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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

BRENT OSTER,

Plaintiff,

vs.

STANDARD INSURANCE COMPANY; THE
LUCASFILM LTD. GROUP LONG TERM
DISABILITY PLAN,

Defendants.

Case No: C 09-00851 SBA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

REDACTED

Plaintiff Brent Oster (“Oster”) brings this action under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001, et seq., seeking long term disability benefits under the terms of Defendants’ long term disability plan. The parties are presently before the Court on cross-motions for judgment under Federal Rule of Civil Procedure 52. Dkts. 29, 66. After consideration of the parties’ briefs, the evidence in the Administrative Record, and the extrinsic evidence offered by Plaintiff on the issue of Defendant Standard Insurance Company’s (“Standard”) conflict of interest, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. OSTER’S OCCUPATION

1. Oster holds a degree in Aerospace Engineering from the University of Toronto and trained as a fighter pilot with the Canadian Armed Forces. Administrative Record (“AR”) 00484-485.
2. For nearly ten years, Oster worked continuously as a computer, graphics, and game programmer, and co-founded two companies. *Id.* In August 2001, Oster began working as an Engineering Technical Director for LucasArts LLC. *Id.* At LucasArts, Oster supervised

1 and assisted the design and development of computer games. Id. 00482, 00484-485. The
2 Technical Director position required long hours and a high level of cognitive functioning. Id.
3 00482.

4 **B. THE STANDARD POLICY**

5 3. As a LucasArts employee, Oster was enrolled in his employer's long term
6 disability plan ("Plan"), which was insured under a group Long Term Disability ("LTD")
7 Insurance Policy No. 638213-T ("Policy") issued by Standard to Lucasfilm Ltd. Id. 00001-38.
8 The Policy became effective on April 1, 2004. Id. 00012. Standard both administers disability
9 claims under the Plan and pays benefits according to the terms of the Policy. Id. 00018, 00033.

10 4. The "Allocation of Authority" section of the Policy states that Standard has full
11 authority to administer claims: "[Standard has] full and exclusive authority to control and
12 manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve
13 all questions arising in the administration, interpretation, and application of the Group Policy."
14 Id. 00033.

15 5. The Policy specifically enumerates that:

16 Our authority includes, but is not limited to:

17 (1) the right to resolve all matters when a review has been requested;

18 (2) the right to establish and enforce rules and procedures for the
19 administration of the Group Policy and any claim under it;

20 (3) the right to determine:

21 (a) eligibility for insurance;

22 (b) entitlement to benefits;

23 (c) the amount of benefits payable; and

24 (d) the sufficiency and the amount of the information we may
25 reasonably require to terminate a, b, or c above.

26 Id. The Allocation of Authority provision concludes: "[s]ubject to the review procedures of
27 the Group Policy, any decision we make in the exercise of our authority is conclusive and
28 binding." Id.

1 6. The Policy states that Oster is entitled to receive disability benefits after a 90-day
2 elimination period if he is unable to: 1) perform with reasonable continuity the “Material
3 Duties” of his own occupation; and 2) suffered a loss of 20% in his indexed predisability
4 earnings when working in his “Own Occupation.” Id. 00021. The Policy defines Material
5 Duties as the “essential tasks, functions and operations, and the skills, abilities, knowledge,
6 training and experience, generally required by employers from those engaged in a particular
7 occupation that cannot be reasonably modified or omitted.” Id. The Policy defines “Own
8 Occupation” as “any employment, business, trade, profession, calling or vocation that involves
9 Material Duties of the same general character as the occupation your are regularly performing
10 for your Employer when Disability begins.” Id.

11 7. If the claimant finds a new occupation, the claimant “will no longer be Disabled
12 when [his] Work earnings from another occupation meet or exceed 80% of [his] Indexed
13 Predisability Earnings.” Id.

14 8. The Policy has a maximum benefit period running to age 65 and pays 60% of a
15 claimant’s predisability earnings. Id. 00016. When Oster left LucasArts, he was making
16 \$10,937.46 per month in pre-disability earnings (or \$132,249.56 per year), which means he is
17 potentially eligible for \$6,562.48 in monthly disability benefits. Id. 00469.

18 9. The Policy provides for certain offsets to the benefit payments that otherwise
19 would be payable. Id. 00025. Offsets include, but are not limited to, social security benefits,
20 severance pay, and earnings from an employer or self-employment. Id. 00025-26.

21 10. Coverage under the Policy terminates when a claimant is no longer employed by
22 Lucasfilm Ltd., unless the claimant is already disabled. Id. 00021.

23 11. Under the Policy, if a claimant is already receiving benefits, his benefits
24 automatically cease when any one of the following occur: the claimant is “no longer disabled;”
25 he becomes insured “under any other LTD plan;” or he “fail[s] to provide proof of continued
26 Disability and entitlement to LTD benefits.” Id. 00024.

1 **C. THE OCTOBER 20, 2003 ACCIDENT AND RELATED MEDICAL TREATMENT**

2 12. On October 20, 2003, while stopped at a red light, Oster was rear-ended by a van
3 traveling about 25 miles per hour. Id. 00359-363. The Traffic Collision Report confirms the
4 absence of skid marks on the roadway, and the van's driver admitted he was not looking at the
5 roadway but was, instead, looking for something that had fallen inside the van. Id. 00359.

6 Oster suffered two impacts. First, from behind, and second, when his car was pushed into the
7 vehicle stopped in front of him. Id. 00362. The force of the collision tore Oster's driver's seat
8 from its mounting, throwing Oster and his broken front seat into the back of his car. Id. 00341.

9 13. Oster refused immediate medical attention after the accident and walked home,
10 which was two blocks away. Id. 00341, 00603. A short time later, Oster's wife returned home
11 and took him to Novato Community Hospital. Id. 00085. The hospital noted that Oster was
12 suffering from a mild headache and midline tenderness in his spine, but was otherwise alert and
13 oriented. Id.

