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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 MICHAEL CREMIN,

12 Plaintiff,

13 v.

14 McKESSON CORPORATION
EMPLOYEES' LONG TERM
15 DISABILITY BENEFIT PLAN,
LIBERTY LIFE ASSURANCE
16 COMPANY OF BOSTON,

17 Defendants.
18

CASE NO. C 04-04394 CW

**LIBERTY LIFE ASSURANCE COMPANY
OF BOSTON'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS CROSS MOTION AND
OPPOSITION TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
RE: STANDARD OF REVIEW**

Date: May 27, 2005
Time: 10:00 a.m.
Judge: Hon. Claudia Wilkin

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I. INTRODUCTION

This ERISA action arises out of the discontinuation of long-term disability benefits to plaintiff Michael Cremin (“Cremin”) under the McKesson HBOC Inc. Employees Long Term Disability Plan. (“McKesson Plan.”) Plaintiff received long-term disability benefits from August 1998 through July 7, 2000 when it was determined that plaintiff was no longer “disabled” within the meaning of the McKesson Plan.. Prior to January 1, 2000, the McKesson Plan was self-insured. On January 1, 2000, pursuant to a Reserve Buy Out Agreement, Liberty Life Assurance Company of Boston (“Liberty”) became responsible for the administration and payment of Cremin’s claim. Plaintiff now seeks review of Liberty’s decision, which is entitled to review by this court for an abuse of discretion. The McKesson Plan clearly and unambiguously confers discretion on Liberty to interpret the Plan and to determine plaintiff’s eligibility for benefits. Although Liberty was the claims administrator and responsible for payment of the claim after January 1, 2000, there is no material or probative evidence that Liberty breached its fiduciary obligations to plaintiff that would alter the standard of review. Accordingly, the applicable standard of review is abuse of discretion

II. STATEMENT OF FACTS

A. DESCRIPTION OF PLAINTIFF

Cremin received a Bachelor of Science degree in Business Administration from the University of San Francisco in 1971 and an MBA from Golden Gate University in 1977. (Ex. C to McGee Decl., pp. CF-300, CF-0486.)¹ He began working at The McKesson Corporation (“McKesson”) in 1980 as a Manager of Financial Analysis. By 1986 he was promoted to Director of Profitability Analyst. (CF-0300.) In 1988, he had a heart attack. (CF-0546.) Thereafter, Cremin returned to work full-time as a Director of Profitability Analyst for ten years until he left due to alleged anxiety on or about January 26, 1998. (CF-0456.) He returned to part-time work on February 10, 1998. (CF-0561.) After seven months he was told he either had to return to work full-time or move to another department. (CF-0118.) He took a vacation and then filed for disability. (CF-0118, CF-0456, CF-0539.)

¹ Hereinafter all referenced to Exhibit C, the claim file, shall be referred to as “CF.”

1 **B. CREMIN SUBMITS A CLAIM FOR DISABILITY BENEFITS**

2 On September 21, 1998, Cremin submitted a claim for long-term disability benefits under
3 the McKesson Plan. Cremin reported the nature of his disability was coronary artery disease and
4 anxiety. (CF-0539.) His attending physician was cardiologist, Kent Gershengorn, M.D. (CF-
5 0539.) A Physician's Statement was also included with Cremin's Disability Claim form. (CF-
6 0541.) Although Cremin had identified his treating physician as Dr. Gershengorn, Dr. Karalis
7 completed it on September 10, 1998. (CF-0541.) Dr. Karalis diagnosed Cremin with severe
8 anxiety disorder. (CF-0541.) On October 6, 1998, Preferred Works (the claims administrator)
9 received another Physician's Statement from Dr. Karalis dated September 21, 1998. (CF-0512.)
10 Cremin's estimated return to work date was now October 21, 1998. (CF-0512.)

11 On or around October 1998, Preferred Works also received copies of two Doctor's
12 Certificates completed by Dr. Gershengorn on February 4, 1998 and April 23, 1998. (CF-0504.)
13 On February 4, 1998, Dr. Gershengorn reported Cremin had a heart attack and was now under
14 extreme emotional stress relating to personal issues and a heavy workload. (CF-0504.) The
15 diagnoses were coronary artery disease and anxiety. (CF-0504.) His estimated return to work
16 date was February 16, 1998.² (CF-0504.)

17 **C. PREFERRED WORKS RECEIVES OFFICE NOTES FROM DR. KARALIS**
18 **AND DR. GERSHENGORN**

19 On or around October 1998, Preferred Works received the office notes from Dr. Karalis:

- 20 • On September 9, 1998, Dr. Karalis noted Cremin had a heart attack in 1988 and
21 even though he had only begun treating him that day, Dr. Karalis indicated Cremin
22 had been anxious ever since. Cremin appeared distractible, fearful and concerned
23 about future heart attacks. His mood was mixed between anxious and depressed.
24 Cremin felt he was totally unable to work. (CF-0499.)
- 25 • On September 21, 1998, Dr. Karalis reported Cremin was doing self-relaxation
26 and was feeling better. Cremin had mild resistance, however, because he felt it
27 was so hard to work at an anxious level. (CF-0499.)

28 On or around October 1998, Preferred Works also received further office notes and test
results from Dr. Gershengorn. (CF-0480 to CF-0498)

- On January 24, 1997, Cremin reported he was feeling well but had recently
developed back and hip pain. (CF-0485.)

² Cremin returned to work part-time on February 16, 1998.

- 1 • In June 1997 Cremin began taking Xanax for sleep. (CF-0484.) Also in June
2 1997, Cremin stated he was feeling well and had begun a formal exercise program.
He had no chest pain currently. (CF0485.)
- 3 • Dr. Gershengorn reported Cremin complained of chest pain and tightness on 12
4 occasions that would last for about 10 minutes. Cremin had increased stress due to
a recent burglary and fire at his home. His coronary artery disease was stable but
5 Cremin still had high periods of stress. (CF-0483.)
- 6 • On January 23, 1998, Cremin underwent a treadmill exercise tolerance test. The
7 treadmill test impression was negative for myocardial ischemia at 91% predicted
heart rate. Cremin had good functional capacity. (CF-0496.)
- 8 • On February 9, 1998, Dr. Gershengorn reported Cremin's recent problems
9 appeared to be stabilized and he could now return to work for 6 hours a day, 3
10 days a week. (CF-0488.)
- 11 • On or around March 1998, Dr. Gershengorn noted Cremin had returned to work
12 part-time. Although his cholesterol levels were elevated, his anxiety was better
and he was to return to full-time work by May 1998. (CF-0482.)
- 13 • On August 4, 1998, Dr. Gershengorn noted Cremin spoke with his employer about
14 changing his work situation. He was feeling well in his current 20-hour work
15 week schedule, but he was still under stress. He had no chest pain. (CF-0480.)

16 Preferred Works continued to investigate Cremin's claim for eligibility and continued to
17 receive Physician's Statements from Dr. Karalis. (CF-0414, CF-0433, CF-0452, CF-0460.) His
18 diagnosis remained severe anxiety disorder. (CF-0465.) The "objective finding" was "anxious."
19 (CF-0465.) The "subjective findings" were "anxiety, depression, insomnia, etc." (CF-0465.)
20 Each listed the same diagnosis – anxiety disorder – and findings, but kept extending Cremin's
21 return to work date. (CF-0414, CF-0433, CF-0452, CF-0460.)

22 **D. CREMIN'S CLAIM FOR LONG TERM DISABILITY BENEFITS IS**
23 **APPROVED**

24 On April 20, 1999, Preferred Works approved Cremin's his claim for long term disability
25 benefits beginning July 26, 1998. (CF-0394 to CF-0395.) Cremin was advised that if he
26 remained totally disabled for 24 months, his benefits would continue if objective medical
27 evidence showed he was not only prevented from performing any occupation for which he was
28 reasonably qualified by training, education and experience. It was also requested that Cremin
apply for Social Security benefits. (CF-0394.)

