. After that date, however, Dr. Engelhardt opined that Healy was capable of sedentary
11 and light work, on a fulltime basis. She endorsed the limitations noted by Dr. Feinberg on
12 overhead reaching, lifting, repetitive neck motions, and the like. USIC denied the appeal.
13 Through counsel, Healy then pursued a further appeal, submitting additional records from Drs.
14 Stevenson and Newkirk. In November of 2013, Healy also submitted a note from Dr. Deepak
15 Sreedharan stating that she had participated in a months-long Functional Restoration Program, but
16 was unable to return to full-time work as of that date.

17 USIC had Healy’s records, including the further submissions, reviewed by Dr. Robert
18 Marks. Dr. Marks opined that after June of 2012, Healy should have been able to use a keyboard,
19 and also “use the now widely available dictation programs,” as long she took frequent and
20 appropriate breaks. Dr. Marks placed significant emphasis on indications he saw in the file that
21 Healy’s shoulder surgery in 2012 had provided her a degree of relief from prior pain. Dr. Marks
22 asserted the TOS diagnosis was “not well substantiated” and opined that Healy could have worked
23 full time, after late October 2012, when there had been sufficient healing from her shoulder
24 surgery.

25 USIC’s Disability Claims Appeals Committee met in January of 2014 and denied Healy’s
26 final appeal. The committee concluded that based on all the medical evidence, Healy was capable
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1 of working in “sedentary and light work settings” and that she had a variety of transferable skills
2 on which to draw. This lawsuit followed.⁴

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4 III. CONCLUSIONS OF LAW

5 A. Standard of Review

6 The plan administered by USIC is governed by ERISA. A participant in an ERISA plan
7 may bring a civil action to recover benefits, to enforce rights, or to clarify future rights under the
8 terms of the plan. The parties have stipulated that in this case USIC’s decision is subject to de
9 novo review. A court employing de novo review in an ERISA case “simply proceeds to evaluate
10 whether the plan administrator correctly or incorrectly denied benefits.” *Abatie v. Alta Health &*
11 *Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006). Generally, the court’s review is limited to the
12 evidence contained in the administrative record. *Opeta v. Nw. Airlines Pension Plan for Contract*
13 *Employees*, 484 F.3d 1211, 1217 (9th Cir. 2007).

14 “In an ERISA case involving de novo review, the plaintiff has the burden of showing
15 entitlement to benefits.” *Schramm v. CNA Fin. Corp. Insured Grp. Ben. Program*, 718 F. Supp.
16 2d 1151, 1162 (N.D. Cal. 2010); see also *Richards v. Hewlett-Packard Corp.*, 592 F.3d 232, 239
17 (1st Cir. 2010) (placing burden on plaintiff to prove disability); *Sabatino v. Liberty Life Assurance*
18 *Co. of Boston*, 286 F. Supp. 2d 1222, 1232 (N.D. Cal. 2003) (same). In conducting its de novo
19 review, the court “considers various circumstances when weighing evidence” and “evaluates the
20 persuasiveness of each party’s case, which necessarily entails making reasonable inferences where
21 appropriate.” *Schramm*, 718 F. Supp. 2d at 1162.

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25 ⁴ Healy points out that she has been found disabled, and continues to receive benefits under a
26 private policy she maintained with Unum. Healy’s Social Security disability claim has been
denied, but she is appealing that decision.

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B. Discussion

1. Medical Condition

At the outset, Healy places heavy emphasis on an argument that, in her view, there was no evidence of any substantial improvement in her condition, and therefore the most reasonable inference is that she remained disabled and her benefits should not have been terminated. In *Saffron v. Wells Fargo & Co. Long Term Disability Plan*, the Ninth Circuit noted that “[the administrator] had been paying [the claimant] long-term disability benefits for a year, which suggests that she was already disabled.” 522 F.3d 863, 871 (9th Cir. 2008). The court opined that to find the plaintiff no longer disabled, “one would expect the [evidence] to show an improvement, not a lack of degeneration.” *Id.* (emphasis in original). This language from *Saffron* “does not impose a burden of proof on a defendant, but rather demonstrates a logical inference that a court may make based on a specific set of facts.” *Schramm, supra*, 718 F. Supp. 2d at 1162.

