

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

3  
4        DAVID DO,  
5                                    Plaintiff,  
6                                    v.  
7        METROPOLITAN LIFE INSURANCE  
8        COMPANY,  
9                                    Defendant.

Case No. 16-cv-05097-CW

ORDER GRANTING PLAINTIFF'S  
MOTION FOR JUDGMENT AND  
DENYING DEFENDANT'S MOTION  
FOR JUDGMENT

(Dkt. Nos. 33, 34)

10  
11            In this case, Plaintiff David Do asserts that he is entitled  
12 to long-term disability insurance benefits under the IVZ, Inc.  
13 Disability Plan pursuant to the Employee Retirement Income  
14 Security Act of 1974, 29 U.S.C. § 1332(a)(1)(B) (ERISA) from  
15 Defendant Metropolitan Life Insurance Company, the claim  
16 administrator for the Plan. Plaintiff now moves for judgment  
17 pursuant to Federal Rule of Civil Procedure 52; Defendant opposes  
18 Plaintiff's motion and cross-moves for judgment. On November 28,  
19 2017, the parties appeared for oral argument. Having considered  
20 the papers and the arguments of counsel, the Court GRANTS  
21 Plaintiff's motion and DENIES Defendant's motion.

22                                    BACKGROUND

23        I.     Plaintiff's background

24            Plaintiff is a thirty-seven year old man who was employed as  
25 an Analyst-Desktop Services for IVZ, Inc. Plaintiff's duties  
26 included resolving promptly and effectively "all support calls  
27 relating to desktop software/hardware, installation, and  
28 maintenance." AR 2863. Plaintiff's position required him to

1 lift and carry up to seventy-five pounds on an occasional basis  
2 throughout the workday, use his hands repetitively in all planes  
3 of motion (grasping, fine manipulation, pushing/pulling), and  
4 reach occasionally above and below shoulder level. AR 2862.

5 II. The Plan

6 While Plaintiff was employed at IVZ, Inc., he was insured  
7 for long-term disability (LTD) benefits through MetLife-issued  
8 Group Insurance Policy No. 116385-1-G (the Plan). IVZ, Inc.  
9 served as the Plan Administrator and Sponsor of the Plan. AR 64.  
10 MetLife served as the Plan's claim administrator.

11 Under the Plan, Plaintiff is eligible for benefits if he can  
12 establish that he is disabled. The Plan defines "disabled" and  
13 "disability" as follows:

14 Disabled or Disability means that, due to Sickness or  
15 as a direct result of accidental injury:

- 16 • You are receiving Appropriate Care and Treatment  
and complying with the requirements of such  
17 treatment; and
- 18 • You are unable to earn more than 80% of your  
Predisability Earnings for any employer in Your  
19 Local Economy at any gainful occupation for which  
You are reasonably qualified taking into account  
Your training, education and experience.

20 AR 28.

21 The Plan also describes the duration of benefits:

22 Your Disability benefit payments will end on the  
23 earliest of:

- 24 • the end of the Maximum Benefit Period;
- 25 • the date benefits end as specified in the section  
entitled LIMITED DISABILITY BENEFITS;
- 26 • the date You are no longer Disabled;  
[. . .]
- 27 • the date You fail to provide required Proof of  
continuing Disability.

28 AR 47.

1           The benefits period is limited to twenty-four months if  
2 the disability is due to "Neuromuscular, Musculoskeletal or  
3 Soft Tissue Disorder" (NMS) "including, but not limited to,  
4 any disease or disorder of the spine or extremities and  
5 their surrounding soft tissue; including sprains and strains  
6 of joints and adjacent muscles." AR 50-51. An exception to  
7 this limitation is where there is "objective evidence  
8 of . . . Radiculopathies," which is defined as a "disease of  
9 the peripheral nerve roots supported by objective clinical  
10 findings of nerve pathology." AR 50-51.

11           III. Plaintiff's disability

12           In February 2013, Plaintiff injured his neck, back and  
13 shoulders while performing his job duties, such as moving  
14 computers, monitors, servers, and other equipment. AR 2541,  
15 2883. He stopped work and applied for and received workers'  
16 compensation and short term disability benefits. AR 230,  
17 2883, 2549.