On May 21, 1999, Cremin applied for Social Security benefits. (CF-0374.) On August
16, 1999, the Social Security Administration sent Cremin an award letter, informing him that his

1 claim was approved in the amount of \$1,455 per month. (CF-0352.) On December 13, 1999
2 Preferred Works received another Physician's Statement, completed by Dr. Karalis on November
3 24, 1999. (CF-0323.) The estimated return to work date was now February 1, 2000. (CF-0323.)

4 **E. LIBERTY BECOMES THE CLAIMS ADMINISTRATOR FOR THE**
5 **McKESSON PLAN**

6 On January 1, 2000, Liberty became the Claim Administrator for the McKesson Plan.
7 (CF-0325.) Liberty reviewed all medical records and continued to monitor the claim, including
8 periodically requesting updated medical information from plaintiff's treating physicians.

9 On March 10, 2000, Liberty received a Restrictions Form and an Attending Physician's
10 Statement completed by Dr. Karalis on March 6, 2000. (CF-0301 to CF-0303.) Dr. Karalis
11 indicated Cremin saw him only as needed for his diagnosis of anxiety disorder. (CF-0301.)
12 Although Dr. Karalis was asked to provide specific restrictions and limitations for the period
13 February 1, 2000 to May 1, 2000, Dr. Karalis simply stated, "totally disabled." (CF-0301.)
14 Under "objective medical findings" Dr. Karalis wrote, "anxiety, depression, agitation." (CF-
15 0301.) In the Attending Physician's Statement, Dr. Karalis reported Cremin's diagnosis was
16 anxiety disorder with a concurrent condition of cardiac impairment. (CF-0302.) His last visit was
17 March 6, 2000. (CF-0302.) He indicated no cardiac impairment. (CF-0303.) The proposed
18 treatment plan was "psychotherapy/prognosis-poor/on cardiac meds only." (CF-0303.) Dr.
19 Karalis reported no "physical impairment" but a Class 5 mental impairment, meaning Cremin had
20 significant loss of psychological, physiological, personal, and social adjustment. (CF-0303.) Dr.
21 Karalis also provided office notes for the period October 15, 1998 to March 6, 2000. (CF-0304 to
22 CF-0309.) These were very brief notes, indicating only that Cremin remained anxious and fearful
23 of sudden death for which Dr. Karalis provided "supportive therapy." (CF-0304 to CF-0309.)

24 On March 10, 2000, Liberty also received a Mental Disorder Questionnaire completed by
25 Dr. Karalis eight months earlier on June 21, 1999. (CF-0314 to CF-0318.) Cremin was receiving
26 supportive therapy from Dr. Karalis. (CF-0314.) Currently Cremin had a fearful, constricted
27 affect, moderate severe anxiety, and isolation but good intellect function. (CF-0315.) Cremin
28 could perform daily activities but was careful not to overstress himself physically. (CF-0316.)

1 He did not have good adaptation to work or work-like situations because he was fearful, anxious
2 and depressed. (CF-0317.) He was currently taking cardiac medications. (CF-0318.) The
3 diagnosis was anxiety disorder and the prognosis was poor. (CF-0318.) Dr. Karalis reported
4 Cremin was totally disabled for at least another 3 years. (CF-0318.)

5 On May 9, 2000, Liberty received a completed Activities Questionnaire from Cremin.
6 (CF-0296 to CF-0298.) He was able to perform the activities of daily living and he could also
7 perform most household activities, except cooking, washing floors or cleaning bathrooms. (CF-
8 0296.) He was able to drive and travel by bus or plane. (CF-0297.) He said the number of times
9 he left the house in a day or week varied. (CF-0297.) He sometimes went to the mall or to a
10 friend's house or restaurant. (CF-0297.) He was not able to pursue his hobbies. (CF-0297.) He
11 slept 1 to 4 hours each night and occasionally took a nap during the day. (CF-0297.) He was able
12 to walk 3 miles for one hour but he was not able to participate in an exercise program. (CF-
13 0297.) His daily routine consisted of getting up, feeding and exercising the dog, getting dressed,
14 eating, listening to the radio, walking the dog again, eating and then bed. (CF-0298.)

15 Based on the information provided, Liberty continued to pay the claim and monitored the
16 claim by periodically requesting updated medical records and forms. On March 27, 2001, Liberty
17 received an Attending Physician's Statement, completed by Dr. Karalis on March 20, 2001. (CF-
18 0279, CF-0282.) The primary diagnosis was anxiety disorder and the prognosis was poor. (CF-
19 0279.) Cremin last saw Dr. Karalis on March 20, 2001. (CF-0279.) The estimated return to
20 work date was "never." (CF-0279.) The treatment plan was psychotherapy as needed. (CF-
21 0282.) This was a Class 5 physical limitation and there was no cardiac impairment. (CF-0282.)

22 Liberty also received a Mental Status Functional Capacities form, completed by Dr.
23 Karalis on March 20, 2001. (CF-0280.) In support of the various restrictions and limitations Dr.
24 Karalis simply stated, "totally disabled." (CF-0280.) In an equally vague Restrictions Form,
25 received the same day, Dr. Karalis stated Cremin's estimated return to work date was "never."
26 (cf-0281.) Under restrictions and limitations, Dr. Karalis wrote, "no work at all." (CF-0281.)

27 **F. DR. GERSHENGORN PROVIDES UPDATED MEDICAL INFORMATION**

28 On December 17, 2001, Liberty received updated medical information from Dr.

1 Gershengorn including a Physical Capacities form and office notes. (CF-0016, CF-0269 to CF-
2 0275.) In the Physical Capacities form completed on December 4, 2001, Dr. Gershengorn stated
3 Cremin could work 8 hours per workday. He could also sit for 8 hours per day with routine
4 breaks, stand for 2 hours, walk or kneel for one hour, climb stairs for half an hour and perform on
5 the job driving for 4 hours in an 8-hour workday. He could not squat, bend at the waist or climb
6 ladders. Further, he could push, pull and reach above the shoulder for half an hour. He could
7 reach at shoulder level for 1 hour and below shoulder level for 2 hours in an 8-hour workday and
8 could lifting and carry 20 to 30 pound range, 6 times a day. (CF-0269.) Dr. Gershengorn also
9 provided office notes from July 21, 2000 to October 30, 2001. (CF-0270 to CF-0271; CF-0274.)

10 On February 4, 2002, Cremin completed an Activities Questionnaire. (CF-0257 to CF-
11 0259.) He stated he was able to walk or sit for 1 hour. He took 2-hour naps during the day. He
12 spent 16 hours each day in bed. He was able to drive in a car for about 1 hour. He left the house
13 2 to 3 times each week, and 1 to 2 times on the weekends and went to the mall once a year. He
14 went outdoors 3 to 4 times per week. (CF-0257.) He was unable to exercise or pursue his
15 hobbies. (CF-0258.) Cremin claimed he could not to perform his own or any occupation because
16 of job-related stress that caused anxiety, which created heart-related problems. (CF-0258.)

17 On February 7, 2002, Liberty spoke with Cremin about his claim. Liberty informed him
18 that from a cardiac perspective, based on Dr. Gershengorn's information, he was not disabled
19 from any occupation. (CF-0015.) Cremin was asked about his plans to return to work in his own
20 or any type of work and he responded that he had been thinking about returning but had torn
21 some ligaments in his ankle while exercising and he was just getting over that injury. He also
22 informed Liberty he was undergoing cardiac testing at the end of the month. Liberty said it
23 would speak to him after the testing to find out the results. Liberty further informed him that at
24 this point, the only issue potentially restricting him was anxiety and depression. (CF-0015.)

