

1 Melvyn D. Silver - S.B. #48674
 Ruth Silver Taube - S. B. #169589
 2 LAW OFFICES OF SILVER & TAUBE
 300 South First Street, Suite 205
 3 San Jose, California 95113
 Telephone: (408) 298-9755
 4 Facsimile: (408) 298-9699

5 Attorneys for Plaintiff

6
 7 UNITED STATES DISTRICT COURT
 8 NORTHERN DISTRICT OF CALIFORNIA
 9 SAN JOSE DIVISION

10 DAVID DIGIACOMO,
 11 Plaintiff,

12 vs.

13 LIBERTY LIFE ASSURANCE
 14 COMPANY OF BOSTON; ADOBE
 SYSTEMS INCORPORATED
 15 GROUP DISABILITY INCOME
 PLAN, et al.

16 Defendants.

) CASE NO.:C03 00538 JF PVT

)
) **Plaintiff's Reply to Defendant's Opposition**
) **to Plaintiff's Motion for Summary Judgment**

) Date: April 12, 2004

) Time: 9:00 a.m.

) Judge: Honorable Jeremy Fogel

)

17 _____ /

I. Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Introduction 1

II. Standard of Review. 2

A. Jebian Issue. 2

B. Insurance Commissioner’s Opinion Letter. 4

III. Argument. 7

**A. Despite Liberty Life’s Introduction of a New but Equally
Unpersuasive Post Hoc Rationale, Liberty Life Is Restricted
to the Indefensible Rationale that It Articulated in the Denial
Letters. 7**

**B. Defendant Focuses Solely on Physical Limitations and Restrictions
and Does Not Attempt to Evaluate Whether Plaintiff Had the Mental
Acuity Necessary for His Cognitively Demanding Job. 12**

C. Plaintiff’s Cases Survive Nord. 13

IV. Conclusion. 25

II. Table of Authorities

Cases

Black and Decker v. Nord, 123 S.Ct. 1965 (2003). 13, 14

Collins v. Continental Casualty Company, 2004 U.S.App.LEXIS 985 (8th Cir. 2004). 8

Conrad v. Reliance Standard, 292 F.Supp.2d 233 (D.C. Mass. 2003). 13

Cook v. Liberty Life, 320 F.3d 11 (1st Cir. 2003). 11

Dishman v. UNUM Life Insurance Co. Of America, 269 F.3d 974 (9th Cir. 2001). 11

Govindarajan v. FMC Corp., 932 F.2d 634 (7th Cir. 1991). 13

Hawkins v. First Union Corporation, 326 F.3d 914 1, 7, 11, 12

Isabel v. Hartford Life and Accident Insurance Company, 1999 U.S.Dist.LEXIS 824
(N.D. Cal. 1999). 14

Jebian v. Hewlett Packard, 348 F.3d 1098 (9th Cir. 2003). 3, 7, 14

Kentucky Ass’n of Health Plans v. Miller, 538 U.S. 329 (2003). 6

LaBarge v. Life Insurance Company of North America 14

Lain v. UNUM, 279 F.3d 337 (5th Cir. 2002). 8

Marziale v. Hartford Life & Accid. Ins. Co., 2002 U.S.Dist.LEXIS 11321
(E.D. LA. 2003). 10

Mitchell v. Eastman Kodak Company, 113 F.3d 433 (3rd Cir. 1996) 8

Mongulezo v. Baxter Travenol LTD Plan, 46 F.3d 939 (9th Cir. 1995). 11

Morgan v. UNUM Life Insurance Co. of America, 2002 U.S.Dist.LEXIS 17663
(D.C. Minn. 2002). 10

Palmer v. University Medical Group, 994 F.Supp. 1221 (D.C. Ore. 1998). 8, 9, 12

Quesinberry v. Life Insurance Company, 987 F.2d 1017 (4th Cir. 1993). 11

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002). 5, 6

Russell v. UNUM, 40 F.Supp.2d 746 (Dist. S.C. 1999). 14

Zavora v. Paul Revere Life Insurance Co., 145 F.3d 1118 (9th Cir. 1998). 14

1 **Statutes**

2	29 U.S.C. 1144(b)(2)(A).	.	.	.	.	.	.	.	.	.	.	6
3	29 U.S.C. 1144(a).	.	.	.	.	.	.	.	.	.	.	6
4	Cal. Ins. Code § 10291.5.	.	.	.	.	.	.	.	.	.	.	6
5	Cal. Ins. Code § 10291.5(b)(1).	.	.	.	.	.	.	.	.	.	.	6
6	Cal. Ins. Code § 10291.5(b)(13).	.	.	.	.	.	.	.	.	.	.	6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. Introduction**