18           Plaintiff received physical therapy treatment from Dr.  
19 Donald Hammon. In March 2013, Dr. Hammon submitted an  
20 Attending Physician Statement to Defendant on Plaintiff's  
21 behalf, stating that Plaintiff suffered from disc injury and  
22 lumbar strain and sprain. AR 2380. Dr. Hammon further  
23 noted that Plaintiff reported pain of an intermittent and  
24 radicular type. AR 2380. He advised that Plaintiff could  
25 perform some job duties, would be restricted in prolonged  
26 sitting, standing, bending, and lifting, but could improve  
27 sitting and standing within twelve weeks. AR 2380-81.

28           On April 3, 2013 and May 24, 2013, Plaintiff received

1 MRIs, which showed degenerative disc disease and a number of  
2 other conditions. AR 2110-12, 2388-89.

3 On April 30, 2013, Dr. Edward Sun, an orthopedic  
4 surgeon, examined Plaintiff and reviewed the April 3, 2013  
5 MRI. AR 2546. Dr. Sun concluded that Plaintiff did not  
6 "exhibit significant lumbar radiculopathy or any  
7 neurological deficit on examination." AR 2546.

8 IV. Defendant's grant of STD and LTD benefits

9 On September 12, 2013, Defendant approved Plaintiff's  
10 claim for short-term disability (STD) benefits from March  
11 11, 2013 through September 2, 2013. The claim notes stated  
12 that Plaintiff was not able to perform essential functions  
13 of his job due to "continued cervical, thoracic and lumbar  
14 pain (level 8/10) and stiffness, markedly limited ROM,  
15 positive MRI, disc desiccation and annualr [sic] tear from  
16 L3-S1, [. . .] insufficient soft tissue mobility and  
17 strength, abnormal posture with left elevated shoulder and  
18 inability to sit for longer than 30 min. . ." AR 108, 2553.

19 Around the time Plaintiff's STD benefits were paid in  
20 full, Plaintiff sought LTD benefits under the Plan. AR 112,  
21 114-17, 1718-28. Plaintiff's claim form noted that he  
22 experienced "piercing pain in lower back, extremely tense  
23 and throbbing in upper back/neck; difficult bending and  
24 lifting, can't sit/stand for long." AR 1722. On August 30,  
25 2013, Dr. Hammon submitted his Attending Physician Statement  
26 in support of Plaintiff's claim, which diagnosed Plaintiff  
27 with "lumbar disk [sic] disease and radiculopathy," and  
28 noted that Plaintiff reported "moderate to severe lower back

1 pain and radicular type symptoms." AR 1703. Dr. Hammon  
2 further prescribed lifting a maximum of ten pounds  
3 occasionally; refraining from lifting a phone for prolonged  
4 periods; refraining from stooping or twisting; and only  
5 sitting, standing and walking for limited periods  
6 intermittently. AR 1703-04.

7 Plaintiff also submitted Division of Workers'  
8 Compensation physician's progress reports from Physician's  
9 Assistant (PA) Kiran Aulakh, which indicated reduced range  
10 of motion and tenderness in the neck and lumbar region. AR  
11 1875-82. In a note dated September 16, 2013, PA Aulakh  
12 noted that Plaintiff stated that he experienced numbness in  
13 his right leg, which worsened with prolonged sitting and  
14 walking, along with numbness and tingling in his right arm.  
15 AR 2563. PA Aulakh diagnosed cervical radiculopathy, among  
16 other things. AR 2563.

17 Defendant sent Plaintiff to undergo an "Independent  
18 Medical Examination" (IME) on November 18, 2013 with Dr. L.  
19 Neena Madireddi through its third-party vendor, Medical  
20 Consultants Network. AR 1779-1784. Dr. Madireddi conducted  
21 a clinical examination and made a number of findings. AR  
22 1783. Dr. Madireddi diagnosed Plaintiff with chronic  
23 cervical and lumbar strain; lumbar spondylosis; disc  
24 desiccation, annular tear L3 to S1; and possible cervical  
25 spondylosis. AR 1783. Nevertheless, Dr. Madireddi  
26 concluded that Plaintiff could work full-time in a light-  
27 capacity job according to the Dictionary of Occupational  
28 Titles, noting: "He could lift and carry at least 30 pounds

1 occasionally, 15 pounds frequently, and can occasionally  
2 stoop, crouch, crawl, and reach overhead. There are no  
3 restrictions on pushing, pulling, handling, finger, or  
4 feeling." AR 1784.