25 On February 13, 2002, Liberty received updated medical information from Dr. Karalis.
26 He saw Cremin on March 20, 2001, July 19, 2001 and February 5, 2002. Dr. Karalis incorporated
27 by reference his March 20, 2001 Attending Physician's Statement and said the information
28 contained in it was correct and reflective of Cremin's current status. Cremin's estimated return to

1 work date remained “never.” Dr. Karalis only provided “supportive therapy.” (CF-0247.)

2 **G. CREMIN’S CLAIM IS REFERRED TO LIBERTY’S MANAGED**
3 **DISABILITY SERVICES UNIT FOR A MEDICAL REVIEW**

4 On March 9, 2002, Liberty sent the claim file to its Managed Disability Services Unit
5 (“MDS”) for a medical review. (CF-0014; CF-0246; CF-0229.) Susan Leonardos, R.N. reviewed
6 the claim file and medical records. (CF-0246.) Nurse Leonardos concluded based on her review
7 that there was no objective evidence from Dr. Karalis to support his restrictions and limitations
8 regarding Cremin’s functional capacity. (CF-0229.)

9 On March 14, 2002, Nurse Leonardos telephoned Dr. Karalis to discuss the claim. During
10 the conversation, Dr. Karalis confirmed he had not prescribed Cremin any antidepressant or anti-
11 anxiety medications due to his cardiac condition. Dr. Karalis reported that overall Cremin was
12 improved, that he only saw Cremin every few months and that he had never been in therapy.
13 Nurse Leonardos explained to Dr. Karalis that to qualify for disability benefits, Cremin must be in
14 active treatment and there must be objective medical evidence to disability. (CF-0228.)

15 On March 25, 2002, Nurse Leonardos spoke with Cremin regarding his claim. He
16 reported he had undergone an angiogram 10 days earlier but he was unable to relay any
17 information regarding its findings, except that he had blockages. He had another appointment
18 that week with his cardiologist to discuss a treatment plan. He further reported he had no energy
19 and suffered chest pains when walking up stairs. Cremin also said he saw his psychiatrist
20 sporadically and had cancelled an appointment with Dr. Karalis due to cardiac testing. Dr.
21 Karalis had given him instructions on how to handle stress. Cremin then stated he would rather
22 have a nurse receive the information from Dr. Gershengorn because he could only relay it in
23 “amateur terms.” Based on their conversation Nurse Leonardos felt Cremin did not seem
24 motivated to resume work at McKesson but could function in some other capacity. (CF-0227.)

25 **H. LIBERTY CONTINUES TO MONITOR THE CLAIM**

26 On April 11, 2002, Liberty received the surveillance report regarding Cremin for
27 surveillance performed on March 28, March 29 and March 30, 2002. (CF-0233 to CF-0243.) On
28 March 28, 2002, Cremin was seen leaving his residence in his car and traveling to a grocery store

1 and fabric store in Daly City. He was seen entering and exiting his vehicle, walking and driving
2 in a normal and natural manner. (CF-0235.) On March 29, 2002, Cremin was seen retrieving an
3 object from his car, entering and exiting his car and walking into and out of his residence while
4 talking on the phone in a normal and natural manner. (CF-0235.) On March 30, 2002, Cremin
5 was seen driving to a private residence in San Francisco, again entering and exiting his car,
6 walking, standing and driving in a normal and natural manner. (CF-0235.)

7 On May 7, 2002, Liberty requested updated medical information from Dr. Gershengorn.
8 In this letter, Liberty noted Dr. Gershengorn had previously indicated Cremin was capable of
9 working an 8-hour day (sitting 8 hours, standing 2 hours, walking 1 hour, climbing stairs for one-
10 half hour with routine breaks and lifting up to 30 pounds 6 times a day). (CF-0224.) That day,
11 Liberty also learned the State Medical Board had put Dr. Karalis on probation and that he had
12 completed his probation on June 9, 1998 – only three months before he began treating plaintiff.
13 He had also been a member of the State Bar of California, but was put on probation on November
14 20, 1990 due to Medicaid fraud. He completed this probation in 1995 and voluntarily resigned on
15 November 10, 1997. (CF-0215.)

16 On July 30, 2002, Liberty received the requested updated medical information from Dr.
17 Gershengorn. (CF-0186 to CF-0214.) Laboratory tests from February 22, 2002 showed an
18 abnormal record due to the anteroseptal infarction, age undetermined and ST abnormality. His
19 blood pressure decreased from 140/87 to 123/74 and his oxygen saturation was 100%. There
20 were no significant EKG changes from baseline or suggestive of Dipyridamole induced ischemia.
21 (CF-0189.) On March 11, 2002 Cremin underwent an exam that showed his lungs were clear
22 bilaterally. His heart size and mediastinal contours were normal and no infiltrates were noted.
23 (CF-0191.) Cremin also had blood tests on June 17, 2002 that demonstrated he had an average
24 risk for cardiac problems. (CF-0198.) Dr. Gershengorn also provided office notes from May 8,
25 2001 to June 10, 2002. Cremin complained of chest pain and Dr. Gershengorn's impression was
26 coronary artery disease. (CF-0211 to CF-0214.)

27 On August 6, 2002, Nurse Leonardos again spoke with Dr. Karalis. Dr. Karalis told her
28 he had not seen Cremin for a few months and there had not been an appointment since his last

1 note of February 2002. When asked about a possible return to work, Dr. Karalis again noted he
2 had not seen Cremin. He stated he was not saying that Cremin could not return to work and
3 agreed that Cremin may very well have sedentary capacity. (CF-0175.)

4 On August 13, 2002, Liberty received updated office notes from Dr. Karalis. (CF-0170 to
5 CF-0172.) On February 5, 2002, Cremin was complaining of chest pain everyday, especially
6 when he was involved in any mild activity. He had an ongoing fear of dying from a heart attack.
7 Supportive therapy was given. Despite Dr. Karalis' representations to Susan Leonardos on
8 August 7, 2002 that he had not seen Cremin since February 2002, the office notes reported a visit
9 on April 11, 2002, May 22, 2002, and August 6, 2002—the day before Nurse Leonardos spoke to
10 Dr. Karalis. On April 11, 2002, Cremin was still fearful of sudden death and supportive therapy
11 was again given. On May 22, 2002, Cremin was taking a TAM holistic approach to mental stress
12 control to help his cardiovascular disease. Cremin was optimistic that he could avoid another
13 heart attack. (CF-0170.) On August 6, 2002, the day before Susan spoke with Dr. Karalis,
14 Cremin stated, "I'm either depressed or the medication (cardiac) is a problem. There is no way I
15 can do any work." (CF-0172.)

16 After reviewing Cremin's file, Nurse Leonardos found that Cremin should be able to
17 perform sedentary activity but recommended Liberty obtain specific restrictions and limitations
18 from Cremin's cardiologist, which she did. (CF-0173.) After two requests for medical records
19 on May 7, 2002 and July 5, 2002, Liberty finally received a Functional Capacities form,
20 completed by Dr. Gershengorn on August 12, 2002. (CF-0169, CF-0220, CF-0224.) No
21 restrictions were given for sitting. Cremin could stand for 1/3 to 2/3 of the day. He could also
22 walk up to 1/3 of the day. There were restrictions for more physical types of activities and these
23 restrictions were based on Cremin's positive stress test. (CF-0169.) Nurse Leonardos reviewed
24 the medical information provided by Dr. Gershengorn and concluded Dr. Gershengorn appeared
25 to support sedentary activity. (CF-0005) Nurse Leonardos also reviewed the records from Dr.
26 Karalis and noted they also did not support total disability. (CF-0005)

27 After obtaining information from Drs. Karalis and Gershengorn, Liberty requested that a
28 Transferable Skills Analysis and Labor Market Survey be performed. (CF-0165 to CF-0166.) On

1 August 23, 2002, Liberty received the report. (CF-0165 to CF-0166.) Several vocational
2 alternatives were identified that were consistent with Cremin's education, work experience and
3 skills. These occupations fell within the sedentary work category and typically allowed the
4 opportunity to change positions throughout the work day. (CF-0166.)