14 14. Oster was seen three additional times in the hospital emergency room for injuries
15 he sustained in the accident: (1) later the same night of the accident, after experiencing
16 increased symptoms of headaches, nausea, vertigo and pain; (2) on October 25, 2003, due to
17 the facial numbness, severe headaches, vertigo and nausea; and (3) on November 17, 2003,
18 with vomiting, dizziness, headaches and blurred vision. Id. 00069-72, 00075, 00080-85,
19 00091-92. Steven Pyke, M.D., Oster's primary care physician, and J. Richard Medius, M.D.,
20 of Novato Community Hospital examined Oster and independently made diagnoses of "post-
21 concussive disorder" and "vestibular concussion status post MVA," respectively. Id. 00852-
22 853. After the November 17, 2003 visit at U.C. San Francisco Medical Center, Oster was
23 referred for follow-up care with UCSF neurologists Neil Raskin, M.D., Anthony Kim, M.D.,
24 and Andrew Ahn, M.D., all of whom concluded that Mr. Oster was suffering from "post
25 concussion syndrome with a posttraumatic migraine element producing the numbness and
26 weakness of his left limbs." Id. 00105, 00159.

27 15. Oster missed work from the date of the accident through January 5, 2004. Id.
28 000476. Upon returning to work, Oster continued to experience severe headaches, and severe

1 pain in his upper back and neck. Id. 00350-351. He continued to experience vertigo, severe
2 headaches, and left-sided numbness. Id. 00159. On January 21, 2004, Dr. Raskin again
3 diagnosed Oster with post-concussion syndrome with a posttraumatic migraine element
4 producing the numbness and weakness of his left limbs, “because the force involved in a
5 concussive injury are focused at the brainstem and because the inherited disturbance of
6 migraine is also in the brainstem.” Id. 00159.

7 16. Lisa Hatt and Blaire Hughes of LucasArts confirmed that Oster “was really
8 struggling by March [2004] to make it into work, and was having difficulty concentrating”, that
9 he “was only able to work 2 days per week for the last three weeks of March”, and that he “was
10 clearly having trouble performing the essential functions of his job.” Id. 00337-338. Oster
11 ceased working at LucasArts on April 7, 2004. Id. 00339.

12 17. Through a Standard “Long Term Disability Benefits Attending Physician’s
13 Statement,” Dr. Pyke certified disability through November 1, 2004. Id. 00191-192. He
14 referred Oster to Dr. Sponzilli, a Physical Rehab & Pain Specialist. Id. 00192. Dr. Sponzilli
15 noted there was disc pathology at C5-6 and C6-7 with exam evidence of cervical facet
16 syndrome as well as cervical radiculopathy involving the C6 dermatome. Id. 00177-178. Dr.
17 Sponzilli’s physical examination revealed a positive Spurling’s test. Id. 00174. Dr. Sponzilli
18 thus performed a cervical epidural injection on June 24, 2004 that was interrupted by a vagal
19 episode. Id. 00173. The procedure was not completed. Id.

20 18. On August 26, 2004, Oster received treatment at Kentfield Rehabilitation Center
21 with Dr. Doherty, a physiatrist. Id. 00810-811. An initial assessment revealed cognitive
22 difficulties with reasoning and short term memory. Id.

23 19. Medical records indicate that sometime between July and October 2004, Oster’s
24 primary care physician, Dr. Pyke, diagnosed Oster as depressed. Id. 01024. Dr. Michael
25 Freeman, one of Plaintiff’s psychiatrists, opined that the “acute onset” of depression resulted
26 from pain, inactivity, financial stressors and marital strife, all of which Dr. Freeman traced
27 back to the accident. Id. 01024, 01019. Dr. Pyke, noting the onset of depression, and not
28 aware that Oster had previously been diagnosed with bipolar disorder, prescribed Effexor, an

1 antidepressant. Id. 01019. Effexor, however, converted Oster’s depression to mania, and he
2 thus began to experience an acute onset of a severe manic episode for which he was ultimately
3 hospitalized on November 3, 2004. Id. 01021. After that episode, Plaintiff continued ongoing
4 psychiatric/pharmaceutical treatment with Dr. Michael Freeman. Id. 00674.

5 20. Oster was examined by neurosurgeon Archimedes Ramirez, M.D., on December
6 7, 2004. Id. 01027-1032. Oster continued to complain of back and neck pain, paraesthesia of
7 his left face, arm and leg and episodic seizures. Id. Dr. Ramirez made the following
8 assessment: “1) this patient was doing well, except for a pre-existing compensated bipolar
9 mental problem. He had an active life until he was involved in a rear-end motor vehicle
10 accident and sustained a traumatic brain injury, manifested by post-cerebral-concussion
11 syndrome. This patient’s head injury is manifested by post-traumatic headaches, partial seizure
12 disorder, and aggravation of his bipolar mental problem; 2) chronic back & left leg pain due to
13 bulging discs at L4-5 and L5-S1; 3) Chronic cervical thoracic, and lumbosacral strain. All of
14 the above injuries are secondary to the accident on 10/20/2003.” Id. 01032. Dr. Ramirez
15 concurred that Oster “is fully disabled because of the traumatic brain injury” and recommended
16 that he continue treatment with his existing providers. Id. 01032.

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1 **D. OSTER’S DISABILITY CLAIM AND STANDARD’S INITIAL DENIAL¹**

2 21. Oster applied for long term disability benefits under the Standard policy on July
3 23, 2004. AR 00476-478. He stated his disability periods as being “10/20/03-1/5/04 [and]
4 4/7/04 to Present.” Id. 00476.

5 22. Standard employed a physician consultant, neurologist Dr. Dickerman, to review
6 the medical records that Oster submitted with his claim. Id. 00790-794. In his November 22,
7 2004 report, Dr. Dickerman disagreed with the post-concussion syndrome diagnosis. Id.
8 00790-794. Dr. Dickerman also asserted that Oster could not have suffered a concussion
9 without a loss of consciousness, even though medical literature Oster submitted to Standard
10 indicates that a concussion does not have to involve loss of consciousness to cause trauma. Id.
11 00984-985, 00992, 01002, 01009.