5 Defendant requested a vocational review to determine if  
6 there were gainful occupations meeting Dr. Madireddi's  
7 findings on job capacity. On December 3, 2013, Defendant's  
8 vocational reviewer acknowledged that, in light of Dr.  
9 Madireddi's restrictions, there were no gainful alternative  
10 occupations that Plaintiff could perform at that time. AR  
11 230. Accordingly, on December 6, 2013, Defendant approved  
12 LTD benefits for Plaintiff effective September 7, 2013. AR  
13 1794-97. The letter approving LTD benefits informed  
14 Plaintiff that, under the plan, for a disability due to a  
15 "Neuromuscular, Musculoskeletal or Soft Tissue Disorder," or  
16 a "disease or disorder of the spine or extremities and their  
17 surrounding soft tissue, including sprains and strains of  
18 joints and adjacent muscles," his maximum benefit duration  
19 would be twenty-four months, unless he could show objective  
20 evidence of a number of exceptions, such as  
21 "Radiculopathies." AR 1794-95. Because Plaintiff's  
22 disability fell into the NMS limitation, the maximum benefit  
23 period would end on September 6, 2015. AR 1794-95. The  
24 letter advised Plaintiff that "benefits may continue after  
25 September 6, 2015 if [he] continue[d] to satisfy the  
26 definition of Disability due to other non-limited medical  
27 condition(s) and other plan requirements." AR 1795. But  
28 the letter did not explain what evidence would be required

1 to make this showing.

2 A. Ongoing review of Plaintiff's LTD benefits claim  
3 Plaintiff submitted additional information to show  
4 continued disability and that he was not subject to the  
5 twenty-four month limitation applicable to NMS.

6 Plaintiff provided nerve conduction velocity (NCV) and  
7 electromyography (EMG) studies of his extremities conducted  
8 by Dr. Scott Standage on November 23, 2013, which showed  
9 results consistent with right-sided lumbar radiculopathy.  
10 AR 1884, 1891.

11 Plaintiff also provided PA Aulakh's office notes dated  
12 February 26, 2014, February 12, 2014, January 10, 2014, and  
13 December 10, 2014, in which he noted Plaintiff experienced  
14 decreased range of motion of the cervical spine and lumbar  
15 spine. AR 1875-81. PA Aulakh diagnosed Plaintiff with  
16 cervical radiculopathy and lumbar radiculitis. AR 1875-81.

17 Plaintiff also provided a February 6, 2014 orthopedic  
18 permanent disability evaluation report that was written by  
19 Dr. Joel Renbaum as part of the workers' compensation  
20 proceedings. AR 2162-69. Dr. Renbaum conducted a physical  
21 examination on January 21, 2014. AR 2165-66. Dr. Renbaum  
22 stated that Plaintiff had multilevel degenerative disc  
23 disease of the lumbar spine "with radicular pain" and had  
24 multilevel degenerative disc disease of the cervical spine  
25 with canal stenosis. AR 2887. He concluded that Plaintiff  
26 was incapable of performing his customary work activities  
27 based on the bending, reaching, crawling, and lifting  
28 requirements of his job, and stated that he was permanent

1 and stationary. AR 2888.

2 On February 26, 2014, Dr. Teresita Degamo, an internist  
3 who was Plaintiff's treating provider, faxed Defendant  
4 records to support Plaintiff's continued disability,  
5 including: an attending physician form, which indicated  
6 Plaintiff had neck and back pain with radicular symptoms;  
7 Dr. Standage's November 23, 2013 report following an EMG;  
8 and office notes dated February 26, 2014, February 12, 2014,  
9 January 10, 2014, and December 10, 2014, with clinical  
10 findings and diagnoses of cervical radiculopathy and lumbar  
11 radiculitis. AR 1867-1881.

12 Defendant submitted the foregoing information to Dr.  
13 Madireddi for an Addendum. Without providing any additional  
14 analysis, Dr. Madireddi stood by her original finding that  
15 Plaintiff could perform full-time, light capacity work. AR  
16 1898-1901.

17 In July 2014, Dr. Degamo provided a workers'  
18 compensation physician's progress report of a physical exam  
19 which indicated low-back pain without radiation to the lower  
20 extremities. AR 2247.

21 On January 16, 2015, Defendant reminded Plaintiff that  
22 he was subject to the Plan's NMS limitation and that  
23 Defendant would continue to review his claim to determine if  
24 he was subject to an exception to the limitation. AR 2017-  
25 18.