5 **I. CREMIN'S CLAIM FOR LONG TERM DISABILITY BENEFITS IS**
6 **DENIED**

7 On August 30, 2002, Liberty sent Cremin a letter informing him his claim for long term
8 disability benefits was denied effective September 1, 2002 because it was determined he was
9 capable of performing occupations outside his previous position and he did not meet the
10 definition of disability beyond August 31, 2002. (CF-0156 to CF-0161.) A copy of the
11 Transferable Skills Analysis and Labor Market Report was enclosed with this letter. (CF-0159.)

12 On September 13, 2002, Liberty sent Cremin a copy of the claim file, per his request.
13 (CF-0144, CF-0155.) On October 15, 2002, Liberty received Cremin's request for an appeal of
14 Liberty's decision. The letter contained no additional medical information but Cremin indicated
15 he would send it as soon as possible. (CF-0154.) The entire claim file was then sent to Liberty's
16 Appeal Review Unit on October 18, 2002 for an independent review. (CF-0145.) On October
17 21, 2002 Liberty requested copies of the surveillance videos to send to Cremin, per his request.
18 (CF-0151.) On October 21, 2002, it was also noted that Liberty had sent Cremin a copy of the
19 McKesson Plan. (CF-0144.)

20 On October 24, 2002, Liberty received a letter from Cremin along with a letter from Dr.
21 Karalis dated October 18, 2002. (CF-0140 to CF-0143.) Dr. Karalis disagreed with Liberty's
22 determination that Cremin was not totally disabled. (CF-0141 to CF-0143.) On November 6,
23 2002, Liberty sent Cremin a letter updating him on the status of his appeal. He was advised his
24 file was currently being reviewed in the Appeal Review Unit and a determination should be made
25 within 20 business days. (CF-0138.) That same day a medical referral form was completed for a
26 physician review of Cremin's claim. (CF-0119.)

27 On November 21, 2002, Cremin informed Liberty that his cardiologist was not in
28 agreement with Liberty's decision to terminate his disability benefits. (CF-0134.) Cremin stated

1 he was sending additional medical information. (CF-0134.) Liberty informed him he needed to
2 provide the additional information as soon as possible. (CF-0134.)

3 On November 22, 2002 Cremin sent a letter to Liberty confirming receipt of a copy of his
4 claim file. (CF-0135.) Also on November 22, 2002, Liberty received a second surveillance
5 report. (CF-0124 to CF-0133.) Surveillance was conducted on November 6, November 7,
6 November 8, November 9 and November 10, 2002. (CF-0125 to CF-0126.) On November 26,
7 2002, Liberty sent Cremin a letter enclosing a copy of the surveillance videos he had previously
8 requested. (CF-0122.)

9 **J. LIBERTY REQUESTS A PSYCHIATRIC PHYSICIAN REVIEW**

10 After receiving Dr. Karalis' letter in which he changed his earlier position, Liberty
11 recommended a psychiatrist review the information in the file. (CF-0118.) On November 30,
12 2002, Liberty received the report prepared by psychiatrist Peter Mirkin, M.D., M.B.A., LLC.
13 (CF-0109 to CF-0116.) Dr. Mirkin reported the psychiatric information provided to support
14 Cremin's claim that he was unable to perform full-time work in a sedentary occupation consisted
15 of subjective symptoms and fears that he had reported to Dr. Karalis, who had taken very little
16 clinical action to manage these claimed symptoms. Moreover, there was no valid reason not to
17 have prescribed psychotropic medication. (CF-0109.) Depression and coronary artery disease
18 were not mutually exclusive and both conditions should have been treated actively if they were
19 truly causing Cremin problems. (CF-0114.) Studies show that post-heart attack patients with
20 untreated or ineffectively treated depression were three times more likely than effectively treated
21 patients to suffer a second heart attack. (CF-0116.) Supportive psychotherapy was not warranted
22 for someone like Cremin who claimed overwhelming anxiety that limited his capacity to function.
23 Furthermore, based on the information from his cardiac evaluations and the notes of Dr.
24 Gershengorn, there was no indication of imminent threat of his cardiac disease. (CF-0109.)
25 There were also some communication discrepancies with Dr. Karalis that raised concerns about
26 the accuracy of information he recorded in his notes. (CF-0110.) Dr. Mirkin further noted that if
27 Cremin was as disturbed by his symptoms as claimed, there was no indication in his records that
28 Dr. Karalis considered the use of psychotropic medication or consulted Dr. Gershengorn about

1 the need to do so. (CF-0115.) According to his notes on April 20, 1998, Dr. Gershengorn
2 considered using antidepressants but there was no indication of a discussion about this with Dr.
3 Karalis. (CF-0111.) From that standpoint, the statement in his letter to Cremin to the effect that,
4 “you do not possess the stabilization of moods and control of psychiatric symptomatology required
5 to have predictably stable cognitive functioning to perform these jobs, which assumes full
6 cognitive functioning” appeared inaccurate because it was not supported in his office notes.
7 Further, there did not appear to be any particular medical event or change in his symptoms that
8 would have led to a sudden increase in his concerns about another heart attack. The major change
9 that resulted in Cremin’s leaving work appeared to be when he was presented with the need to
10 either return to full-time work, change his job or leave the company. (CF-0110.)

11 Moreover, despite Dr. Karalis’ opinion in his October 18, 2002 letter that Liberty’s
12 analysis was incomplete, Dr. Mirkin stated it was apparent from Liberty’s August 30, 2002 letter
13 to Cremin and in other notes and letters in the file that the evaluation of Cremin’s functional
14 capacity involved much more than the single abstraction from Dr. Gershengorn’s form in coming
15 to the conclusion that Cremin had sedentary work capacity. (CF-0115.)

16 **K. LIBERTY UPHOLDS THE DENIAL OF CREMIN’S CLAIM FOR**
17 **DISABILITY BENEFITS**

18 On December 6, 2002, Liberty sent Cremin a letter upholding the denial of his claim for
19 disability benefits. (CF-0102 to CF-0106.) Cremin had not provided additional medical
20 information to support his appeal. Based on the length of time and the amount of information he
21 had requested and received, he had sufficient time to appeal. (CF-0103.) Based on the
22 information in the file, Liberty determined he was able to perform the duties of his own
23 occupation. Liberty advised that Liberty’s decision was now final and his claim would remain
24 closed. (CF-0105.)

25 On December 21, 2002, Cremin sent Liberty a letter from Dr. Gershengorn. (CF-0084 to
26 CF-0085.) This letter was addressed to Cremin and was dated December 4, 2002. (CF-0085.)
27 On December 31, 2002 Liberty sent Cremin a letter stating that, pursuant to ERISA regulations,
28 he was afforded the opportunity to appeal the denial of his claim and to submit additional

1 documentation to support his claim. (CF-0083.) Cremin had exhausted his administrative
2 remedies under ERISA and his claim remained closed. (CF-0083.)

3 **III. THE MCKESSON PLAN**

4 On December 1, 1976, McKesson Corporation established the McKesson Plan. (Ex. A to
5 McGee Decl., pp. Plan-001.)³ As a benefit of his employment, plaintiff became a participant in
6 the McKesson Plan. The McKesson Plan provides in part:

7 The Plan Administrator shall have the exclusive rights to interpret
8 the terms and provisions of the Plan and to determine any and all
9 questions arising thereunder or in connection with the
administration. . . . (Plan-0097.)