2 An examination of the briefs that Liberty Life filed with the court leaves the erroneous
3 impression that Liberty Life’s denial letters were replete with discussions of surveillance reports,
4 websites, and attacks on Mr. Di Giacomo’s credibility. In fact, the denial letters make absolutely
5 no mention of surveillance reports and websites, and there are no attacks on Mr. DiGiacomo’s
6 credibility. In the instant case, defendant’s post hoc rationale is not only too late but is also
7 unpersuasive. In its Opposition, defendant not only argues that the substantial evidence in support
8 of its decision includes a surveillance report (Def. Opp., 25:1-3) that it acknowledges was never
9 received until after the final denial, but Liberty Life goes as far as to make the incredible claim
10 that the surveillance report is actually “in the file.” (Def. Opp., 22:27:28- 23:1). Not content with
11 fabricating a new administrative file, defendant outdoes itself by introducing into evidence, in
12 addition to Mr. DiGiacomo’s personal website, a web page from the website at
13 <http://www.mobygames.com> which refers to a game created by a **different** David DiGiacomo
14 (spelled David Di Giacomo.) Liberty Life even erroneously identifies the Moby Game’s web page
15 in its Errata as part of plaintiff David DiGiacomo’s website. These efforts are evidently
16 calculated to detract attention from the indefensible grounds for denial of plaintiff’s claim set
17 forth in the two denial letters (Ex. 18 and 30). The grounds for denial in the claim and appeal
18 denial letter boil down to defendant’s contention that 1) plaintiff’s complaints are subjective and
19 testing is essentially normal; and 2) the effects of the pain medication are irrelevant because
20 Donnatal is not a narcotic, and he began taking Donnatal in June about the time he began to work
21 part-time. However, courts have recognized, as Judge Posner stated in Hawkins v. First Union
22 Corporation Long-Term Disability Plan, 326 F.3d 914, 919 (7th Cir. 2003), that a finding of
23 disability can be predicated on subjective complaints of pain and that pain often “cannot be
24 detected by laboratory tests.” Additionally, Liberty Life appears to have adopted a rule, which is
25 nowhere in the plan that, unless pain medication is a narcotic, Liberty Life will disregard the
26 effects of pain medication. However, even Liberty Life’s nurse acknowledges that Donnatal is
27 sedating, and it defies logic and common sense to argue that the barbituate, phenobarbital, which
28 is contained in Donnatal is not impairing. Moreover, as discussed at length in plaintiff’s
Opposition, the administrative record clearly reflects the fact that Mr. DiGiacomo began taking

1 Donnatal consistently on March 28, 2001 prior to his return to a part-time accommodated job
2 performed primarily from home on May 21, 2001. The fact remains that defendant's only
3 supporting evidence is the terse, error-ridden, sketchy, and selective paragraph written by Liberty
4 Life's in-house nurse reviewers of no known specialization which are clearly entitled to little
5 weight and which does not constitute substantial evidence. Liberty Life has arbitrarily refused to
6 credit the opinions of Mr. DiGiacomo's physician specialists. Liberty Life's new "reviewing
7 nurse rule" is nowhere to be found in the case law. Courts have consistently rejected, under any
8 standard of review, denials, like Liberty Life's, that are predicated on the absence of gross
9 abnormalities on medical tests and that completely ignore complaints of pain and the side effects
10 of pain medication.

11 **II. Standard of Review**

12 **A. Jebian Issue**

13 In its Opposition, defendant argues that it substantially complied with ERISA regulations
14 and, therefore, the standard of review is abuse of discretion. However, defendant's argument
15 lacks merit. In its Opposition, defendant acknowledges that in phone calls of November 8 and
16 26 it informed Mr. DiGiacomo that it was aware that it had 60 days to render a response to Mr.
17 DiGiacomo's appeal and that, unless Liberty Life requests an extension before the end of the 60
18 day period, it was required by ERISA regulations to render an appeal decision within 60 days.
19 (Ex. 33a and 33b). Defendant acknowledges that it received Mr. DiGiacomo's appeal on
20 September 24, 2001. Therefore, since Liberty Life acknowledges that it did not request an
21 extension within 60 days, it was required to render an appeal decision by November 24, 2001. In
22 its Opposition, defendant contends that it substantially complied with the requirement to render a
23 decision within 60 days because its delay was justified by its need to respond to the California
24 Department of Insurance with whom Mr. DiGiacomo had filed a complaint. However, the letter
25 which defendant wrote to Mr. DiGiacomo and copied to the Department of Insurance cannot
26 possibly justify its delay. The letter (Ex. 33 & 39) states that "[t]his letter responds to the request
27 for assistance that you submitted to the California Department of Insurance. It contains only two
28 substantive sentences that refer to Mr. DiGiacomo's claim:

Our records show that your long term disability benefits were denied based on a
determination that the medical findings did not establish that your medical

1 condition was of a nature and severity which would prevent you from performing
2 the material and substantial duties of your occupation....You were sent denial
3 letters dated August 10, 2001 (and revised September 6, 2001) which explained to
4 you in detail the basis for the denial of your claim. Under ERISA guidelines, you
were advised of your right to appeal this claim denial. Our office has received your
September 17, 2001 letter requesting an appeal of the denial of your claim, along
with additional medical documentation.

5 The rest of the letter contains the plan definition of disability and repeats the ERISA statutory
6 time limits for an appeal response. A letter that merely states conclusorily that the claim was
7 denied because plaintiff did not meet the plan definition of disability without any reasoning
8 or new information that would require research or investigation and that the insurer had received
9 plaintiff's appeal cannot possibly justify the failure to comply with ERISA regulations or could
10 constitute the meaningful dialogue contemplated in it Jebian v. Hewlett Packard, 349 F.3d 1098
11 (9th Cir. 2003). Defendant also contends that its delay was in part due to the fact that Mr.
12 DiGiacomo did not respond to its letter requesting pharmacy information and an updated medical
13 authorization. However, this argument lacks merit since Liberty Life admittedly did not send Mr.
14 DiGiacomo a letter requesting pharmacy records until November 9, 2001, 15 days before the end
15 of the 60 day period. (CF 55, Ex. 40). Moreover, contrary to Liberty Life's contention, Mr.
16 DiGiacomo did respond promptly. The November 9 letter was sent from Dover, New Hampshire
17 which would take at the very least 3 to 4 days. (Ex. 40). Defendant states in its Opposition that
18 "[p]laintiff did not provide Liberty with requested pharmacy information until November 14,
19 2001." The administrative record reflects (Ex. 41, CF50) that Mr. Di Giacomo faxed back a
20 response at 7:20 a.m. on November 14 with a cover letter dated November 13. Contrary to
21 Liberty Life's implication that Mr. DiGiacomo was a cause of Liberty Life's delay, it is evident
22 that Mr. DiGiacomo responded promptly on the date he received the letter and utilized a fax rather
23 than the U.S. mail in order to assure that Liberty Life received a prompt response. Liberty Life
24 offers no explanation for the fact that it waited until 15 days prior to the end of the 60 day period
25 to request authorization to first obtain pharmacy records when Mr. DiGiacomo states in his
26 September 17, 2001 appeal (Ex. 23) that he was taking Donnatal which impaired his
27 concentration and caused drowsiness and Dr. Verhille's records in Liberty Life's possession
reflected that Mr. DiGiacomo had been taking Donnatal consistently since March, 2001.