26 Plaintiff subsequently provided a February 13, 2015  
27 Transfer of Care Report from Dr. Brian Mitchell. AR 2075-  
28 79. Dr. Mitchell conducted a physical exam and reviewed the



1 May 24, 2013 MRI; April 3, 2013 MRI; and November 23, 2013  
2 EMG of bilateral lower extremities. AR 2077-78. He  
3 diagnosed Plaintiff with several conditions including  
4 cervical radiculopathy and lumbar radiculitis. AR 2078,  
5 2080, 2083. He advised that Plaintiff was limited to four  
6 hours sitting, standing, and walking in an eight hour day  
7 and was limited to lifting up to twenty pounds a day. AR  
8 2073.

9 On March 25, 2015, Defendant commissioned one of its Senior  
10 Medical Directors, Dr. Joseph Monkofsky, Jr., to provide a file  
11 review of the available medical record. AR 2138. He noted that  
12 the 2013 MRI was consistent with a right-side L5 radiculopathy.  
13 AR 2138. But he also stated, "There was no convincing clinical  
14 evidence of significant and impairing radiculopathy here despite  
15 the previous diagnostics largely due to the continuing nature of  
16 the complaints and lack of exam evidence to support." AR 2138.  
17 He also noted, "It remains unclear why updated diagnostic imaging  
18 and further diagnostics have not been done when the claimant has  
19 been out of work for so long." AR 2139. He concluded, "Some  
20 limitations still appear to be indicated despite the unimpressive  
21 clinical findings and old imaging/diagnostic studies being relied  
22 on." AR 2139.

23 On April 24, 2015, Defendant's vocational consultant  
24 provided an updated vocational report that concluded again that  
25 there were no alternative occupations meeting the gainful wage  
26 requirement at that time. AR 702-07.

27 B. Defendant's termination of benefits  
28

1 Defendant reviewed all of this information and informed  
2 Plaintiff by letter dated August 25, 2015 that it had determined  
3 he would no longer be considered disabled under the Plan after  
4 September 6, 2015 because there was no showing of radiculopathy  
5 as defined by the Plan. AR 2337-39. The letter quoted from Dr.  
6 Monkofsky's paper review, stating that "[u]pdated diagnostic  
7 imaging and further diagnostics have not been done" and noting  
8 that there was a "lack of exam evidence." AR 2238.

9 C. Plaintiff's appeal

10 On appeal of his claim, Plaintiff, through counsel,  
11 provided updated medical evidence. AR 2620. He provided a  
12 February 10, 2016 Electronic Consultation by Dr. Standage,  
13 who conducted nerve conduction studies and EMGs and noted  
14 results consistent with bilateral lumbar radiculopathy. AR  
15 899, 2625-2627. Plaintiff additionally provided a March 1,  
16 2016 MRI showing canal and nerve passageway narrowing. AR  
17 902. Plaintiff also provided a Transfer of Care examination  
18 report from Dr. April Mancuso Reynolds, dated March 14,  
19 2016, following a comprehensive clinical examination. AR  
20 2632-2639. Dr. Reynolds reported a positive straight leg  
21 test bilaterally, and a decrease in sensation in the left  
22 upper and right lower extremities, among other things. AR  
23 2632-2639. Dr. Reynolds diagnosed Plaintiff with cervical  
24 radiculitis and bilateral lumbar radiculopathy. AR 2638.

25 During the appeal, Defendant sought an independent  
26 physician consultation from Dr. Malcolm McPhee, board-  
27 certified in Physical Medicine and Rehabilitation. Dr.  
28 McPhee reviewed the medical records and issued a report,

1 dated June 20, 2016, summarizing the medical evidence,  
2 including Dr. Reynolds's report. AR 916-18. He opined:  
3 "Radiculopathy was considered but clinical exam revealed no  
4 focal findings in a nerve root pattern." AR 920. He  
5 further noted that a "repeat electrodiagnostic study was not  
6 done." AR 920.

7 His report was sent to Plaintiff's counsel on June 22,  
8 2016. In a letter dated June 23, 2016, Plaintiff's counsel  
9 responded that the reviewer had failed to consider all of  
10 the evidence included with the appeal because Plaintiff had  
11 provided updated electrodiagnostic tests and Dr. Reynolds's  
12 examination report from 2016. AR 895-96.