12
13 ¹ A district court may admit evidence outside of the record on the issue of the “nature,
14 extent and effect” of any administrator’s conflict of interest. Abatie v. Alta Health and Life
15 Ins. Inc., 458 F.3d 955 (9th Cir. 2006). The Court finds the evidence offered by Plaintiff – the
16 documents showing Standard compensation to Dr. Dickerman, Dr. Toenniessen, and United
17 Review Services, as well as Standard’s claim manual – to be relevant to this issue. Dkt. 31,
18 Kim Decl., Exs. A-G. Those documents referred to in these Findings are admitted into
19 evidence. However, Plaintiff’s Motion for Leave of Court to supplement the administrative
20 record to include recent medical reports due to “procedural irregularities” in Standard’s claim
21 administration (Dkt. 73) is DENIED. As indicated below, Standard’s administration of
22 Plaintiff’s claim for long term disability benefits is reviewed for an abuse of discretion. In
23 applying the abuse of discretion standard, the district court generally should exclude evidence
24 outside the administrative record. See Burke v. Pitney Bowes Inc. Long-Term Disability Plan,
25 544 F.3d 1016, 1027 (9th Cir. 2008) (“It is the general rule, of course, that when applying an
26 abuse of discretion standard to an ERISA plan, the district court’s review is limited to the
27 administrative record.”). This general rule was qualified in Abatie, which held that district
28 courts may take additional evidence whenever “[procedural] irregularities have prevented full
development of the administrative record.” See Saffon v. Wells Fargo Co. Long Term
Disability Plan, 522 F.3d 863, 872 n.2 (9th Cir. 2008) (quoting Abatie, 458 F.3d at 973).
Standard’s failure to address the specific medical reports as issue here is not a procedural
irregularity. The medical reports Plaintiff seeks to admit as evidence were generated between
August 24, 2009 and January 31, 2010. See Dkt. 73-1, Oster Decl. ¶¶ 2-4. As indicated below,
Standard issued its final determination letter on August 5, 2008. AR 01588. These recent
medical reports were not excluded from Standard’s administration of the claim due to any
procedural error because they did not exist at the time of the administrative determination. See
Patrick v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan, 638 F. Supp. 2d
1195, 1209 (S.D. Cal. 2009) (“because the additional medical reports and materials submitted
by Plaintiff did not exist at the time of VPA’s denial of her appeal, these documents could not
have been excluded from the claim file due to procedural irregularities”).

1 23. Dr. Dickerman ultimately found that “the medical information would support
2 limitations and restrictions from sedentary work activity from 10/20/2003 to... 11/17/2003. I
3 see no indication.... that would have prevented him from continuing to perform his sedentary
4 work activities from about late 11/2003.” Id. 00793. Dr. Dickerman concluded that “the
5 patient has never had restrictions from physical disease point of view that has prevented him
6 from performing full-time sedentary level physical work.” Id.

7 24. On December 2, 2004, Standard issued a denial letter, relying on reasons set
8 forth in Dr. Dickerman’s report. Id. 00298-301. Standard based its denial, first, on that ground
9 that the injury was pre-existing to Oster’s claim, and, second, on the ground that there was
10 insufficient medical evidence of disability. Id.

11 **E. OSTER’S APPEAL**

12 25. On May 25, 2005, Oster appealed the denial, submitting evidence of his asserted
13 disability from his treating physicians, and literature on post-concussion syndrome and
14 brainstem injury. Id. 00982-1071. Oster also asserted in his appeal that Dr. Dickerman had a
15 record of bias in favor of insurers, including Standard, when evaluating the medical conditions
16 of disability claimants. Id. 01033-1071. The appeal also included a January 2, 2005
17 psychiatric evaluation by psychiatrist Dr. Freeman, performed after Oster was released from
18 the hospital for his manic episode. Id. 01018-1025. Dr. Freeman found Oster to be
19 “hypomanic with insomnia, racing thoughts, intrusive communication, irritability, [and]
20 eccentric thinking.” Id. 01022. Dr. Freeman found that it was likely that the automobile
21 accident triggered the onset of Oster’s depression and manic symptoms, given the pain and
22 physical limitations caused by the accident. Id. 01024.

23 26. Standard used Dr. Dickerman for another medical review in response to Oster’s
24 appeal. Dr. Dickerman again opined in a report dated June 22, 2005 that post-concussive
25 syndrome required a loss of consciousness that he did not find present for Oster. Id. 00929.
26 Dr. Dickerman asserted that Oster could perform a sedentary or light duty job, without
27 considering or discussing the specific cognitive demands of his position at LucasArts. Id.
28 00930.

1 27. Standard also solicited the medical records review of a psychiatrist, Linda
2 Toenniessen, M.D., who submitted a report on July 11, 2005. Id. 00921-00924. Dr.
3 Toenniessen claimed she did not know if Oster’s bipolar disorder, as retriggered by his post-
4 concussive disorder, disabled him from his job, despite the evidence Oster submitted from Dr.
5 Freeman that the disorder was and continued to be disabling. Id. 00922-923, 01018-1025.

6 28. Standard agreed to pay Dr. Dickerman to perform medical record reviews for ten
7 hours a week at the rate of \$200.00 per hour. Dkt. 31, Kim Decl., Exh. B 04195-4196.
8 Starting March 1, 2005, Dickerman’s hourly rate was increased to \$225.00 per hour. Id.
9 04200-4201. Moreover, Standard paid Dr. Dickerman \$172,300.00 in 2003, \$222,600.00 in
10 2004, \$182,107.50 in 2005, and \$219,150.50 in 2006. Id. Exh. A 04190-4193.