28 In the instant case, Liberty Life was not engaged in the meaningful dialogue contemplated
in Jebian because the only communications regarding the processing of Mr. DiGiacomo's claim

1 were the letter regarding his complaint to the Insurance Commissioner, which, as discussed above,
2 merely stated that the appeal response was pending and the two calls from David DiGiacomo on
3 November 8, 2001 and November 26, 2001 inquiring as to the status of his appeal. In response to
4 the November 8, 2001 inquiry, Liberty Life stated that it was “still reviewing his file.” Mr.
5 DiGiacomo asked for Liberty Life’s understanding of the 60 day time frame. He was advised that
6 Liberty Life has “60 days in which to render decision unless there may be additional information
7 lacking or that we may need to obtain. If [Liberty Life] notif[ies] him prior to the 60 day limit
8 then [Liberty Life] may have up to 120 days.” Mr. DiGiacomo asked “when [he] would know and
9 if [Liberty Life] would advise him within 60 days.” Liberty Life told him that it “could not give
10 him a date - however we rec’d his appeal on 9/24/01 - and he would know something within 60
11 days of receipt of his appeal.” (Exhibit 33a). In fact, Liberty Life failed to notify Mr. DiGiacomo
12 within 60 days of the appeal. On November 26, 2001, Mr. DiGiacomo called to inquire why his
13 review had not been completed within 60 days. He was advised that Liberty Life “review[] files
14 in the order in which we get them.” (Exhibit 33b). These two status inquiries and responses
15 clearly do not constitute the “meaningful dialogue” described in Jebian.. Liberty Life did not
16 notify Mr. DiGiacomo prior to the 60 day limit that it required additional time and, as set forth
17 above, the claim was deemed denied on November 23, 2001. Therefore, there was no opportunity
18 for the exercise of discretion, and the denial is reviewed de novo.

18 **B. Insurance Commissioner’s Opinion Letter**

19 In its Opposition, defendant contends that the California Insurance Commissioner’s
20 Opinion Letter and Notification of Intent to Withdraw approval of insurance policies containing
21 discretion is not binding because it is not final as the affected insurers have 30 days to request a
22 hearing. However, this argument lacks merit because the publication of the opinion is a separate
23 act from the issuance of the Notice of Withdrawal and its persuasive effect is not dependent on the
24 withdrawal notice. Nothing in the notice to withdraw negates, delays, or in any way affects the
25 conclusion reached in the letter opinion that the discretionary language in the police at issue in
26 this case violates California and in the DOI’s amicus brief that it has long been the DOI’s position
27 that such language violates California law and will not be approved. (Ex. 42).

28 Defendant next contends that the Letter Opinion is irrelevant, because even though the
clause may have been determined today to be invalid, it had not been determined to be unlawful

1 when the appeal was denied. This argument is devoid of logic and commonsense and ignores
2 basic ERISA trust law. It is a basic principle of trust law that “a provision in the terms of a trust is
3 invalid if illegal.” Restatement (Second) of Trusts, § 60. However, the invalidity of a particular
4 trust provision due to illegality does not invalidate the entire trust unless “the illegal provision
5 cannot be separated from the other provisions without defeating the purpose of the settlor in
6 creating the trust.” *Id.* at § 65. In this case, DOI’s opinion makes clear that the discretionary
7 language in the policy violates California insurance law. The separation of the discretionary
8 language from the other policy provisions does not defeat the purpose of the settlor in creating the
9 trust because there is no indication that Adobe’s purpose in creating the plan was anything other
10 than to provide its employees with benefits in the event of disability. In fact, invalidity of the
11 discretionary language is more likely to promote Adobe’s purpose in creating the plan than
12 enforcement of the discretionary language. Defendant’s reliance on cases that hold that a claim is
13 governed by the terms of the plan in effect at the time of the events giving rise to the claim is
14 misplaced because in the cases cited by defendant the terms of the plan in effect at the requisite
15 time were not unlawful and did not violate state law. Therefore, the court should enforce the plan
16 terms without giving effect to the illegal language - that is, it should review Mr. DiGiacomo’s
claims de novo.

17 Additionally defendant argues that the presence of a fiduciary relationship and of conflict
18 of interest analysis undermine the Department of Insurance’s conclusion that discretionary
19 language deprives California insureds of state protections. This argument lacks merit because,
20 despite the fiduciary relationship and conflict of interest analysis, it is axiomatic that the abuse of
21 discretion standard of review deprives a California claimant of the scrutiny of a de novo review.

22 Finally, in a sentence which is not a model of clarity and which misstates ERISA
23 jurisprudence on the issue of preemption, defendant states that “the commissioner’s opinion is
24 expressly preempted by ERISA because the decision falls within the deemer clause of ERISA.” In
25 fact, defendant misconstrues the ERISA “deemer” clause. The deemer clause only provides that
26 state law regulating insurance shall not apply to self-insured plans. In the seminal Supreme Court
27 case of Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, n. 6 (2002), the Supreme Court stated
28 that “ERISA’s “deemer” clause provides an exception to its saving clause” and that the deemer
clause “forbids states from regulating self-funded plans as insurers.” Since the plan at issue is not

1 a self-funded plan (a plan funded solely by Adobe without the purchase of insurance) but a fully
2 insured plan because Adobe purchased insurance from Liberty Life, the deemer clause is not
3 applicable in the instant case.