13 On July 26, 2016, Dr. McPhee provided an addendum to  
14 his report, acknowledging review of the additional evidence  
15 and addressing it in detail. AR 870-75. With respect to  
16 the February 10, 2016 nerve conduction studies and EMGs  
17 conducted by Dr. Standage, Dr. McPhee noted that "the  
18 lumbosacral electrodiagnostic studies showed some  
19 electrophysiological changes that were not inconsistent with  
20 radiculopathy," but dismissed it because the study "in and  
21 of itself is not diagnostic of radiculopathy, with clinical  
22 correlation still required." AR 887. Dr. McPhee concluded  
23 the same with respect to the January 2016 MRI, stating that  
24 the results showed Plaintiff had conditions that "could  
25 contribute to radicular symptoms on the left, but clinical  
26 correlation is required." AR 887. He further stated:  
27 "Clinical correlation should consist of reported symptoms in  
28 a nerve root distribution, with provocation and nature of

1 the symptoms consistent with a radiculopathy . . . in  
2 addition to exam findings in a nerve root distribution with  
3 some consistency of the involved level based on specific  
4 sensory exam findings, muscle stretch reflexes and strength  
5 on manual muscle testing of multiple muscles innervated by  
6 the same nerve roots." AR 887. Dr. McPhee concluded that,  
7 although the MRI indicated possible nerve root irritation  
8 and the EMG was consistent with radiculopathy, "the file  
9 lacks specific clinical correlation of symptoms and specific  
10 findings on neurological exam." AR 887. Dr. McPhee  
11 recommended that "it may be helpful to obtain an IME with  
12 detailed neuromuscular exam to determine if there is  
13 clinical correlation for a radiculopathy." AR 888.

14 On August 1, 2016, Defendant sent a letter to Plaintiff  
15 upholding its original adverse determination because "there  
16 was a lack of clinical examination findings" to support  
17 radiculopathy. AR 860. Defendant did not order an IME as  
18 recommended by Dr. McPhee.

19 On September 2, 2016, Plaintiff filed suit in this  
20 Court under 29 U.S.C. § 1132(a)(1)(B).

21 LEGAL STANDARD

22 The court reviews de novo whether the plan administrator  
23 correctly or incorrectly denied benefits. Opeta v. Nw. Airlines  
24 Pension Plan for Contract Employees, 484 F.3d 1211, 1217 (9th  
25 Cir. 2007). In most cases, the court bases its review solely on  
26 the evidence in the administrative record. Id. The plaintiff  
27 bears the burden of proving that he is entitled to benefits under  
28 the Plan. Muniz v. Amec Const. Mgmt., Inc., 623 F.3d 1290, 1294

1 (9th Cir. 2010). "In reviewing the administrative record, the  
2 Court evaluates the persuasiveness of each party's case, which  
3 necessarily entails making reasonable inferences where  
4 appropriate." Schramm v. CNA Fin. Corp. Insured Grp. Ben.  
5 Program, 718 F. Supp. 2d 1151, 1162 (N.D. Cal. 2010).

6 DISCUSSION

7 The parties agree that Plaintiff demonstrated that he was  
8 disabled as defined by the Plan. The central issue in this case  
9 is whether the radiculopathy exemption to the NMS limitation  
10 applies.

11 Plaintiff argues that Defendant bears the burden of  
12 establishing the NMS limitation applies; Defendant disagrees.  
13 Plaintiff cites a number of out-of-circuit cases in support of  
14 his contention that the insurer bears the burden of showing that  
15 an exclusion from coverage applies. See Okuno v. Reliance  
16 Standard Life Ins. Co., 836 F.3d 600, 609 (6th Cir. 2016)  
17 (holding that the insurer "bears the burden to show that the  
18 exclusion on which it based denial of benefits, the Mental and  
19 Nervous Disorder Limitation, applies in this case"); Owens v.  
20 Rollins, Inc., 2010 WL 3843765, at \*2 (E.D. Tenn. Sept. 27, 2010)  
21 (holding that the insurer bears the burden of proving the  
22 limitation on benefits, which is a coverage exclusion and  
23 affirmative defense to coverage); Deal v. Prudential Ins. Co. of  
24 Am., 263 F. Supp. 2d 1138, 1143 n.2 (N.D. Ill. 2003) ("The burden  
25 of proving that a claim falls within an exclusion rests squarely  
26 on the insurer.").