11 29. On March 1, 2005, Standard agreed to pay Dr. Toenniessen \$160.00 per hour to
12 perform medical record reviews for four hours a week. Id. Exh. C 04204-4205. Starting
13 January 1, 2006, Dr. Toenniessen was paid \$165.00 per hour. Id. 04208. Standard paid Dr.
14 Toenniessen \$42,833.00 in 2004, \$44,402.50 in 2005, and \$39,276.25 in 2006. Id. Exh. D
15 04210-4214.

16 30. From 2004 through 2006, Standard paid United Review Services \$397,255.01 to
17 arrange for disability reviews, including Independent Medical Evaluations. Id. Exs. F, G.

18 **F. THE INDEPENDENT MEDICAL EXAMINATION ON APPEAL**

19 31. On January 16, 2006, Plaintiff began employment with Radical Entertainment
20 (“Radical”) in Vancouver, Canada, as a Technical Director. AR 01444. Oster started with a
21 yearly salary of \$110,000 in Canadian dollars (“CDN”) (\$95,700 in United States dollars
22 (“USD”)), which was later reduced due to performance issues to \$90,000 CDN (\$78,300 USD).
23 Id. 02597, 02631. During his employment at Radical, Oster was entitled to a reduced benefit
24 under the policy’s Return to Work Provisions, because he made less than 80% of his
25 predisability salary at LucasArts. Id. 00022, 00469.

26 32. As part of the appeal, Standard asked Oster to submit to an “Independent
27 Medical Examination” by a neuropsychologist through Standard’s vendor United Review
28 Services. Id. 00754-00757. On March 20, 2006, Oster underwent an IME with

1 neuropsychologist Dr. William J. McMullen. After the exam, Dr. McMullen told United
2 Review Services that he needed previous neuropsychological, psychological, and psychiatric
3 testing of Oster, because Oster was “no longer alleging CURRENT disability – he is back to
4 work.” Id. 00685. Dr. McMullen characterized Oster as “fighting for disability” for the period
5 after the motor vehicle accident. Id.

6 33. In his subsequent report, submitted to Standard on April 26, 2006, Dr. McMullen
7 found that Oster’s performance on a test requiring rapid processing speed was a “significant
8 weakness.” Id. 00656, 00657-658. Oster’s processing speed was the same as it was when he
9 was tested by clinical psychologist Jennifer M. Duffy, Ph.D. in 2005. Id. 00678. Dr.
10 McMullen also indicated that Oster’s reading recognition, and spelling and math achievement,
11 were weaker than anticipated based on Oster’s high IQ, and lower than the results reported by
12 Dr. Duffy when she tested Oster in May 2005. Id. 00657. Dr. McMullen also acknowledged
13 that Oster’s score for attention and concentration was weaker than it had been when he had
14 been tested by Dr. Duffy in 2005. Id. 00664, 00679. Dr. McMullen admitted this was a cause
15 for “some concern.” Id. 00665. Dr. McMullen agreed that Oster was in fact disabled from his
16 own occupation from July 7, 2004 to May 31, 2005. Id. 00667-669.

17 34. However, Dr. McMullen concluded that, because Oster found employment with
18 Radical in January 2006, he was no longer disabled from his condition after May 2005. Id.
19 00645, 00669. Dr. McMullen made this conclusion without discussing the salary or job
20 demands of Oster’s position at Radical, and despite admitting that Oster’s personality was such
21 that he minimized problems and the effects that such problems have had upon his life and the
22 lives of others. Id. 00659. Also, Dr. McMullen opined that that the negative effects of Oster’s
23 post-concussion syndrome lasted only three months, because nearly 100% of individuals in
24 sports concussion cases made a full recovery. Id. 00664.

25 **G. DETAILS OF OSTER’S UNSUCCESSFUL RETURN TO WORK**

26 35. Standard received a copy of McMullen’s IME report on April 26, 2006, but did
27 not provide a copy to Oster until three weeks later, despite repeated requests by Oster’s
28

1 counsel. Id. 01463, 01466, 01480. At the time, Standard did not provide to Oster the raw data
2 underlying Dr. McMullen’s report. Id.

3 36. Before Standard had provided the report, Oster’s counsel informed Standard that
4 Oster’s condition had made it impossible for him to perform his position at Radical on a full-
5 time basis, resulting in a demotion, and ultimately termination. Id. 01480, 01482, 02662-2663,
6 02665-2669.

7 37. On April 19, 2006, Oster disclosed to his supervisors his difficulties in
8 performing his job at Radical due to his condition, and requested an accommodation. Id.
9 02629-2630. In May 2006, Oster was demoted to the position of Senior Programmer. Id.
10 02628, 02631-2632. Oster was unable to perform the duties of his reduced position, and he
11 was terminated effective June 28, 2006. Id. 02636-2637.²

12 38. On August 8, 2006, Oster’s counsel submitted to Standard the sworn statement
13 of Oster’s former supervisor at Radical, Rod Davison. AR 01444-1445. In that statement, Mr.
14 Davison indicates that Plaintiff started taking vacation time immediately “to disguise his
15 inability to physically cope with a regular work schedule ... in retrospect, I realize that Mr.
16 Oster pushed himself very hard to be successful during his first few weeks, but he was unable
17 to sustain such effort.” Id. 01444. Mr. Davidson further states that Oster was “unable to
18 concentrate on the tasks he was required to perform” and suffered from fatigue. Id. He
19 observes that “[o]n multiple occasions I found him asleep at his desk.” Id. Mr. Davidson
20 explains that, after a three-month probation period, Oster was demoted to the position of Senior
21 Programmer in April 2006; however, Oster’s work continued to be unsatisfactory, as it took
22 him “approximately one week to write a piece of code that should not have taken more than
23 four hours to compose.” Id.

24
25 ² In Oster’s Proposed Findings of Fact and Conclusions of Law, submitted in support of
26 his motion, Oster indicates, without reference to any supporting declaration, that he began
27 work at Nvidia Corporation on April 1, 2008 as a Technical Support employee. Dkt. 89 ¶ 59.
28 In addition, while Oster initially moved for payment of benefits from July 7, 2004 to the
present, Oster indicates in his proposed findings that he is seeking benefits from July 7, 2004 to
April 1, 2008. Due to this unexplained discrepancy, the Court requests further briefing from
the parties on this issue, as indicated below.