4 Defendant's argument that the law at issue, Cal. Ins. Code § 10291.5(b)(1), (13), is not a
5 law that regulates insurance and, is therefore, saved from preemption under the savings clause
6 also lacks merit. The Department of Insurance's Letter Opinion discusses this issue thoroughly.
7 ERISA expressly preempts all states laws that relate to employee benefit plans. ERISA § 514(a),
8 29 U.S.C. § 1144(a). However, ERISA's insurance savings clause exempts from preemption any
9 law of any state which regulates insurance. ERISA 514(b)(2)(A), 29 U.S 1144(b)(2)(A). The
10 Supreme Court has specifically held that state regulation that deprives insurers of deferential
11 review of benefits decisions is not preempted by ERISA. Rush Prudential, supra, 536 U.S. at 384-
12 85. A state law regulates insurance if it is directed at insurance entities and substantially affects
13 the risk-pooling arrangement between insurer and insured. Kentucky Ass'n of Health Plans v.
14 Miller, 538 U.S. 329, 123 S.Ct. 1471, 1479 (2003). DOI's application of Insurance Code §
15 10291.5 and the insurance regulation itself clearly meet these criteria. First DOI has determined
16 that the discretionary language violates California law, a determination that is directed at
17 insurance entities and specifically at insurers. DOI's determination substantially affects the risk-
18 pooling arrangement because it shifts risk from insureds to insurers: an insurer bears a greater risk
19 of liability for benefits if it must pay benefits whenever an insured meets the eligibility criteria set
20 forth in the policy as opposed to only when it cannot articulate a non-arbitrary and non-capricious
21 reason by denying benefits. Indeed, DOI specifically determined that the level of risk borne by
22 insureds where discretionary language is present in their policies renders those policies
23 economically unsound for the insured because it deprives them "of the benefits for which they
24 bargained." Therefore, the DOI's opinion and the Section 10291.5 of the Insurance Code which
25 prohibits the approval of any form containing provisions that are "unintelligible, uncertain,
26 ambiguous or abstruse or likely to mislead a person to whom the policy is offered, delivered or
27 issued" is exactly the type of insurance regulation that is saved from preemption. Moreover, in
28 the DOI amicus brief (Ex. 42) the DOI's General Counsel states that the DOI has not approved
policies with discretionary clauses since the mid-nineties because they violate California law.
Since there is no evidence in the administrative record that the plan at issue was submitted to the

1 DOI for approval and since the DOI would not have approved a plan with a discretionary clause,
2 the discretionary clause in the instant case is not enforceable because it violates California law.

3 III. Argument

4 A. **Despite Liberty Life’s Introduction of a New but Equally Unpersuasive Post 5 Hoc Rationale, Liberty Life Is Restricted to the Indefensible Rationale that It 6 Articulated in the Denial Letters.**

6 In its briefs before this court, Liberty Life introduces for the first time a new but equally
7 unpersuasive rationale involving surveillance reports, websites, and credibility attacks not
8 contained in the denial letters. Courts in our circuit have warned of defendant’s attempts to
9 sandbag plaintiff’s with rationales that emerge for the first time in litigation. See eg. Jebian v.
10 Hewlett Packard Co., 349 F.3d 1098, 1104 (9th Cir. 2003)(post-hoc rationales sandbag claimants
11 by a “rationale the plan administrator adduces only after the suit has commenced”). Liberty Life
12 is restricted to the grounds for denial articulated in its denial letters. The grounds for denial in the
13 initial claim denial letter of September 6, 2001 (Ex. 18) are summed up in its conclusion as
14 follows: “[i]n summary, treatment records report subjective complaints of abdominal pain” and
15 “objective diagnostic tests results have been normal.”¹ The grounds for the appeal denial of
16 December 12, 2001 (Ex. 30) are that 1) Mr. DiGiacomo never used narcotics; 2) Donnatal can be
17 sedating, but Mr. DiGiacomo never used Donnatal with consistency until June which is around the
18 time he began to work part time; 3) symptoms are subjective; and 4) all testing has been
19 essentially within normal limits. The grounds for denial in the claim and appeal denial letter,
20 therefore, boil down to defendant’s contention that 1) plaintiff’s complaints are subjective (there
21 is no objective medical evidence) and testing is essentially normal; and 2) the effects of the pain
22 medication on Mr. DiGiacomo’s ability to work cannot be considered because Donnatal is not a
23 narcotic, and he began taking Donnatal in June about the time he began to work part-time. Both
24 grounds are unreasonable. Courts have recognized, as Judge Posner stated in Hawkins v. First

25 ¹ In the September 6, 2001 denial (Ex. 18), Liberty Life states that Dr. Verhille’s
26 treatment notes of February 27, 2001 state that “[p]atient has had chronic aching discomfort in
27 epigastrium daily times 14 years.” However, defendant misreads Dr. Verhille’s treatment notes
28 which clearly states that “[p]atient has had chronic aching discomfort in epigastrium daily times
1 yr.” (Ex. 21). In the appeal denial letter, (Ex. 30), Liberty Life’s nurse correctly summarizes
Dr. Verhille’s office notes and recognizes that Mr. DiGiacomo’s irritable bowel syndrome did
not produce pain noting that Dr. Verhille’s notes reflect the fact that Mr. Di Giacomo has “a
history of irritable bowel syndrome dating back to age 12 but never associated with pain. [He]
reported epigastric pain about a year before [he] went out of work.” (Ex. 30).

1 Union Corporation Long-Term Disability Plan, 326 F.3d 914, 919 (7th Cir. 2003), that a finding of
2 disability can be predicated on subjective complaints of pain and that pain often “cannot be
3 detected by laboratory tests.”² With regard to Liberty Life’s disregard of the effects of pain
4 medication, Liberty Life appears to have adopted a rule, which is nowhere in the plan, that Liberty
5 Life will ignore the effects of pain medication unless the medication is a narcotic. However, even
6 Liberty Life’s nurse acknowledges that Donnatal is sedating, and, it defies logic and common
7 sense to argue that the barbituate, phenobarbital, which is contained in Donnatal is not impairing.