27 Plaintiff acknowledges Hoffmann v. Life Ins. Co. of N. Am.,  
28 which addresses facts similar to the present situation. 2014 WL

1 7525482 (C.D. Cal. Dec. 29, 2014), aff'd, 669 F. App'x 399 (9th  
2 Cir. 2016). There, the district court held that a two-year  
3 mental illness limitation on coverage was not an exclusion from  
4 coverage because the insurer was still required to pay benefits  
5 for two years. Id. at \*5. The claimant, not the insurer, bears  
6 the burden of showing that the two-year mental illness limitation  
7 does not apply. Id. The Ninth Circuit affirmed the decision,  
8 stating that the "district court did not err in placing the  
9 burden on [the claimant] to show that he has Bipolar II," an  
10 "exemption" from the mental illness limitation. Hoffmann v. Life  
11 Ins. Co. of N. Am., 669 F. App'x 399, 400 (9th Cir. 2016). The  
12 Ninth Circuit further explained that, even if the two-year  
13 limitation was an exclusion, the insurer "met that burden by  
14 demonstrating that [the claimant] is disabled due to a mental  
15 illness." Id. "The real issue is whether [the claimant] has a  
16 kind of mental illness--Bipolar II-- that is exempted from the  
17 policy's limitation provision." Id. The Ninth Circuit concluded  
18 that the plaintiff had the burden to prove he was exempted from  
19 the limitation, "just as he would have the burden to prove his  
20 eligibility for coverage." Id. See also Aeroquip Corp. v. Aetna  
21 Cas. & Sur. Co., 26 F.3d 893, 894-95 (9th Cir. 1994) (noting  
22 that, "although courts are split on this issue, the majority of  
23 decisions place the burden on the insured" to prove that an  
24 exception to the insurance policy exclusion applies).

25 Here, Plaintiff similarly seeks to prove that an exemption  
26 to a limitation on coverage applies. Plaintiff does not dispute  
27 that his disability is a neuromuscular, musculoskeletal, or soft  
28 tissue disorder that falls within the purview of the NMS

1 limitation. Instead, Plaintiff argues that he has radiculopathy,  
2 which is an exemption to the NMS limitation. Thus, the Court  
3 follows the reasoning of Hoffman and holds that Plaintiff bears  
4 the burden of showing he has radiculopathy, an exemption to the  
5 NMS limitation, just as he would bear the burden of proving that  
6 he is eligible for coverage.

7 Thus, the Court considers whether Plaintiff has shown by a  
8 preponderance of the evidence that the radiculopathy exemption  
9 applied at the time that his benefits ended due to the NMS  
10 limitation, that is, on September 6, 2015. Muniz, 623 F.3d at  
11 1295. The policy requires "objective evidence" of radiculopathy,  
12 which is defined as a "disease of the peripheral nerve roots  
13 supported by objective clinical findings of nerve pathology." AR  
14 50-51.

15 Plaintiff asserts that he has presented objective evidence  
16 of radiculopathy, including: (1) the two EMGs conducted by Dr.  
17 Standage, dated November 23, 2013 and February 10, 2016, which  
18 show lumbar radiculopathy that has progressed from the right side  
19 at L5 in 2013 to both lower extremities in 2016, (2) the March 1,  
20 2016 MRI, which shows mild to moderate canal stenosis and  
21 moderate to severe left neural foraminal narrowing, and (3) Dr.  
22 Reynold's March 14, 2016 report, which reported the results of  
23 clinical examination (such as a positive straight leg test  
24 bilaterally and decreased sensation light touch and pinprick to  
25 Plaintiff's left upper extremity and right lower extremity) and  
26 various diagnostic tests, and diagnosed lumbar radiculopathy. In  
27 addition, Plaintiff contends that various other physicians'  
28 clinical findings support the objective evidence. From 2013

1 through 2016, several medical professionals conducted clinical  
2 examinations and reviewed diagnostic tests of Plaintiff's  
3 condition and diagnosed him with radiculopathy. See, e.g., AR  
4 2380 (Dr. Hammon); AR 2563 (PA Aulakh); AR 1867-1881 (Dr.  
5 Standage); AR 2887 (Dr. Renbaum); AR 2078-2083 (Dr. Mitchell).  
6 The Court finds particularly persuasive Dr. Reynold's March 14,  
7 2016 report, which is reasonably close in time to the date  
8 Plaintiff's benefits terminated, suggesting he had radiculopathy  
9 at that time. See Fontana v. Guardian Life Ins., 2009 WL 73743,  
10 at \*4 (N.D. Cal. Jan. 12, 2009) (citing Smith v. Bowen, 849 F.2d  
11 1222, 1225 (9th Cir. 1988)) (holding that "reports containing  
12 observations made after the period for disability are relevant to  
13 assess the claimant's disability.").