The weakness in Healy’s attempt to rely on *Saffron* here, however, is that the applicable policy definition of disability changed after she had been receiving benefits for two years. Under the express policy terms, it was completely possible, and not unreasonable, that a condition qualifying as disabling from Healy’s own “occupation,” might not prevent her from performing in a different occupation, even without any improvement in her physical condition whatsoever.

The relevant, question, therefore, is whether the medical evidence supported a conclusion that as of the date her benefits were terminated, Healy was disabled from performing “at least one of the material duties of each gainful occupation for which [her] education, training, and experience qualifie[d] [her].” Healy insists that at the time her benefits were terminated, there was no evidence from any treating physician that she was capable of working full time and/or of keyboarding for sufficient amounts of time to make working in any appropriate occupation feasible.⁵

⁵ Under the policy provisions as applicable to Healy’s salary history, an appropriate job was one which would pay a “gainful” wage of not less than \$66,372 annually.

1 USIC, of course, relied on Dr. Fischer’s conclusions to the contrary. As to the issue of
2 whether and how much Healy could reasonably be expected to keyboard in a day, it is not clear
3 that Dr. Fischer unreasonably disregarded any of the evidence in the medical files. While Healy
4 points to limitations her various treating and examining physicians noted as to her range of
5 movement during the 2010-2012 time frame, her argument depends on extrapolating from
6 comments about neck and shoulder issues to an inability to keyboard. Although it may be
7 reasonable to presume such limitations might be connected (indeed, Dr. Marks advised frequent
8 breaks from keyboarding for that very reason), there is a marked absence of any findings of
9 express keyboard restrictions by Healy’s examining physicians in the relevant time frame. Given
10 that Dr. Fischer could appropriately also note that Healy had some positive responses to Dr.
11 Kalra’s treatment and improvements resulting from her shoulder surgery, his conclusions are not
12 irreconcilable with those of treating and examining physicians. Cf. Salomaa v. Honda Long Term
13 Disability Plan, 642 F.3d 666, 676 (9th Cir. 2011) (medical opinions rendered following in-person
14 examination were more persuasive than contrary opinions rendered following administrator’s
15 paper-only review). Nevertheless, whether characterized as keyboarding limitations per se, or
16 more generalized limitations on repetitive neck and shoulder movements, there was evidence
17 calling into question Healy’s ability to perform work in which constant keyboarding would be
18 required.

19 More significantly, Dr. Fischer’s conclusion that Healy was capable of full time work is
20 not supported by such persuasive evidence or analysis as to warrant crediting it above the opinions
21 of the treating physicians. As noted, he was initially retained merely to evaluate whether the
22 policy “Special Conditions” were applicable. Consistent with the scope of his assignment, Dr.
23 Fischer concluded Healy’s neck and back conditions, were not “special conditions” subject to a 24
24 month limitation on benefits, and he did not evaluate whether they were disabling. Subsequently,
25 however, Dr. Fischer offered the additional opinion that Healy “is not limited from working full
26 time at any occupation due to chronic cervical and lumbar spine degenerative disc disease
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1 (DOD).” The basis for that conclusion, however, is simply unclear. Dr. Fischer lists “additional
2 medical evidence” he reviewed, consisting of reports from Dr. Kalra, and states that it “did not
3 change my previous conclusions reprinted below.” Dr. Fischer, however, does not explain how
4 either the additional medical evidence he reviewed, or the prior evidence, led to his conclusion
5 that Healy could work full time. Dr. Stevenson’s contemporaneous opinions, based on direct and
6 ongoing examination of Healy, support the conclusion that the pain relief she obtained from
7 shoulder surgery was not sufficient to permit her return to full-time employment in the relevant
8 time period. To the extent Dr. Fischer and later reviewing doctors relied on the improvements
9 Healy realized from that surgery, their conclusions do not adequately account for the fact that
10 Healy’s conditions were not limited to the issues that surgery was designed to address. As noted,
11 Dr. Weiss, the shoulder surgeon, expressly observed that Healy’s ability to return to work turned
12 on other issues, which Dr. Stevenson was in the best position to evaluate.