1 39. Moreover, Standard failed to follow its own claims manual by not investigating
2 whether Oster remained disabled after he started working for Radical. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 There is no
13 indication from the record that Standard followed these procedures, despite its acceptance of
14 Dr. McMullen's assertion Oster was not disabled because he was working again. AR 00645,
15 00669.

16 **H. DR. HORSTMAN'S REBUTTAL TO DR. MCMULLEN'S REPORT**

17 40. Standard provided Oster with the raw data underlying Dr. Mullen's report on
18 November 1, 2006, which was three months after Oster initially requested the data. Id. 01288,
19 01314, 02665, 01120-1257.

20 41. On December 18, 2006, Oster's counsel wrote Standard, indicating that Oster's
21 medical reviewer would need additional time preparing a response to Dr. McMullen's report.
22 Id. 02577-2578. Standard sent a letter to Oster the following day, asserting that Standard's
23 decision to deny benefits under the own occupation definition was appropriate. Id. 02581-
24 02585. That letter introduced a new reason for denying benefits, claiming that Oster did not
25 prove he suffered a loss of 20% of his predisability earnings, notwithstanding the income
26 documentation, including tax returns, that Oster's counsel provided. Id.

27 42. On February 14, 2007, Oster's counsel submitted to Standard a report from
28 neuropsychologist Dr. William R. Horstman, who reviewed Dr. McMullen's report. Id. 02261-
2338. Dr. Horstman opined that it was improper for Dr. McMullen to rely on the Dictionary of

1 Occupational Titles (“DOT”) description for Program Manager (which was last revised in
2 1991) provided by Standard’s vocational consultant, when Standard asked that consultant if
3 Oster could perform the job of a Project Director. Id. 02268-2269. Rather, according to Dr.
4 Horstman, Standard should have considered the more specific cognitive requirements of
5 Oster’s position. Id. 02268-2272.

6 43. Dr. Horstman disagreed with Dr. McMullen’s reliance on a study tracking the
7 cognitive effects of concussions in college football players, and noted that more recent and
8 comprehensive literature indicated that patients with mild brain injury had difficulty returning
9 to work due to cognitive deficits, including processing speed, even after a few years. Id.
10 02272-2277.

11 44. Dr. Horstman noted that neither Dr. McMullen nor Standard attempted to obtain
12 any medical documents dated after 2005, or to contact Oster’s treating physicians. Id. 02280.
13 02282, 02317. Dr. Horstman asserted that such procedures were a customary and normal
14 practice for any IME, and were mandated by the Specialist Guidelines for Forensic
15 Psychologists. Id. 02280. In response, Standard claims adjuster Christine Foster asserted that
16 there was “no point to getting updated records when claim [sic] already old.” Id. 02279.

17 45. Dr. Horstman criticized Dr. McMullen for relying on the computerized
18 interpretation of the Personality Assessment Inventory test, which Dr. Horstman asserted is
19 discouraged by the Standards for Education and Psychological Testing as potentially “grossly
20 misleading,” and which could lead to “faulty diagnostic and prognostic decisions, as well as
21 mislead the trier of fact in judicial and governmental settings.” Id. 02284. Dr. Horstman
22 further opined that Dr. McMullen’s refusal to administer the more detailed MMPI-2 test, which
23 had been administered to Oster previously, was suspect. Id. 02325, 2327.

24 46. Dr. Horstman criticized Dr. McMullen for failing to administer a test of divided
25 attention, in view of the fact that Dr. McMullen previously stated in his own publication that
26 the lack of such a test would lead an examiner to “erroneously conclude that there is no
27 evidence for neuropsychological impairment.” Id. 02285. Dr. Horstman noted that Dr.
28 McMullen asserted that he performed tests that were never described in the reported nor

1 included in the raw data provided. Id. 02287. Dr. Horstman asserted that Dr. McMullen also
2 overstated the amount of time he devoted to testing by claiming six hours of testing when he
3 only performed five hours. Id. 02313-2314.

4 47. Dr. Horstman criticized Dr. McMullen for relying on the Wisconsin Card
5 Sorting Test (WCST) to measure Oster's executive function, as Dr. Duffy had administered the
6 test previously, and Oster's prior knowledge of the test, made it of "no clinical utility and/or
7 reliability." Id. 02291. Dr. Horstman pointed out that Oster's performance on the test was
8 extremely low given Oster's high IQ and was evidence of cognitive decline. Id. 02293. Dr.
9 Horstman also asserted that Dr. McMullen's conclusion that Oster's did "very well" on these
10 tests was inaccurate. Id. 02293-2295.

11 48. Dr. Horstman observed that Dr. McMullen's measurement of Oster's percentile
12 ranking incorrectly failed to include years of education and age. Id. 02296. Dr. Horstman
13 asserted that, when correctly measured, Oster actually scored at the 2nd percentile on Digit-
14 Symbol Coding, which, according to Dr. Horstman, demonstrated a profound loss in Oster's
15 ability to multi-task (including visual scanning, sequencing, motor coordination and speed). Id.
16 02298. Dr. Horstman opined that Oster's errors in simple arithmetic portions of the exam for
17 someone of his high IQ and education demonstrated significant cognitive decline. Id. 02300-
18 2302.

19 49. Dr. Horstman criticized Dr. McMullen's attempt to blame Oster's decline in
20 processing speed solely on his use of Depakote as an assertion not supported by the literature.
21 Id. 02303-2304. Moreover, Dr. Horstman disagreed with Dr. McMullen's conclusion that it
22 was Oster's fault that he suffered a manic episode after being prescribed Effexor. Id. 02304-
23 2305. Dr. Horstman concluded that Dr. McMullen's report contained numerous errors,
24 including: "the sheer number of scoring errors, misrepresentation regarding tests administered,
25 attempts at denigrating [Oster's] psychiatrist's character and clinical ability." Id. 02336.
26 Furthermore, Dr. Horstman concluded that Dr. McMullen had laid no foundation for the
27 definition of either disability or impairment. Id.