10 The Plan defines "Disability" as:

11 'Disability' shall mean any physical or mental condition arising
12 from an illness, pregnancy or injury which renders a Participant
13 incapable of performing work. During the first twenty-four (24)
14 months of Disability, a Participant must be unable to perform the
15 work of his or her regular occupation or any reasonably related
16 occupation, and must not, except as provided in Section 3.4
[rehabilitative employment], be performing work or services of any
17 kind for remuneration. After twenty-four (24) months of Disability,
18 a Participant must be unable to perform the work of any occupation
19 for which he or she is or becomes reasonably qualified by training,
20 education or experience, and, in addition, be receiving Social
21 Security benefits on account of his or her disability." (Plan-0022.)

22 The Plan also provides:

23 "No Participant shall be entitled to a Disability benefit if his or her
24 Disability arises out of, relates to, is caused by or results from the
25 following:

26 * * *

27 D) an illness or injury for which he or she is not under the regular
28 and continuous care and treatment of a Physician, unless such
regular and continuous care and treatment are not medically
indicated given the nature of Disability..." (Plan-034.)

The Plan also provides:

"Eligibility for Disability benefits shall terminate upon the
occurrence of any of the following events, or on the earliest of the
following:

* * *

³ Hereinafter all references to Exhibit A, the McKesson Plan, shall be referred to as "Plan."

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B) the day on which the Disability no longer exists, as determined by the Plan Administrator;

* * *

G) The Participant is no longer under the regular and continuous case and treatment of a Physician, unless such regular and continuous care and treatment are not medically indicated given the nature of the Disability, or the Participant refused to follow or rejects the treatment plan recommended by the attending Physician, unless such treatment plan is disputed in good faith and on the written advice of another physician.” (Plan-0040.)

Prior to January 1, 2000, the McKesson Plan was self-insured by McKesson HBOC, Inc. and the third party claims’ administrator was Preferred Works. (Decl. of McGee ¶ 2.) On January 1, 2000, Liberty issued a Group Disability Income Policy to McKesson HBOC, Inc. insuring the Plan with respect to claims incurred after January 1, 2000. (Decl. of McGee ¶ 3.) Effective January 1, 2000, Liberty also entered into a Reserve Buy Out Agreement (“RBO Agreement”) with McKesson HBOC, Inc., the McKesson Plan and McKesson HBOC, Inc. Employees’ Long Term Disability Plan Trust. (Decl. of McGee ¶ 4.)

The RBO Agreement provided in part:

As of the effective date of this Agreement Liberty will make all decisions as to coverage, amount and continued eligibility of benefit payments with respect to all Claimants. Liberty has the right to investigate these claims arising under the Plan and the Employer, the Plan and/or Trust hereby assign to Liberty all of their rights to investigate these claims. The provisions in the Plan regarding proof of loss and notice of claim will apply to such claims. **Liberty has the authority in its sole discretion to construe the terms of the Plan and to determine benefit eligibility with respect to persons claiming benefits under the Plan and pursuant to this Agreement. Decisions of Liberty regarding construction of the terms of the Plan and benefit eligibility are conclusive and binding.**” (Exhibit B to McGee Decl., pp. LC-003, emphasis added.)

Pursuant to the RBO Agreement Liberty agreed to assume the claims administration and payment obligations for designated Claimants. (Decl. of McGee ¶ 4.) Pursuant to the Agreement, Liberty Life took over the claim’s administration and payment obligations for plaintiff’s claim on January 1, 2000 and the claim file maintained by Preferred Works was transferred to Liberty. (Decl. of McGee ¶ 6.)

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IV. LEGAL ARGUMENT

A. **THE APPLICABLE STANDARD OF REVIEW IS AN ABUSE OF DISCRETION**

A claims administrator’s decision to deny benefits under an ERISA plan is entitled to review under an abuse of discretion standard if the plan confers discretionary authority on the claims administrator to construe the terms of the plan and to determine benefit eligibility. (Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L.Ed.2d 80, 109 S.Ct. 948 (1989).) Here, it is undisputed the Plan delegated to Liberty, through the RBO Agreement, sole discretion to construe the terms of the plan and determine a claimant’s continued eligibility for disability benefits. (LC-003, Plan-0022, Plan-0097.) This language is sufficiently clear to overcome the presumption of de novo review and merit application of the deferential abuse of discretion standard of review. (See, McDaniel v. The Chevron Corp., 203 F.3d 1099, 1107 (9th Cir. 2000); also, Bendixen v. Standard Ins. Co., 185 F.3d 939 (9th Cir. 1999); Kearney v. Standard Ins. Co., 175 F.3d 1084 (9th Cir. 1999) (en banc).)

A. **LIBERTY’S ROLE AS BOTH CLAIMS ADMINISTRATOR AND INSURER DOES NOT AFFECT THE STANDARD OF REVIEW**

Although the Ninth Circuit has held that an “apparent” conflict of interest exists whenever a claims administrator is responsible for both funding and paying claims (Tremain v. Bell Indus., Inc., 196 F.3d 970, 976 (9th Cir. 1999), such apparent conflict, standing alone, does not affect the standard of review. (McDaniel v. The Chevron Plan, *supra*, 203 F.3d at 1108; Bendixen v. Standard Ins. Co., *supra*, 185 F.3d 943-944.) In order to show that the conflict affected the insurer’s decision to deny benefits, the insured must present “material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary’s self-interest caused a breach of the administrator’s fiduciary obligations to the beneficiary.” (Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322 (9th Cir. 1995); McDaniel, 203 F.3d at 1108.) Otherwise, the court will review the administrator’s decision under the traditional abuse of discretion standard. (Atwood, 45 F.3d at 1322; McDaniel, 203 F.3d at 1108-1109.)

Here, there is no material, probative evidence that Liberty breached its fiduciary obligations to plaintiff. Liberty provided plaintiff with a full and fair review. Liberty kept

1 plaintiff informed as the status of his claim and the reasons for its decisions. Liberty requested
2 and considered all relevant medical and non-medical information received and maintained a
3 proper dialogue with plaintiff and his treating physicians throughout the claim.

4 **1. Liberty Conducted a Thorough and Fair Investigation of the Claim**

5 Liberty conducted a complete and fair investigation of the claim. Liberty regularly and
6 timely requested updated medical records from his two identified treating physicians, including
7 updated office notes and completion of relevant forms before rendering a decision. Liberty also
8 considered all of the information that it received. When Liberty was apprised that additional tests
9 would be performed, Liberty followed-up and requested, received and evaluated all tests and
10 records. Indeed, when Liberty made its decision, it had all of the medical records and opinions of
11 his doctors before making its decision. Liberty waited over three months and had to send two
12 requests to Dr. Gershengorn to obtain requested records and completion of a Physical Capacities
13 form before its initial denial. Moreover, in the two letters to Dr. Gershengorn, Liberty
14 specifically asked Dr. Gershengorn to comment whether his opinion as to Cremin's functional
15 capacity had changed since December 2001, wherein he stated Cremin was able to sit 8 hours a
16 day, stand 2 hours a day, walk 1 hour and lift up to 30 lbs six times a day. (CF-0269, CF-0224,
17 CF-0220.) Dr. Gershengorn did not respond to Liberty's request, but did indicate on the
18 Functional Capacities form that Cremin had no restrictions for sitting, he could stand for 1/3 to
19 2/3 of the day and he could walk up to 1/3 of the day. (CF-0169.) Thus, plaintiff's argument that
20 Liberty did not obtain relevant evidence is without basis. The records shows Liberty had
21 requested and received all medical records from plaintiff's doctors and, therefore, the fact Liberty
22 concluded the information did not show adequate proof of disability is not evidence that Liberty
23 failed to conduct a full or thorough investigation of the claim.