9 ² Defendant contends that Mitchell and Duncan v. Continental Casualty Co., 1997 WL
10 88374, *2 (N.D. Cal. 1997) and Mitchell v. Eastman Kodak Company, 113 F.3d 433 (3rd Cir.
11 1996) are inapposite because fibromyalgia and chronic fatigue are conditions which are not
12 susceptible to diagnosis by a dipstick test while Mr. DiGiacomo’s condition is. However, Dr.
13 Verhille specifically states in his report that the absence of dramatic abnormalities on medical
14 tests is “**common and expected in patients with functional GI disorders** [emphasis added].”
15 Moreover, plaintiff cites these cases for the proposition that a finding of disability can be
16 predicated on subjective complaints of pain and that neither the instant plan nor the case law
17 requires objective medical evidence to prove a claim. Moreover, even if the chronic fatigue and
18 fibromyalgia cases are excluded, there are numerous cases involving back pain, generalized pain
19 without a cause, and gastrointestinal problems in which there are no gross abnormalities on test
20 results and a recognition that pain cannot be detected by a lab test. See Lain v. UNUM, 279 F.3d
21 337, 344-347 (5th Cir. 2002), (gastrointestinal problems with tests that were essentially normal
22 where court held that the insurer failed to take into account the fact that Ms. Lain’s “pain cannot
23 be clinically measured by tests,” and the court concluded that “[t]o focus on the tests, rather than
24 the pain and its effect, further indicates abuse of discretion”); Collins v. Continental Casualty
25 Company, 2004 U.S.App.LEXIS 985, *4-*6 (8th Cir. 2004), (where plaintiff suffered from
26 symptoms of pain without a cause, and the court rejected the plan’s heavy reliance on the fact
27 “that Collins’ self-reported symptoms were not supported by clinical testing” because a plan
28 administrator “may not deny benefits simply because a claimant cannot provide a diagnosis that
would explain her self-reported symptoms” and “a plan administrator may not deny benefits
simply because the only evidence of pain is subjective.”). In Palmer v. University Medical
Group, 994 F.Supp. 1221 (D.C. Ore. 1998), which is factually similar to the instant case despite
defendant’s contention to the contrary, plaintiff had back pain which did not show up on xrays,
bone scans, or neurological tests. Like Liberty Life, the insurer in Palmer “emphasized the
absence of gross abnormalities detectable through tests such as x-rays bone scans, and
neurological tests.” However, the court rejected this basis for denial noting that “[t]here is
nothing in the record to indicate that a negative examination necessarily means Ms. Palmer is not
suffering from severe back pain.” Additionally, the insurer in Palmer like Liberty Life argued that
the absence of a detectable cause for the pain was fatal to Ms. Palmer’s claim. The court also
rejected this argument and stated that “[a]lthough Dr. Krohn was unable to point to a specific
cause of the pain on an x-ray, he did not doubt that Ms. Palmer was in fact suffering from severe
pain which was exacerbated by her employment.” The court concluded that “[w]hile Standard
was concentrating on the lack of “objective medical evidence,” it simply ignored plaintiff’s
subjective complaints of pain.” The Palmer insurer discounted the plaintiff’s claim because “the
subjective complaints far outweigh the clinical findings.” However, the court held that this
reason was not an adequate reason for discounting the complaints. Similarly, in the instant case,
Liberty Life’s reason for discounting Mr. DiGiacomo’s complaints of pain is that “[a]ll testing
submitted has been essentially within normal limits and your reported symptoms are mainly
subjective” which is not an adequate reason for discounting his complaints.

1 Moreover, the administrative record clearly reflects the fact that Mr. DiGiacomo began taking
2 Donnatal consistently on March 28, 2001 prior to his return to a part-time accommodated job
3 primarily from home on May 21, 2001.³

4 The bulk of defendant's brief is devoted to attacks on plaintiff's credibility, which is not
5 impugned in any way in the claim and appeal denial letters, to a surveillance report, which
6 defendant acknowledges it did not receive until after the final appeal denial letter, and to a
7 personal website that Mr. DiGiacomo uses to pursue a hobby and to a game invented by a
8 different David DiGiacomo. In Palmer v. University Medical Group, 994 F.Supp. 1221 (D. Ore.
9 1998), the court is faced with similar post hoc rationales which it rejects. The courts states: "[a]t
10 oral argument, and in its briefs filed with this court, Standard attempted for the first time to
11 articulate legitimate reasons for discounting plaintiff's subjective complaints for her physician's
12 conclusion that she was disabled. That was too late. If Standard's decision is to be affirmed, it
13 must be on the grounds and for the reasons that were articulated in its decision, not some new
14 grounds propounded for the first time in this court by Standard's attorneys. In any event,
15 Standard's arguments are unpersuasive." Similarly, Liberty's Life's post hoc rationale is too late
16 and unpersuasive. In its Opposition, Liberty Life goes as far as to claim that the surveillance
17 report is included in the substantial evidence that supports the denial and is part of the
18 administrative record. On page 25, lines 1-3 of its Opposition, defendant makes the incredible
19 statement that its decision to deny benefits was "supported by substantial evidence **in the record**