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1 50. Four months after receiving Dr. Horstman’s report, Standard’s in-house
2 physician, Dr. Gwinnell, recommended to Standard that Dr. McMullen provide a response. Id.
3 02258. In its request to Dr. McMullen to provide a response, Standard recognized that it had
4 not previously asked Dr. McMullen to contact any of Oster’s treating physicians as part of
5 preparing his initial IME report, and indicated that “Dr. McMullen does not need to respond to
6 those assertions.” Id. 02226.

7 51. On October 16, 2007 – eight months after Standard received Dr. Horstman’s
8 report – Dr. McMullen submitted to Standard a response to Dr. Horstman’s critiques. Id.
9 02203-2210. Dr. McMullen indicated that two tests he previously had represented were
10 administered – the Ruff Figural Fluency Test and the Phrase Repetition Tests – were never
11 given, and that these tests were listed in his report due to a clerical error. Id. 02204. Dr.
12 McMullen also indicated that he had spent five hours testing Oster, rather than the six hours he
13 had previously reported, which he again contributed to a clerical error. Id. 02208.

14 **I. ADDITIONAL INFORMATION PROVIDED TO STANDARD DURING THE APPEAL PROCESS**

15 52. On October 5, 2006, Oster informed Standard that he was considered totally
16 disabled by the Social Security Administration since 2004, provided records of state disability
17 benefits received, and provided his 2003 through 2005 tax records. Id. 01314-1347.

18 53. On November 21, 2006, Oster disclosed to Standard employment records from
19 his employment with Radical. Id. 02597.

20 54. On March 29, 2007, Oster disclosed to Standard his 2006 Canadian tax returns.
21 Id. 02393-2394.

22 55. On March 29, 2007, Oster submitted to Standard the transcripts of his attendance
23 at the University of Santa Barbara Extension. Id. 02389-2391.

24 56. On April 9, 2007, Oster submitted an “Activities of Daily Living” form to
25 Standard in relation to his claim. Id. 02362-2368. Oster reported that he continued to suffer
26 from fatigue and pain at the base of skull and in his neck and back. Id. 02363, 02367-2368.
27 Oster reported that he was taking one class. Id. 02367. Oster also stated that his fiancée was
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1 taking care of most the activities of daily living for him, including financial functions, because
2 his condition made him unable to handle them. Id. 02368.

3 **J. THE FINAL DENIAL**

4 57. On August 5, 2008, Standard issued a final denial of Oster’s claim. Id. 01588 –
5 01600. Standard admitted that it had incorrectly denied Oster benefits from July 7, 2004 to
6 May 31, 2005, but asserted that it was only obligated to pay Oster the minimum benefit amount
7 of \$656.25 per month because Oster had failed to provide “satisfactory documentation of what
8 [his] income from work activity was during that period.” Id. 01589. Standard further asserted
9 that Oster’s attempt to return to work at Radical meant he was fully recovered and denied
10 benefits after May 31, 2005. Id. 01444-1445, 01593-1594. Moreover, Standard stated that
11 Oster has failed to provided financial information or “medical documentation of treatment [he]
12 may have received after May 2005 for any condition that was severe enough to preclude him
13 from working.” Id. 01593. Standard also asserted that Plaintiff was not disabled because
14 website sources indicated that he participated in “Trek Races” in May 2006. Id. 01594.

15 58. In its August 5, 2008 denial letter, Standard asserted, for the first time, that the
16 examination findings of Dr. Floyd David Fortuin (a physician hired by the opposing party in
17 Oster’s personal injury lawsuit related to the automobile accident) conducted in February 22,
18 2005 supported a finding that Oster was no longer disabled. Id. 01597, 02339-2347.

19 **CONCLUSIONS OF LAW**

20 **A. LEGAL STANDARD**

21 59. Federal Rule of Civil Procedure 52(a)(1) provides that “[i]n an action tried on
22 the facts without a jury..., the court must find the facts specially and state its conclusions of law
23 separately.” In a Rule 52 motion, as opposed to a Rule 56 motion for summary judgment, the
24 Court does not determine whether there is an issue of material fact, but actually decides
25 whether the plaintiff is disabled under the policy. See Kearney v. Standard Ins. Co., 175 F.3d
26 1084, 1095 (9th Cir. 1999). The Court is to “evaluate the persuasiveness of conflicting
27 testimony,” and make findings of fact. Id. This is considered a “bench trial on the record,”
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1 which may “consist[] of no more than the trial judge rereading [the administrative record].”

2 Id.

3 60. In an ERISA action, the plaintiff carries the burden of showing, by a preponderance
4 of the evidence, that he was disabled under the terms of the Plan during the claim period. See
5 Sabatino v. Liberty Life Assurance Co. of Boston, 286 F.Supp.2d 1222, 1232 (N.D. Cal. 2003);
6 Finley v. Hartford Life & Acc. Ins. Co., 2007 WL 4374417, at *7 (N.D.Cal. 2007).

7 61. In this case, the Plan grants Standard discretion in considering disability claims.
8 However, Standard also funds the benefits provided under the Plan and makes the final
9 decision on appeal. Standard, therefore, has a structural conflict of interest in its administration
10 of the Plan. Montour v. Hartford Life & Accident Ins. Co., 588 F.3d 623, 629-30 (9th Cir.
11 2009). Accordingly, this Court “must take into account the administrator’s conflict of interest
12 as a factor in the analysis.” Id. at 630.³

13 62. “More particularly, the court must consider numerous case-specific factors,
14 including the administrator’s conflict of interest, and reach a decision as to whether discretion
15 has been abused by weighing and balancing those factors together.” Id.