24 The only information plaintiff complains Liberty did not consider was the letter of Dr.
25 Gershengorn. This is not evidence of an actual conflict because Liberty did not receive the letter
26 until December 21, 2002 **after** it had already made its final decision on appeal and the claim was
27 closed. Liberty was under a 60-day legal time constraint within which it had to render a final
28 decision. Thus, the decision had to be made by December 15, 2002. The record shows plaintiff was

1 given adequate time to submit information to support his appeal and plaintiff was notified several
2 times to do so. Liberty advised plaintiff on October 21, 2002 that he had thirty days within which
3 to submit additional information to be considered on appeal. On November 21, 2002, the appeal
4 review consultant notified plaintiff that if he wished to have additional information considered he
5 needed to send the information as soon as possible. Plaintiff was given over three months to
6 submit the information. Accordingly, Liberty's rendering of a decision prior to receipt of Dr.
7 Gershengorn's letter is not material or probative evidence that Liberty was acting under a conflict
8 of interest. Because the letter was submitted after the claim was closed, it is therefore not part of
9 the administrative record and cannot even be considered by this court.

10 **2. Liberty Was Not Looking for a Way to Deny the Claim**

11 The administrative record refutes plaintiff's argument that Liberty was looking for a way
12 to deny the claim in spite of the medical information it had received. Plaintiff completely ignores
13 the fact that Liberty continued to pay and investigate the claim even after Dr. Gershengorn had
14 indicated that plaintiff could work an eight-hour day in December 2001. (CF-0269.) After
15 receiving that information from Dr. Gershengorn, Liberty had all the medical records reviewed by
16 a registered nurse. Although Nurse Leonardos concluded, based on her review, that there was no
17 objective medical evidence in the claim file to support a disability from a cardiac or psychiatric
18 standpoint, she determined it was necessary to talk with Dr. Karalis, which she did on two
19 separate occasions. She also spoke with plaintiff and informed him of her findings. Nurse
20 Leonardos told plaintiff in February 2002 that from a cardiac standpoint it appeared he could
21 return to work and the only question was whether he was disabled due to anxiety and depression.
22 (CF-0015.) Plaintiff acknowledged during this conversation that he considering retraining to
23 return to work, but could not do so at the time because he was recovering from a torn ligament in
24 his ankle he sustained while exercising. (CF-0015.) The claim was denied only after a registered
25 nurse had reviewed all of the medical information and Dr. Karalis reported to her on August 7,
26 2002 that he was unable to state whether plaintiff could or could not work because he had not
27 seen him since February 2002. Based on the notes and information provided by Dr. Karalis,
28 Liberty concluded that there was not enough information to support a lack of function from a

1 psychiatric perspective. Liberty did not deny the claim until after it had received all of the
2 requested medical records from plaintiff's treating physicians and a vocational analysis
3 identifying occupations plaintiff could perform within the restrictions and limitations identified
4 by Dr. Gershengorn on August 20, 2002.

5 Liberty's claim note stating that the file was out of office with all other McKesson files is
6 not evidence of an actual conflict of interest. That claim note is taken out of context and cannot
7 reasonably construed to mean that Liberty was looking for a way to deny all McKesson claims as
8 plaintiff argues. There are other, more likely explanation for the comment such as an audit of the
9 claims by an outside service at the behest of the Plan sponsor, McKesson. Indeed, the note states
10 that the files were not in Liberty's office and does not support an inference that Liberty was
11 conducting the review. (CF-0226.) Further, plaintiff's unreasonable interpretation of the claim
12 note is refuted by the administrative record and Liberty's handling of the claim.

13 **3. Liberty's Denial Was Not Based On An Obviously Erroneous Findings**

14 Liberty did not rely on erroneous information to deny the claim or in upholding the denial
15 as plaintiff asserts. Plaintiff counsel's unqualified medical opinion is not only inadmissible, it is
16 refuted by the administrative record, which shows that plaintiff was prescribed Xanax years
17 earlier in 1997 -- before his claim -- to help him sleep. (CF-0484.) Before denying the claim, Dr.
18 Karalis confirmed on several different occasions that plaintiff was not taking medication for his
19 psychiatric problems. (CF-0228, CF-0175.) Further, neither Dr. Karalis, nor Dr. Gershengorn
20 has ever stated that the Xanax was prescribed for treatment of plaintiff's psychiatric conditions.
21 It is also unreasonable to believe that Dr. Mirkin, a psychiatrist, would expressly note in his report
22 that plaintiff was taking Xanax (as well as other cardiac medications), yet then remark plaintiff
23 was not taking a psychotropic medication if the Xanax had been prescribed as a psychiatric
24 medication. (CF-0109 to CF-0116.)

25 Moreover, Liberty also did not, as plaintiff repeatedly asserts, deny the claim solely
26 because plaintiff was not taking any psychiatric medications. Rather, the claim was denied on the
27 basis that the medical records did not indicate a level of anxiety or depression that precluded
28 plaintiff from returning to work in another occupation. As set forth in Liberty's denial letter, the

1 conclusion was based in part on the fact that plaintiff saw his psychiatrist sporadically and was
2 not on psychiatric medication. (CF-0156 to CF-0161) Prior to denying the claim, Liberty
3 confirmed with Dr. Karalis on numerous occasions that plaintiff had not been prescribed any
4 psychiatric medications and that his treatment was “supportive therapy only.” Cremin himself
5 also confirmed before the denial that he was seeing Dr. Karalis only sporadically.

6 **4. Liberty Provided Plaintiff With A Full and Fair Review on Appeal**

7 At the time plaintiff’s claim was filed, Section 503 of ERISA, 29 U.S.C. § 1133, required
8 all employee benefit plans to establish a reasonable claims procedure under which participants
9 and beneficiaries may file benefit claims. (See also 29 C.F.R. 2560.503-1(b).) U.S. Department
10 of Labor regulations further provided that notice be given in writing to any participant or
11 beneficiary whose claim for benefits has been denied, that the plan offer an opportunity to appeal
12 the decision and allow the participant or beneficiary to obtain a full and fair review of the claim
13 and its denial. (29 C.F.R. 2560.503-1(g).) To ensure a full and fair review, the notice must
14 specify reason(s) for the denial, refer to any pertinent provisions of the plan, describe any
15 additional material or information necessary to perfect the claim with an explanation. Here,
16 Liberty set forth in detail the reasons and bases for its denial and quoted the applicable plan
17 language and summarized the medical records, reports and other documents relied on. (CF 0156
18 to CF-0161.) Liberty also identified what information was needed to perfect the claim. (CF-
19 0160.) Liberty’s denial letter discussed the lack of treatment and lack of psychotrophy
20 medication. Thus, Liberty’s denial letter, which fully complied with the ERISA requirements and
21 regulations existing at the time, provided plaintiff with the opportunity to ensure a full and fair
22 review.

23 Also contrary to Cremin’s assertions, Liberty did provide him with all the information
24 used in the determination of his claim for disability benefits. Liberty sent Cremin a letter on
25 August 30, 2002, informing him that his claim for long-term disability benefits was terminated as
26 of September 1, 2002 based on medical records from Drs. Gershengorn and Karalis, a nurse
27 review, and a vocational analysis. (CF-0156 to CF-0161.) Liberty enclosed the Vocational
28 Analysis and Labor Market Survey with the denial letter. After Cremin requested the information

1 used to support Liberty's decision and a copy of the Plan, Liberty sent him a complete copy of the
2 claim file as well as a copy of the McKesson Plan, which plaintiff acknowledged receiving. (CF-
3 0135.) The March 2002 surveillance reports were contained in the claim file sent to plaintiff.