20 ³ The New World Medical Dictionary defines a barbiturate as "[a] class of drugs that
21 depress activity in the central nervous system, including many sleeping pills, sedatives,
22 antispasmodics, and anesthetics. Barbiturates are addictive, carry a high risk of overdose, and
23 should never be used with alcohol or with other CNS [central nervous system] depressants." (Ex. 43).
24 Any medication that depresses activity in the central nervous system is impairing. In
25 its Opposition, defendant states that plaintiff's admission in its moving papers that he took
26 Donnatal on a one time trial basis in May, 2000 somehow bolsters defendant's argument. It is
27 clear from the records that Mr. DiGiacomo tried Donnatal only once in May, 2000 and began
28 taking it regularly from March 28, 2001 on. However, the significance of Mr. DiGiacomo's one
time trial of Donnatal in May, 2000 is unclear. In its moving papers and Opposition, Liberty
Life takes the indefensible position that Mr. DiGiacomo's consistent use of Donnatal which,
according to Liberty Life, coincided with his return to work part-time mainly from home is
evidence that he was not disabled. The fact that the record clearly reflects that Mr. DiGiacomo
began taking Donnatal consistently in April and May, 2001 before he returned to part-time work
undercuts defendant's argument although it is still unclear how the argument helps Liberty Life.
The fact that Mr. DiGiacomo had to continue to take barbiturates while he was working part-time
merely tends to prove that he is not a malingerer and to corroborate Mr. DiGiacomo's complaints
of inability to concentrate and fatigue and difficulties in completing assignments, absorbing
material, and avoiding errors.

1 including “plaintiff’s medical records, **surveillance reports** and the opinion of Liberty’s
2 medically trained staff.” On page 22, lines 27-28 and page 23, line 1 of its Opposition, defendant
3 makes the equally incredible statement that the “surveillance report” is part of the “non-medical
4 information **in the file**” that contradicts Mr. DiGiacomo’s subjective complaints of pain.
5 Defendant’s contention in its Opposition that the surveillance report, which it did not even receive
6 until after the appeal denial, played any part in the defendant’s denial is illogical and a post hoc
7 rationale that has been rejected in our circuit.⁴ Defendant argues that, in October, 2003, Liberty
8 has learned that plaintiff was operating a web site trading test manuals and other electronic test
9 equipment and he was able to respond to 300 e-mails per day. (Def. Opp., p. 11). In its Errata,
10 defendant submits a webpage allegedly from Mr. DiGiacomo’s website but actually from the
11 website of <http://www.mobygames.com> which refers to a different Mr. David DiGiacomo [spelled
12 David Di Giacomo] who invented games. Liberty also submits the first 2 home pages of plaintiff
13 David DiGiacomo’s website followed by 2 pages listing various electronic equipment and
14 manuals for sale and four pages of a “want” list of manuals that Mr. DiGiacomo is seeking in
15 support of his hobby of collecting and trading manuals and electronic test equipment. Contrary to
16 the statement in the Declaration that the exhibit is evidence that “he was able to respond to over
17 300 e-mails a day that I reviewed online and then downloaded on or about October 24, 2003,” the
18 declaration contains no such evidence. As set forth in Mr. DiGiacomo’s declaration
19 accompanying this brief and in the attachment to his declaration that contains a copy of the
20 website, Mr. DiGiacomo’s website is a personal website that he uses to write about his personal
21 life and his hobby of collecting and selling manuals and electronic test equipment, he applies the
22 proceeds from the trading and sale of these manuals to defray the cost of the rent of the storage
23 facility where he stores the manuals and equipment, and he did not respond to over 300 e-mails

24 ⁴ Even if the surveillance were not a post hoc rationale, which it is, courts have rejected
25 surveillance reports that have not correlated the physical conduct observed with the ability to
26 perform the material and substantial duties of a highly intellectually demanding job like the
27 plaintiff’s in this case and that have not been reviewed by physicians who specialized in the
28 relevant field. See Morgan v. UNUM Life Insurance Company of America, 2002 U.S.
Dist.LEXIS 17663, *14 (D.C. Minn. 2002); Marziale v. Hartford Life & Accid. Ins. Co. 2002
U.S.Dist.LEXIS 11321 (E.D. LA. 2003). There is no indication that the investigator had any
medical training, and Liberty Life fails to address the relationship between Mr. DiGiacomo’s
observed physical conduct and his ability to perform the material and substantial duties of his
highly cognitive profession.

1 per day. On its face, defendant's assertion that Mr. DiGiacomo answers 300 e-mails a day is
2 absurd since Mr. DiGiacomo would have to spend 96 seconds per e-mail without a break for 8
3 hours to answer 300 e-mails per day.⁵ In Hawkins v. First Union Corporation Long-Term
4 Disability Plan, 326 F.3d 914 (7th Cir. 2003), Judge Posner reasons that "becoming inert" is not
5 required to prove disability. In the instant case, Mr. DiGiacomo may pursue a hobby for a limited
6 time each day and does not have to become inert to prove disability.

7 In its Opposition defendant also makes the post-hoc and erroneous argument that plaintiff
8 would not fall within the definition of disabled under the plan if he was working part-time, and, as
9 a result, quit working on November 6, 2001. (Def. Opp. 24:8-10). However, as noted in footnote
10 8 to plaintiff's moving papers, under the Quick Recovery Program (Ex. 1, Policy, Section 4), an
11 insured is eligible for benefits if he or she is partially disabled or is "able to perform all of the
12 material and substantial duties of his own or any other occupation on a part-time basis" or "able to
13 perform one or more, but not all, of the material and substantial duties of his own or any other
14 occupation on an Active Employment or a part-time basis." (Ex. 1, Form DOP3-LTD-0007).
15 Moreover, defendant did not quit working because he believed that he would not be eligible for
16 benefits if he worked part-time.⁶ He quit working as even defendant acknowledges because the

17 ⁵ Defendant requests that, if the court determines that the standard of review is de novo,
18 defendant be permitted to supplement the record with information regarding Mr. DiGiacomo's
19 hobby. However, such supplementation is not permitted in our circuit even on de novo review.
20 In Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 944 (9th Cir.
21 1995), the Ninth Circuit stated that, on de novo review, "[w]e emphasize that a district court
22 should not take additional evidence merely because someone at a later time comes up with new
23 evidence that was not presented to the plan administrator." Moreover, plan administrators are
24 not permitted to present post hoc rationales even in de novo cases. See Jebian v. Hewlett-
25 Packard Company, 49 F.3d 1098, 1104-1105 (9th Cir. 2003)(a de novo case)(rejecting post hoc
26 rationales "articulated by counsel" that sandbag claimants); Dishman v. UNUM Life Insurance
27 Company of America, 269 F.3d 974, 987 (9th Cir. 2001)(a de novo case)(the fact that UNUM
28 may be able, post hoc, to offer a legally plausible justification for its termination of Dishman's
benefits is irrelevant.)