16 63. “A court may weigh a conflict more heavily if, for example, the administrator
17 provides inconsistent reasons for denial; fails adequately to investigate a claim or ask the
18 plaintiff for necessary evidence; fails to credit a claimant’s reliable evidence; or has repeatedly
19 denied benefits to deserving participants by interpreting plan terms incorrectly or by making
20 decisions against the weight of evidence in the record.” Abatie, 458 F.3d at 968 -969 (internal
21 citations omitted).

22 64. As explained by the Ninth Circuit in Montour:

23 _____
24 ³ Oster filed Objections to and Requests to Strike Evidence Submitted by Defendants in
25 Support of Defendants’ Response to Plaintiff’s Rule 52 Motion for Judgment. Dkt. 63. Oster
26 objects to the Declaration of Ronald Fraback, M.D. (Dkt. 49) and the Declaration of Micah
27 Rubenstein (Dkt. 50), submitted by Defendants in support of their response to Oster’s Rule 52
28 motion, on the ground that Defendants failed to disclose these individuals as witnesses under
Federal Rule of Civil Procedure 26(a)(1)(A). In response, Defendants argue that the omission
was harmless and substantially justified because they offered a Rule 30(b)(6) witness on the
issue of conflict of interest, which is the issue addressed by these declarants. The Court agrees
and DENIES Oster’s request to strike.

1 Under this rubric, the extent to which a conflict of interest appears to have
2 motivated an administrator's decision is one among potentially many relevant
3 factors that must be considered. Other factors that frequently arise in the ERISA
4 context include the quality and quantity of the medical evidence, whether the
5 plan administrator subjected the claimant to an in-person medical evaluation or
6 relied instead on a paper review of the claimant's existing medical records,
7 whether the administrator provided its independent experts "with all of the
8 relevant evidence[,]” and whether the administrator considered a contrary SSA
9 disability determination, if any.

10 588 F.3d at 630.

11 65. “The weight the court assigns to the conflict factor depends on the facts and
12 circumstances of each particular case. For example, ... this factor should prove more
13 important (perhaps of great importance) where circumstances suggest a higher likelihood that it
14 affected the benefits decision, including, but not limited to, cases where an insurance company
15 administrator has a history of biased claims administration.” *Id.* at 630-631 (quoting *Abatie*,
16 458 F.3d at 967 (holding that in weighing a conflict of interest, the court's discretionary review
17 must be “informed by the nature, extent and effect” that conflict may have had “on the
18 decision-making process”)).

19 66. If a conflict of interest exists, “abuse of discretion review applies” and “that
20 conflict must be weighed as a factor in determining whether there is an abuse of discretion.”
21 *Id.* at 631. “If those facts and circumstances indicate the conflict may have tainted the entire
22 administrative decisionmaking process, the court should review the administrator's stated bases
23 for its decision with enhanced skepticism: this is functionally equivalent to assigning greater
24 weight to the conflict of interest as a factor in the overall analysis of whether an abuse of
25 discretion occurred.” *Id.*

26 **B. ABUSE OF DISCRETION ANALYSIS**

27 67. Applying those principles here, Standard's reliance on Dr. Dickerman, Dr.
28 Toenniessen, and United Review Services to deny Oster's claim and maintain its denial
warrants a high level of skepticism. See e.g. *Caplan v. CNA Fin. Corp.*, 544 F. Supp. 2d 984,
991-92 (N.D. Cal. 2008) (finding Hartford demonstrated a strong conflict of interest by relying

1 on a third party vendor UDC and peer medical reviewer “that Hartford knows benefits
2 financially from doing repeat business with it”).

3 68. In this case, Dr. Dickerman and Dr. Toenniessen benefited financially from
4 Standard’s repeat business. Similarly, it is clear that United Review Services was repeatedly
5 rewarded financially by Standard. This evidence demonstrates that Standard failed to use a
6 “truly independent medical examiner or a neutral, independent review,” as required by Abatie.
7 Abatie, 458 F.3d at 969 n.7. Therefore, Standard’s denial should be viewed with the high
8 skepticism.

9 69. In addition, Standard improperly discounted the evidence submitted with Oster’s
10 appeal regarding his disability, demonstrating an abuse of discretion. Black & Decker
11 Disability Plan v. Nord, 538 U.S. 822 (2003) (refusal to credit reliable evidence constituted
12 abuse of discretion). The ERISA regulations require that an administrator take “into account
13 all comments, documents, documents, records, and other information submitted by the claimant
14 relating to the claim, without regard to whether such information was submitted or considered
15 in the initial benefit determination.” 29 C.F.R. § 2560.503-1(h)(2)(iv).

16 70. The assertions of Dr. McMullen and Standard that Oster could not receive
17 disability benefits because he attempted employment at Radical further shows an abuse of
18 discretion, particularly in view information that Oster provided to Standard regarding his
19 demotion and ultimate termination. Courts have held that an insurer cannot refuse or deny
20 disability benefits if a claimant is working, but remains disabled. Hawkins v. First Union Corp.
21 Long-Term Disability Plan, 326 F.3d 914 (7th Cir. 2003) (“A disabled person should not be
22 punished for heroic efforts to work by being held to have forfeited his entitlement to disability
23 benefits should he stop working.”); Seitz v. Metropolitan Life Ins. Co., 433 F.3d 647 (8th Cir.
24 2006) (“adopting MetLife’s position would unfairly punish individuals who test their
25 limitations and attempt to keep working before seeking benefits.”).

26 71. Moreover, Standard’s failure to consider whether Oster remained disabled from
27 his own occupation when he started to work for Radical is contrary to its own claims manual
28 procedures. In Friedrich v. Intel Corp., 181 F.3d 1105 (9th Cir. 1999), the Ninth Circuit held

1 that an insurer's refusal to follow its own policies and procedures demonstrated the extent of
2 the insurer's conflict of interest. Id. at 1110. As discussed above, Standard's own claim
3 manual makes clear that if a claimant returns to work, Standard is still required to investigate
4 whether the claimant is disabled from performing the duties of his own occupation with
5 reasonable continuity. See e.g. Dinh v. Standard Ins. Co, 2007 WL 2298319 at *8 (finding that
6 Standard abused its discretion by asserting the claimant was not disabled because she could
7 perform sedentary to light occupation, when it made no attempt to recognize the cognitive
8 demands of the claimant's position as a professional executive recruiter). However, there is no
9 indication that Standard considered the evidence from Oster's failed employment at Radical as
10 probative evidence of his continued disability.