4 The fact that Liberty did not send plaintiff a copy of Dr. Mirkin's report or the
5 surveillance conducted on appeal is not evidence of an actual conflict of interest. Plaintiff never
6 requested the information generated on appeal, nor was Liberty obligated to provide it. (29
7 C.F.R. 2560.503-1 (1997).) Moreover, contrary to plaintiff's assertions, the reasons for the denial
8 did not change on appeal. Neither Dr. Mirkin's opinion, nor the November 2002 surveillance
9 provided the basis for a new reason to deny the claim. Dr. Mirkin did not even review the
10 November 2002 surveillance DVD or reports or rely on them in reaching his opinion on appeal.
11 (CF-0109 to CF-0116.) The initial decision to deny the claim was simply further supported by
12 Dr. Mirkin's opinion, which Liberty obtained after Dr. Kiralis refuted Liberty's conclusions and
13 findings. It did not serve as a basis for asserting a new reason for denying the claim so it was not
14 necessary for plaintiff to receive the opinion a full and fair review. The cases cited by plaintiff
15 are, therefore inapplicable.

16 **5. Liberty Was Not Required To Obtain An Independent Medical**
17 **Examination Before Denying Plaintiff's Claim**

18 Liberty was not required to obtain an independent medical examination before denying
19 plaintiff's claim and the failure to do so here is not evidence that Liberty was acting under a
20 conflict of interest. The Plan does not require an independent medical examination be performed,
21 only that one may be requested. (Plan-0044 and Plan-0046.) ERISA also does not require the
22 insurer to have the claimant independently examined. (Jordan v. Northrop Grumman Corp.
23 Welfare Benefit Plan, 63 F.Supp.2d 1145, 1158 (C.D.Cal. 1999), *affirmed* Jordan v. Northrop
24 Grumman Corp. Welfare Benefit Plan, 370 F.3d 869 (9th Cir. 2004); Stith v. Prudential Ins. Co.
25 of Am., 2005 U.S. Dist. LEXIS 2000, 26, fn 3 (D.N.J. 2005) ["no legal requirement that a plan
26 administrator require an independent medical examination prior to finally adjudicating a claim for
27 disability benefits under an ERISA-governed plan."]; Scott v. Prudential Ins. Co. of Am., 2005
28 U.S. Dist. LEXIS 1251, 14-15 (W.D.Mich. 2005) [Finding "courts routinely affirm administrative

1 decisions in ERISA cases that are made solely on the basis of a document review.”]; Kocsis v.
2 Standard Ins. Co., 142 F.Supp.2d 241, 254-55 (D.Conn. 2001) [“Because the Plan does not
3 require an independent examination, it is not per se unreasonable. . .to deny the plaintiff benefits
4 without requesting an independent medical examination, in light of Standard’s file review by two
5 independent medical examiners.”].)

6 Plaintiff’s assertion that Liberty was required to obtain evidence to support his claim (e.g.
7 obtain an independent psychiatric evaluation) is also without merit. It is not inappropriate for an
8 insurance company to place an initial burden of proof on claimants and, therefore, is not a basis
9 for establishing a conflict of interest. (Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 985
10 (6th Cir. 1991).) Moreover, under the circumstances here an independent psychiatric examination
11 was not required before it denied the claim in August 2002, because Liberty had all the
12 information and records necessary to make an informed decision. Indeed, Dr. Gershegorn had
13 indicated plaintiff had functional work capacity (CF-0269 and CF-0169) and Dr. Kiralis stated if
14 plaintiff could work he may have sedentary work capacity. (CF-0015.) Further, in February
15 2002, plaintiff told Liberty he was considering retraining but could not do so because he had torn
16 an ankle ligament while exercising. (CF-0015.) Thus, at the time Liberty denied the claim there
17 was no conflicting medical evidence or opinions that would require an IPE to resolve.

18 Nor was an independent psychiatric evaluation required on appeal. After plaintiff
19 appealed the denial and submitted a letter from Dr. Karalis, Liberty had the claim file and medical
20 records reviewed by psychiatrist Peter Mirkim, M.D. In his report, Dr. Mirkim specifically
21 addressed the opinions of Dr. Karalis’ October 18, 2002 letter. (CF-0114 to CF-0116.) Based
22 upon his review of the medical records, Dr. Mirkin concluded that the psychiatric information
23 that supports Cremin’s claim that he was unable to perform full-time work in a sedentary
24 occupation consisted of subjective symptoms and fears that he reported to Dr. Karalis. The only
25 clinical intervention that Dr. Karalis had taken, according to his records, was to provide
26 “supportive psychotherapy.” Such treatment is warranted for people with mild anxiety or with
27 fears based on inadequate information, not for people who claim overwhelming anxiety that
28 limits their capacity to function. Dr. Mirkin also concluded that based on the information from

1 Cremin’s cardiac evaluations and notes of Dr. Gershengorn there was no indication of imminent
2 threat from his cardiac disease.

3 **B. LIBERTY APPLIED THE PROPER DEFINITION OF DISABILITY AND**
4 **OTHER APPLICABLE PLAN TERMS**

5 **1. Liberty Applied The Correct Definition of Disability**

6 Contrary to plaintiff’s assertions, Liberty applied the correct definition of disability from
7 the McKesson Plan in making its claims determination. The definition cited by plaintiff in his
8 moving papers was expressly set forth in the denial letter and on appeal. Contrary to plaintiff’s
9 assertions, the McKesson Plan did not state that an award of social security benefits was
10 conclusive proof of disability. Accordingly, plaintiff’s reliance on Boyd v. Trustees of United
11 Mine Workers Health and Retirement Fund, 873 F.2d 57 (5th Cir. 1989) is misplaced because the
12 plan in that case the plan expressly provided that receipt of social security was conclusive
13 evidence of disability. Here, the receipt of social security benefits was one of two conditions for
14 establishing disability. The other condition was that plaintiff was incapable of performing work
15 of any occupation for which he or she becomes reasonably qualified by training, education and
16 experience. (Plan-0022.) The second condition of disability is not met simply because plaintiff
17 received social security benefits. Plaintiff’s award of social security benefits is wholly irrelevant
18 to the issue of whether he was “disabled” within the meaning of the McKesson Plan. (See, Black
19 & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S. Ct. 1965; 155 L. Ed. 2d 1034 (2003);
20 Madden v. ITT Long Term Disability Plan, *supra*, 914 F.2d at 1287; Boomis v. Metropolitan Life
21 Ins. Co., 970 F.Supp. 584, 590 (E.D. Mich. 1997).) It is well established that a social security
22 determination is not binding upon an ERISA administrator where, as is here, the ERISA Plan has
23 a different definition of disability and different evidence may have been presented in the two
24 proceedings. (Madden, *supra*, 914 F.2d at 1287; Boomis, *supra*, at 590.) Employers have a
25 “large leeway” to design plans, so unlike a Social Security claim, the validity of a claim is “likely
26 to turn in large part on interpretation of terms in the plan at issue” rather than on a uniform set of
27 criteria.” (Black & Decker Disability Plan v. Nord, 538 U.S. 822, 833 (2003).)

28 Although the definitions of disability are similar, they are not identical. (See, Black &

1 Decker v. Nord, 538 U.S. at 832-833, noting critical differences.) Further, the evidence submitted
2 in support of a Social Security award is different from the information obtained by a claims
3 administrator. Social Security also applies a treating physician rule, which the United States
4 Supreme Court has recently held is inapplicable to ERISA disability claims. (Black and Decker
5 v. Nord, supra, 538 U.S. 822.) Thus, the social security standards are unique and different from
6 an ERISA disability claim, which is governed by the terms of the contract. Plaintiff has failed to
7 present any evidence that Social Security reviewed or reevaluated plaintiff's claim since its initial
8 determination in January 1999 – more than three years before Liberty's denial.