24 ⁶ Defendant relies on an alleged statement from "Valerie" that is not mentioned in either
25 the denial letter (Ex. 18) or appeal denial letter (Ex. 30). Defendant clearly didn't rely on this
26 statement in the denial letters or consider the statement to be of any significance because there is
27 no evidence in the record that Liberty Life ever followed up the statement with an investigation.
28 The statement itself cannot be reasonable grounds for a denial because it is unclear whether
Valerie's statement was transcribed accurately and whether Valerie was in a position to know or
observe Mr. DiGiacomo's capabilities or the extent of his medical problems. Liberty Life's
failure to mention this evidence or impugn Mr. DiGiacomo's credibility in its claim or appeal
denial letters suggests Liberty's own recognition of the weakness of the evidence. See Cook v.
Liberty Life, 320 F.3d 11, 23 (1st Cir. 2003)(Liberty Life's failure to state either in its initial
termination letter, or in its letter affirming its denial, that a piece of evidence factored into its

1 employer would no longer permit him to work predominantly from home in an accommodated
2 part-time position. Defendant also argues in its Opposition that “the fact that he was able to work
3 five hours a day is conclusive proof that he was not disabled under the terms of the plan.”
4 However, this argument lacks merit because, as Judge Posner recognized in Hawkins, work from
5 home is different from work in the office because of the ability to rest as needed. Moreover, in his
6 appeal denial letter, plaintiff chronicles his difficulty working with pain and the effects of the pain
7 medication. (Ex. 24)(“no longer [able to] concentrate sufficiently to complete complex
8 programming tasks,” Donnatal “causes drowsiness and further impairs my concentration,” “not
9 able to work at a computer for extended periods because it exacerbates the pain,” “difficulty in
10 reading and absorbing complex technical material,” “often not able to attend scheduled meetings”
11 because “the degree of pain is not predictable,” “difficulty participating in technical discussions
12 and providing leadership because of lack of concentration and drowsiness,” and “not able to
13 concentrate sufficiently to work at a normal pace, and I make an excessive number of errors.”) If,
14 as defendant contends, the ability to work predominantly at home part-time, is “conclusive proof”
15 that an insured “was not disabled under the terms of the plan,” then the Quick Recovery Program
16 is illusory and any insured who takes advantage of the program can expect to be denied benefits
17 immediately. In Palmer, supra, 994 F.Supp. at 1236, Standard “cites as proof that [Ms. Palmer]
18 was not disabled” the fact that she “continued to work for 15 years while suffering from back and
19 neck pain.” However, the court reasons that “[i]t equally tends to prove that she was not
20 malingering.” Similarly, the fact that Mr. DiGiacomo chose to attempt to work part-time on May
21 21, 2001 instead of choosing not to work at all and only stopped work, as defendant
22 acknowledges, when his employer could no longer accommodate him in a part-time position
23 working predominantly from home tends to prove that he was not malingering.

23 **B. Defendant Focuses Solely on Physical Limitations and Restrictions and Does**
24 **Not Attempt to Evaluate Whether Plaintiff Had the Mental Acuity Necessary**
25 **for His Cognitively Demanding Job**

26 When Liberty Life does attempt to justify its actual rationale in its Opposition, its
27 justification exposes a fundamental error in Liberty Life’s reasoning. Defendant argues that
28 plaintiff “**never identified any physical limitations or restrictions** other than to report that

decision to deny benefits suggests Liberty Life’s own recognition of the weakness of the
evidence as a basis for denial.)

1 plaintiff's self-reported complaints of pain affected his ability to concentrate. [highlighting in
2 original]." (Def. Opp., 19:10-12). As evidence, defendant identifies the Physical Capacity form
3 completed by Dr. Verhille that did not list any physical restrictions for plaintiff during an 8 hour
4 day. (Ex. 15 to Moving Papers & Ex. 44 to Reply). However, defendant neglects to point out that
5 Dr. Verhille states under the "physical capacity and lifting capacity" provisions "N/A [not
6 applicable]" because these manual capacities are irrelevant to Mr. DiGiacomo's occupation as a
7 Senior Computer Scientist who performs complex intellectually demanding work. Liberty Life
8 also ignores the fact that, on the very same form, Dr. Verhille states under the "Additional
9 Comments" section "Pt [patient's] job requires concentration at a computer which is difficult with
10 his chronic pain." (Ex. 44). A plan administrator's selective review of the evidence supports
11 reversal under any standard of review. Govindarajan v. FMC Corp., 932 F.2d 634, 637 (7th Cir.
12 1991). It is unreasonable for Liberty Life to attempt to correlate the ability to perform medium
13 manual work with the ability to perform the extremely complex and intellectually demanding
14 work of a Senior Computer Scientist. In Conrad v. Reliance Standard, 292 F.Supp.2d 233, 241
15 (D.C. Mass. 2003), the court notes that "it is clear that [the Vocational Rehabilitation
16 Coordinator] limited his inquiry to whether Conrad [who had severe back pain] had the physical
17 ability to do sedentary work, and there was no attempt to evaluate whether Conrad had the mental
18 acuity necessary for his job" which was cognitively demanding. Similarly, in the instant case,
19 defendant limits its inquiry to whether Mr. DiGiacomo had the physical ability to do sedentary
20 work, and there was no attempt to evaluate whether Mr. DiGiacomo had the mental acuity
21 necessary for his job.