13 The record developed in Healy’s subsequent appeals does not fully resolve the conflict
14 between the evidence of ongoing conditions that would interfere with full time work, and the
15 assessments of some doctors to the contrary. Certainly if Dr. Newkirk’s TOS diagnosis and
16 opinions are fully credited, or Dr. Sreedharan’s assertion of an inability to work is accepted, then a
17 finding of disability would be required. The reviews conducted by Drs. Engelhardt and Marks,
18 however, even if not based on personal examination of Healy, supply some basis for USIC to have
19 questioned the reliability of those opinions. Ultimately, however, even assuming the opinions of
20 Dr. Newkirk and Dr. Sreedharan could be disregarded entirely, there would still be insufficient
21 evidence that Healy was capable of returning to full time work at all, and especially in any
22 environment requiring heavy keyboarding, at the time USIC terminated her benefits.

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2. Job availability

USIC’s labor market survey identified two possible positions for her, one of which it later
conceded was outside (just barely) the geographical range. Moreover, it appears the remaining job

1 very well may have required a degree of computer usage that would not have been fully consistent
2 with the various restrictions that even USIC’s own reviewing doctors were suggesting likely were
3 appropriate. Merely characterizing Healy as capable of “light” or “sedentary” work is a poor
4 substitute for an analysis that compares her specific impairments to the actual requirements of a
5 particular job. While it was Healy’s burden to prove she was disabled within the meaning of the
6 policy, she met her initial burden to do so by submitting the medical evidence. USIC’s
7 identification of one job opening, which quite possibly required more continual computer use than
8 Healy could safely perform, is not sufficient to show she was not eligible for benefits after the
9 change in definition date.

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11 In sum, the evidence establishes that Healy, more likely than not, was disabled under the
12 plan’s terms continuing after the change in definition date. To the extent she may have
13 experienced some relief from her shoulder surgery, her conditions nonetheless persisted to
14 preclude her from working full time, particularly in an environment requiring heavy keyboard use.
15 Even apart from the issue of her ability to work full time, there is a lack of evidence of jobs that
16 Healy could perform paying a “gainful” wage and consistent with her experience and physical
17 limitations.

18 The evidence does not support a conclusion that Healy’s statements, or her treating
19 professionals’ observations and conclusions, lack credibility. See Schramm, 718 F. Supp. 2d at
20 1165 (reinstating long term disability benefits after concluding that plaintiff presented sufficient
21 evidence of her disability and defendant failed to persuade the court that plaintiff or her physicians
22 were not credible). Accordingly, it was improper for USIC to terminate Healy’s benefits.

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24 IV. CONCLUSION

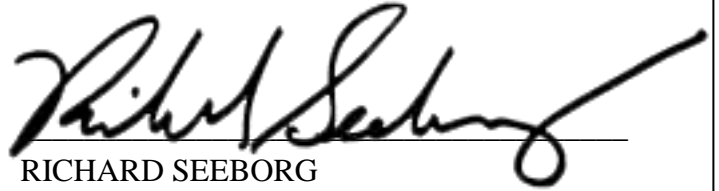
25 Healy is entitled to the reinstatement of her long term disability benefits. The parties are
26 directed to meet and confer and jointly submit a proposed judgment consistent with this order

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within twenty days.

IT IS SO ORDERED.

Dated: September 14, 2015



RICHARD SEEBORG
United States District Judge