14 Defendant points to some contrary evidence in the record,  
15 such as Dr. Sun's report that Plaintiff did not exhibit  
16 radiculopathy as well as Dr. McPhee's and Dr. Madireddi's medical  
17 opinions. On balance, this evidence does not outweigh the ample  
18 evidence described above. Moreover, Dr. McPhee's opinion  
19 originally did not consider the objective evidence submitted by  
20 Plaintiff. After it was pointed out to Dr. McPhee that he did  
21 not consider the evidence, he issued revised findings which came  
22 to the same conclusion as before. Dr. McPhee's addendum appears  
23 suspect, especially considering he acknowledged that Plaintiff's  
24 MRI and EMG tests were not inconsistent with radiculopathy, but  
25 nevertheless dismissed the test results as not the best evidence  
26 of the disease. Dr. McPhee did so despite the fact that he has  
27 stated previously that "[n]eedle electromyography [EMG] is the  
28 single most useful procedure diagnostically in cases of suspected



1 radiculopathy." Brien v. Metro. Life Ins. Co., 2012 WL 4370677,  
2 at \*8 (D. Mass. Sept. 21, 2012). Thus, the Court does not find  
3 Dr. McPhee's opinion to be persuasive. As for Dr. Madireddi, the  
4 Court affords limited weight to her opinion because she conducted  
5 a paper review and did not conduct any clinical examination of  
6 Plaintiff. Dr. Madireddi also provided an addendum to her report  
7 without providing any additional analysis, calling her  
8 conclusions into question.

9 Defendant responds that the evidence presented by Plaintiff  
10 is not "objective clinical evidence." Defendant does not point  
11 to anything in the Plan defining clinical evidence, or explain  
12 why Plaintiff's evidence does not qualify as such. Without any  
13 guidance on this point, the Court declines to reject Plaintiff's  
14 evidence on this basis.

15 Defendant also contends that the clinical findings proffered  
16 by Plaintiff were from long before and long after September 6,  
17 2015, and thus do not support an inference that Plaintiff had  
18 radiculopathy when Defendant terminated Plaintiff's benefits.  
19 Defendant submits no evidence showing that Plaintiff's  
20 radiculopathy could disappear and reappear within a matter of  
21 months. Absent such evidence, the Court finds that Plaintiff has  
22 shown that it is more likely than not that Plaintiff had  
23 radiculopathy when his benefits were terminated.

24 CONCLUSION

25 For the foregoing reasons, the Court GRANTS Plaintiff's  
26 motion for judgment (Docket No. 33) and DENIES Defendant's cross-  
27 motion for judgment (Docket No. 34). Plaintiff's claim for long-  
28 term disability benefits shall be reinstated. Plaintiff is

1 entitled to an award of long-term disability benefits from  
2 September 6, 2015 through the entry of judgment, plus pre-  
3 judgment interest.

4 Defendant shall calculate the amount of past benefits and  
5 interest due in the first instance and the parties shall file a  
6 stipulated form of judgment within fourteen days of the Court's  
7 Order, unless a dispute concerning the amount due arises and  
8 cannot be resolved without Court intervention, in which case the  
9 parties shall each file a proposed form of judgment and a brief  
10 not exceeding two pages explaining why their calculation of the  
11 amount due is correct.

12 Plaintiff may file a motion for attorneys' fees and costs  
13 within fourteen days of entry of judgment. See 29 U.S.C.  
14 § 1132(g)(1). Pursuant to Civil Local Rule 54-5, the parties  
15 must meet and confer for the purpose of resolving all disputed  
16 issues relating to attorneys' fees before Plaintiff files his  
17 motion.

18 IT IS SO ORDERED.

19  
20 Dated: May 1, 2018



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CLAUDIA WILKEN  
United States District Judge

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