11 72. Furthermore, Standard abused its discretion by ignoring the raw data of Dr.
12 McMullen's IME that showed that Oster had cognitive deficits that precluded his ability to
13 perform his own occupation with reasonable continuity. Specifically, Dr. McMullen and
14 Standard ignored the results in the raw data that demonstrated that Oster suffered significant
15 cognitive deficits in reading recognition, spelling and math achievement, attention and
16 concentration and rapid processing speed. See AR 00657 (low achievement in basic math
17 despite engineering background and high IQ); 00664 (weaker processing speed and working
18 memory than noted in May 2005). Dr. Horstman's review of the IME report made clear the
19 extent of Oster's cognitive deficits, as he revealed Dr. McMullen's interpretation of the raw
20 data was flawed. Id. 02297-2303. Standard's failure to acknowledge its own evidence
21 supporting Oster's continued disability was an abuse of discretion.

22 73. Additionally, Standard failed to provided a "full and fair review" of Oster's
23 claim by adding rationales for its denial over a three year period without providing Oster an
24 opportunity to respond. Under ERISA, an administrator must provide a plan participant a "full
25 and fair review" of a participant's claim. 29 U.S.C. §1133(2). In Abatie, the court held that
26 introducing a new rationale for the first time in a final decision violated the "full and fair
27 review" requirement:
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1 When an administrator tacks on a new reason for denying benefits in a final
2 rationale for denial at the administrative level, the administrator violates
3 ERISA's procedures. . . . Moreover a review of the reasons provided by the
4 administrator allows for a full and fair review of the denial decision, also
5 required under ERISA. Accordingly, an administrator that adds, in its final
6 decision, a new reason for denial, a maneuver that has the effect of insulating the
7 rationale from review, contravenes the purpose of ERISA. This procedural
8 violation must be weighed by the district court in deciding whether [the
9 administrator] abused its discretion.

10 458 F.3d at 974 (citations omitted).

11 74. Further evidence that Standard failed to engage in a full and fair review of
12 Oster's claim includes its refusal to provide the raw data to Oster's counsel until six months
13 after the IME has been conducted. In addition, none of Standard's physician reviewers ever
14 contacted or spoke with Oster's treating physicians to ascertain the current state of his
15 condition. Moreover, Standard made no attempt to obtain Oster's medical records from 2006
16 onward, nor did it make any attempt to contact his physicians after 2006, even though its
17 decision was not rendered until two years later. Finally, Standard's decision in August 2008
18 (four years after Oster initially filed his claim) to only pay the minimum benefit from July 7,
19 2004 to May 31, 2005 is further compelling evidence of the bias that Standard demonstrated
20 during the claims process.

21 75. Standard also failed to conduct a full and fair review of Oster's claim by relying
22 on Dr. Dickerman during both the initial denial and the appeal process. ERISA regulations
23 provide:

24 Appeal of adverse benefit determinations ... the claims procedures of a plan will
25 not be deemed to provide a claimant with a reasonable opportunity for a full and
26 fair review of a claim and adverse benefit determination unless the claims
27 procedures ... [p]rovide that the health care professional engaged for purposes of
28 a consultation under paragraph (h)(3)(iii) of this section shall be an individual
who is neither an individual who was consulted in connection with the adverse
benefit determination that is the subject of the appeal, nor the subordinate of any
such individual.

29 C.F.R. § 2560.503-1(h)(3)(v)(4)(h) (emphasis added).

1 76. In general, Standard did not comply with its obligation as an ERISA fiduciary to
2 adhere to “higher-than-marketplace quality standards on insurers” or “discharge [its] duties” in
3 respect to discretionary claims processing “solely in the interests” of Oster, its claimant. See
4 Metropolitan Life Ins. Co. v. Glenn, 128 S.Ct. 2343, 2345 (2008) (citing 29 U.S.C. §
5 1104(a)(1)). Instead, its treatment of Oster as an adversary during the claims process casts
6 doubt on the credibility of its decision on appeal.

7 **CONCLUSION**

8 For the foregoing reasons,

9 IT IS HEREBY ORDERED THAT:

- 10 1. Standard’s claim decision is REVERSED.
- 11 2. The parties shall meet and confer in an effort to reach a stipulation regarding the
12 amount of benefits owed under the Policy, including consideration of any applicable offsets.
- 13 3. By no later than October 29, 2010, the parties either shall submit such a
14 stipulation, or shall each submit an additional brief, not to exceed five (5) pages (excluding any
15 supporting declaration(s)), addressing the amount of benefits owed under the Policy.
- 16 4. Defendants’ Administrative Motion to File Portions of a Document Under Seal
17 (Dkt. 45) and Plaintiff’s Administrative Motion to File Exhibit E to the Declaration of Brian H.
18 Kim and Plaintiff’s Amended Rule 52 Motion for Judgment Under Seal (Dkt. 57) are
19 GRANTED.
- 20 5. Because this Order may contain information filed under seal by the parties, this
21 Order shall remain under seal pending further Order of the Court. By no later than October 29,
22 2010, the parties shall jointly advise the Court which facts, if any, they contend should be
23 redacted from the public version of this ruling. To the extent any party seeks redaction of any
24 portion of the Court’s ruling, such party shall provide the Court with the legal authority for
25 such request and a proposed redacted order for public disclosure.

26 6. This Order terminates Dkts. 29, 45, 66, 57, and 73.

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IT IS SO ORDERED.

Dated: January 3, 2011



SAUNDRA BROWN ARMSTRONG
United States District Judge