9 Liberty's reference to "sedentary capacity" was not improper, nor inconsistent with the
10 terms of the McKesson Plan. Here, the McKesson Plan, unlike the case relied on by plaintiff in
11 his motion, did not define disability as "the inability to perform the material and substantial duties
12 of any occupation." Rather, the McKesson Plan defined disability in terms of an inability to
13 work. (Plan- 022.) Accordingly, Liberty's reference to plaintiff's sedentary work capacity was
14 not inconsistent with the terms of the Plan and is not evidence of a conflict of interest.

15 **2. The McKesson Plan Requires Objective Medical Evidence and**
16 **Regular and Continuous Care of a Physician**

17 Contrary to plaintiff's assertions, the McKesson Plan expressly requires objective medical
18 evidence to support the determination of Disability: "Pursuant to the procedures established by
19 the Plan Administrator, a determination shall be made whether a Disability exists with respect to
20 a Participant on the basis of objective medical evidence." (Plan-0071, emphasis added.)
21 Accordingly, Liberty's references to and statements regarding the lack of objective medical
22 evidence were not improper and are not a valid basis for finding a conflict of interest.

23 Contrary to plaintiff's assertions, Liberty's references to plaintiff's lack of treatment and
24 sporadic visits to his treating physicians were consistent with the express terms of the Plan. The
25 Plan requires that a claimant must be under the regular and continuous care and treatment of a
26 Physician in order to continue receiving disability benefits. (Plan-0079.) The Plan also provides
27 that benefits will terminate if the Claimant is no longer under the regular and continuous care of a
28 physician unless such regular and continuous care and treatment are not medically indicated given

1 the nature of the disability. (Plan-0079.) Here, Nurse Leonardos and Dr. Mirkin specifically
2 noted that if plaintiff was as depressed and anxious as he claimed, then more psychiatric
3 treatments would have been required. Thus, Liberty properly considered whether the exception to
4 the continuous and regular treatment applied, which it concluded it did not. Further, before
5 denying the claim the lack of regular care or treatment was confirmed by Liberty on numerous
6 occasions before the denial. Both Dr. Karalis and plaintiff admitted his psychiatric treatment was
7 sporadic and Dr. Karalis confirmed he had not prescribed any medications for Cremin's
8 psychiatric disorder. Accordingly, there is no evidence of a conflict of interest.

9 **C. LIBERTY CONSIDERED ALL OF THE MEDICAL INFORMATION**
10 **BEFORE MAKING A DECISION**

11 The record demonstrates that Liberty properly considered all of the medical records and
12 non-medical information received before denying the claim. Because the records and opinions
13 were considered by Liberty, the standard of review is not affected. (*Jordon, supra*, 63 F.Supp.2d.
14 at 1156.) "That the administrator ultimately rejects the applicant's physicians' views does not
15 establish that it 'ignored' them." (*Jordan, supra*, 370 F.3d at 878. Liberty's denial was supported
16 by the information it had received during its investigation, including the medical records and the
17 information provided by Dr. Karalis and Dr. Gesrhengorn. On December 4, 2001, Dr.
18 Gershengorn stated plaintiff could sit for hour hours a day with breaks and that he could work
19 eight hours a day. (CF-0269.) On February 7, 2002, Liberty informed plaintiff that based on the
20 information it received from Dr. Gergengorn he was not disabled from a cardiac perspective.
21 During that conversation with Liberty, plaintiff told Liberty he was considering retraining so he
22 could return to some kind of work, but he had torn some ligaments in his ankle while he was
23 exercising. The records received by Liberty from Dr. Gershengorn in August 2002, including the
24 Functional Capacity Form, indicated that plaintiff had demonstrated functional capacity and a
25 vocational analysis identified occupations that plaintiff could perform without the identified
26 restrictions and limitations.

27 Further, prior to the denial, Liberty spoke with Dr. Karalis on August 6, 2002 about the
28 claim. During this conversation, Dr. Karalis stated he could not give an opinion as to plaintiff's

1 ability to work because he had not seen him since February 2002 and that he may well have
2 sedentary capacity to work. Although Liberty received updated office notes from Dr. Karalis
3 after its conversation with him and before the initial denial (indicating that he had treated plaintiff
4 several times since February 2002, including the day before he spoke with Liberty), Dr. Karalis
5 never opined in those records that plaintiff could not return to work, only that plaintiff reported on
6 August 6, 2002 that he could not return to work.

7 Liberty considered and reviewed the new records as well as the information received from
8 Dr. Gershengorn before its denial. Although Liberty disagreed with Dr. Karalis' opinions
9 rendered on appeal, this is not evidence of an actual conflict of interest. It is not material,
10 probative evidence of a conflict of interest simply because the claim administrator rejects a
11 treating physician's conclusion. (Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370
12 F.3d 869 (9th Cir. 2004).) In Jordan, the Ninth Circuit held, "Where the applicant's physicians
13 depend entirely on the patient's pain reports for their diagnoses, their *ipse dixit* cannot be
14 unchallengeable. That would shift the discretion from the administrator, as the Plan requires to
15 the physicians chosen by the applicant, who depend for their diagnoses on the applicant's reports
16 to them of pain." (Id. at 878.) Likewise, here, it was unreasonable for Liberty to disagree with
17 Dr. Mirkin's opinions of appeal which were based exclusively on plaintiff's self-reported
18 capabilities. Moreover, here, it was entirely reasonable for Liberty to give more weight to the
19 opinion of Dr. Mirkin for numerous reasons. Dr. Mirkin went through and analyzed in significant
20 detail the reasons and basis for his disagreements with Dr. Karalis' opinions which were wholly
21 conclusory. Further, Dr. Karalis' opinion was based on his speculation that Dr. Gershengorn's
22 report was misinterpreted by Liberty. Dr. Karalis' credibility was also called into question when
23 he told Liberty on August 6, 2002 that he had not seen plaintiff since February 2002 and then
24 submitted records showing he had seen him the day before. Finally, the State Medical Board had
25 put Dr. Karalis on probation and that he had completed his probation on June 9, 1998 – only three
26 months before he began treating plaintiff. (CF-0215.) He had also been a member of the State
27 Bar of California placed on probation on November 20, 1990 due to Medicaid fraud. (CF-0215.)

28 Finally, the "overwhelming" evidence that plaintiff asserts supports his claim was not only

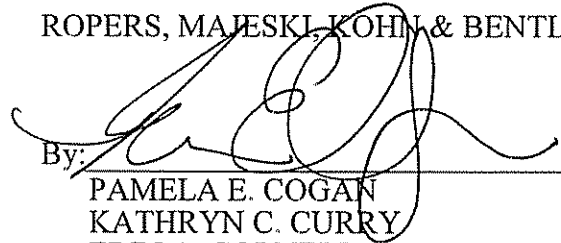
1 considered by Liberty, it does not support a finding that Cremin was disabled within the meaning
2 of the policy. The only evidence to which plaintiff refers is the Social Security Award rendered
3 almost four years earlier, Dr. Karalis' GAF score given on March 20, 2001 and February 2002,
4 and the surveillance. As set forth above, the Social Security Award was remote in time and based
5 on different criteria. The reliance on the GAF scores is misplaced because Dr. Karalis told
6 Liberty in August 2002 that plaintiff might have sedentary work capacity. Further, Dr. Mirkin
7 specifically noted in his report that Dr. Kiralis' opinions on appeal were based on the results of a
8 Zung Depression and Anxiety Test, which was a self-rating method (e.g. based on plaintiff's
9 subjective reports) as opposed to the more reliable clinician rating scales, which Dr. Kiralis did
10 not use. Thus, there was little, if any, objective evidence to support a finding that plaintiff was
11 "disabled" within the meaning of the policy and Liberty's decision is not evidence of a conflict of
12 interest.

13 **II. CONCLUSION**

14 For the reasons set forth herein, the applicable standard of review to be applied by this
15 court is an abuse of discretion.

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18 Dated: April 29, 2005

ROPERS, MAJESKI KOHN & BENTLEY

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