22 **C. Plaintiff's Cases Survive Nord.**

23 In its Opposition, defendant contends the cases plaintiff cites are not good law in light of
24 the Supreme Court's rejection of the treating physician rule in Nord. However, plaintiff did not
25 cite these cases for the treating physician rule but for the proposition that a reviewing physician
26 (and, in the instant case, reviewing nurses of no known training in gastroenterology) is entitled to
27 less weight than an examining physician. Such a proposition is consistent with Nord and with
28 Ninth Circuit case law. In Nord, the Supreme Court noted that "[p]lan administrators, of course,
may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a

1 treating physician.” Black and Decker v. Nord, 123 S.Ct. 1965, 1972 (2003). The court also
2 stated that “it may be true that treating physicians, as a rule, have a greater opportunity to know
3 and observe the patient as an individual.” Id. at 1971. Additionally, the Supreme Court stated that
4 a treating physician does not warrant greater credit than the opinion of plan physicians when “for
5 example, the relationship between the claimant and the treating physician has been of short
6 duration.” Id. Therefore, the Supreme Court rejected the blanket application of a treating
7 physician rule in favor of an individualized assessment but did not, as defendant appears to
8 contend, adopt a “reviewing physician” rule. The Ninth Circuit recognized the holding in the
9 Nord case and specifically stated in the revised Jebian opinion that “[o]f course, the opinions of
10 Jebian’s doctors may (indeed, must) be accorded whatever weight they merit” and that, even with
11 a deferential review, a plan administrator “may not arbitrarily refuse to credit a claimant’s reliable
12 evidence, including the opinions of a treating physician.” Jebian v. Hewlett-Packard, 349 F.3d
13 1098, n. 8 (9th Cir. 2003). Finally, the court stated that the court must “take cognizance of the fact
14 (if it is a fact in the particular case) that a given treating physician has “a greater opportunity to
15 know and observe the patient” than a physician retained by the plan administrator.” Id. The
16 cases from courts in the Ninth Circuit that plaintiff cites in his moving papers survive Nord
17 because they stand for the proposition that a **reviewing** physician’s report should be entitled to
18 less weight than the report by an **examining** physician and a **reviewing nurse’s report** to the
19 least weight. See Isabel v. Hartford Life and Accident Insurance Company, 1999 U.S. Dist.
20 LEXIS 824, *6-7 (N.D.Cal. 1999)(“the opinion of a **non-examining** physician cannot, by itself,
21 constitute substantial evidence to overturn the opinion of an **examining** physician);” Zavora v.
22 Paul Revere Life Insurance Co., 145 F.3d 1118, 1122-1123 (9th Cir. 1998)(reversing a denial of
23 benefits under the abuse of discretion standard and holding that there was an insufficient
24 evidentiary basis for rejecting an **examining** physician’s diagnosis because *inter alia* the insurer
25 **did not examine plaintiff**); Russell v. UNUM, 40 F.Supp.2d 747, 751 (Dist. S.C. 1999)(reliance
26 **solely on two nurses** did not constitute authoritative medical opinion and could not overcome the
27 evidence of the authoritative medical opinion by a physician in the record.); LaBarge v. Life
28 Insurance Company of North America, 2001 WL 109527 (N.D.Ill. 2001)(LINA’s “determination
lacks a proper medical foundation” because LINA relied on a **non-physician** and “[t]he findings

1 of non-physicians should be afforded little weight”). Similarly, Liberty Life’s denial lacks a
2 medical foundation because the findings of the non-physician nurses are entitled to little weight,
3 and the denial of benefits cannot withstand scrutiny under any standard of review.

4 Liberty Life arbitrarily refuses to credit the opinions of Mr. DiGiacomo’s physicians and
5 instead relies on a selective and flawed nurse’s report based only on a paper record review. Nurse
6 Janousek reviews the file, summarizes plaintiff’s medical reports, and responds to the question
7 “Are the R/L’s supported by the objective data” with the answer “No” and without explanation.
8 (Ex. 13). In another four sentence note, Nurse Janousek states conclusorily that “[t]here was no
9 objective data to support subjective complaints,” that the claims unit would like to close the file at
10 this time, and that Nurse Janousek will refer to physicians if appropriate. (Ex. 20). Nurse Betty
11 Todd, provides a terse three sentence assessment on November 16, 2001 after a short summary of
12 the claim file (Ex. 28) and repeats the same three sentence evaluation in a Referral Sheet on
13 November, 29, 2001. (Ex. 20). Neither of the nurse reviewers evaluates the opinions of the
14 examining physicians.

15 Despite Liberty Life’s attempt to bolster its denial with unpersuasive post-hoc arguments,
16 the fact remains that defendant’s only supporting evidence is the terse, error-ridden, sketchy, and
17 selective paragraph written by Liberty Life’s in-house nurse reviewers of no known specialization
18 which is clearly entitled to little weight and which does not constitute substantial evidence.
19 Liberty Life has arbitrarily refused to credit the opinions of Mr. DiGiacomo’s physician
20 specialists. Courts have consistently rejected denials, like Liberty Life’s, that are predicated on
21 the absence of gross abnormalities on medical tests and that completely ignore complaints of pain
22 and the side effects of pain medication.

23 **IV. Conclusion**

24 For the reasons set forth above, plaintiff respectfully requests that this court grant
25 plaintiff’s Motion for Summary Judgment and deny Defendant’s Motion for Summary Judgment.

26
27 _____
28 Date

Ruth Silver Taube
Attorney for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28