United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IOANNIS KANELLAKOPOULOS,

Plaintiff,

v.

UNIMERICA LIFE INSURANCE COMPANY,

Defendant.

Case No. 15-cv-04674-BLF

ORDER VACATING HEARING ON PLAINTIFF'S MOTION FOR NEW TRIAL; AND DENYING MOTION

[Re: ECF 287]

Plaintiff, Dr. Ioannis Kanellakopoulos, moves for a new jury trial pursuant to Federal Rule of Civil Procedure 59(a)(1)(A). The motion has been fully briefed. Having reviewed the briefing, the record, and the relevant legal authorities, the Court finds the motion to be appropriate for disposition without oral argument. *See* Civ. L.R. 7-1(b). The Court VACATES the hearing set for May 16, 2019. The motion is DENIED for the reasons discussed below.

I. INTRODUCTION

Plaintiff filed this action against Defendant Unimerica Life Insurance Company in October 2015, alleging that Defendant wrongfully denied him benefits under a catastrophic disability policy. Compl., ECF 1. Plaintiff asserted claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing (insurance bad faith), and (3) violation of California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200 *et seq*. *Id*. Claims 1 and 2 were tried to a jury, which found that Plaintiff did not suffer a covered loss under the Unimerica policy. Jury Verdict Form, ECF 247. That finding was dispositive of both Claims 1 and 2, as Plaintiff could not prevail on either of those claims absent a covered loss.

Id. Claim 3 was tried to the Court, which found for Defendant and against Plaintiff. FFCL, ECF 282. Judgment was entered for Defendant on October 17, 2018.

Plaintiff timely filed a motion for new trial on November 14, 2018. Motion for New Trial, ECF 287. He asserts that the jury verdict was tainted by four errors. First, Plaintiff argues that Jury Instruction No. 33 improperly instructed the jury that he needed to prove his disability claim with medical evidence when no medical evidence is required under the policy. Second, he asserts that the Court should have excluded the testimony of Defendant's expert neuropsychologist, Richard Perrillo, Ph.D., under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Third, Plaintiff contends that the Court improperly admitted testimony of Unimerca's expert psychiatrist, Jonathan Chamberlain, M.D., regarding Plaintiff's "judgment," over Plaintiff's objection that testimony regarding "judgment" was outside the scope of Dr. Chamberlain's expert reports. Finally, Plaintiff argues that the Court should have stricken Dr. Chamberlain's improper testimony regarding the policy's provision addressing Activities of Daily Living ("ADL").

II. LEGAL STANDARD

After a jury trial, a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Because Rule 59 does not specify the grounds on which a new trial may be granted, courts are "bound by those grounds that have been historically recognized." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (internal quotation marks and citation omitted). "Historically recognized grounds include, but are not limited to, claims that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." *Id*. (internal quotation marks and citation omitted).

"[E]rroneous jury instructions, as well as the failure to give adequate instructions, are also bases for a new trial." *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). "An instruction is erroneous when, viewing the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1194 (9th Cir. 2019) (internal quotation marks, citation, and brackets omitted). "If there is an error, we presume that the error was prejudicial and the non-moving party bears the burden of establishing that it is

more probable than not that a properly instructed jury would have reached the same verdict." *Id.* (internal quotation marks and citation omitted).

A new trial also is warranted when the "erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party's right to a fair trial." *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005). However, "[a] new trial is only warranted when an erroneous evidentiary ruling 'substantially prejudiced' a party." *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995). Where the party seeking a new trial establishes that expert testimony was admitted in error, the burden is on the beneficiary of the error to show that "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 465 (9th Cir. 2014) (internal quotation marks and citation omitted).

III. DISCUSSION

Applying these standards, the Court concludes that Plaintiff has failed to establish grounds for a new trial. Before turning to his asserted grounds for relief, however, the Court addresses Defendant's objection to Plaintiff's submission of an affidavit from one of the jurors in this case, Frederic Alagueuzian.

A. Juror's Affidavit

"A juror's observations may not be used as grounds to grant a new trial absent exceptional circumstances." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1140 (9th Cir. 1999). This rule is codified in Rule 606(b) of the Federal Rules of Evidence, which provides as follows:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. *The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.*

Fed. R. Evid. 606(b)(1) (emphasis added). The rule enumerates three exceptions to this blanket prohibition, providing that "[a] juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form. Fed. R. Evid. 606(b)(2).

Plaintiff has submitted a declaration from the jury foreperson, Frederic Alagueuzian, regarding the importance the jury placed on Jury Instruction No. 33 and the testimony of the defense experts. *See* Alagueuzian Decl., Exh. L to Creitz Decl., ECF 288-12. Plaintiff relies on the declaration to show that he was prejudiced by the Court's asserted errors in giving Jury Instruction No. 33 and admitting the testimony of defense experts Dr. Perrillo and Dr. Chamberlain. As Defendant points out in its opposition, Plaintiff's proposed use of Mr. Alagueuzian's declaration for this purpose falls squarely within the prohibition of Rule 606(b). Mr. Alagueuzian's statements, which focus solely on the jury's internal deliberations, do not fall within any of the exceptions. Plaintiff does not dispute – or even acknowledge – the Rule 606(b) bar in his reply brief.

Mr. Alagueuzian's declaration, discussing the internal processes of the jury in this case, is STRICKEN. *See United States v. Leung*, 796 F.3d 1032, 1035 (9th Cir. 2015) ("Although an exception to Rule 606(b) permits inquiry into whether 'extraneous influences' tainted the verdict, juror testimony regarding the jury's 'internal processes' is categorically barred.").

B. Jury Instruction No. 33

Plaintiff challenges Jury Instruction No. 33 on the asserted basis that it improperly instructed the jury that he needed to prove his disability claim with medical evidence when, in his view, no medical evidence is required under the policy. Jury Instruction No. 33, titled "Re: Policy Terms that Require Interpretation," quotes and interprets several policy provisions. The portion of the instruction addressing medical evidence reads as follows:

> I instruct you that under the insurance policy proof of a claim for catastrophic disability must include medical documentation. The insurance policy does not require any specific amount of medical evidence to prove a claim, nor does the policy exclude other types of evidence that may prove a claim. Do not read into this instruction, or the following instructions, that I have any view as to the specific medical documentation and records Dr. Kanellakopoulos must provide in order for him to be entitled to benefits under the policy. It is up to you, the jury, to determine whether Dr. Kanellakopoulos submitted the documentation and records the policy requires.

Jury Instruction No. 33, ECF 240.

Plaintiff argues that this instruction was erroneous because the policy does not require an insured to provide any medical evidence at all to perfect a claim. His view is that the policy

requires an insured to provide medical proof of ongoing disability, but only after the claim initially is granted. Defendant argues that the policy does require medical proof at the time a claim is presented, and thus that Jury Instruction No. 33 properly stated Plaintiff' obligations under the policy.

Jury Instruction No. 33 was the subject of extensive argument in chambers, with Plaintiff asserting his current position that no medical evidence was required to present a claim of catastrophic disability and Defendant arguing its position that contemporaneous medical evidence showing catastrophic disability throughout the entire period of disability was required to support a claim.

After a close reading of the policy in full, and careful consideration of both parties' positions, the Court interpreted the relevant policy provisions to require some medical documentation as part of the proof of claim. The provision titled "Catastrophic Disability Benefit" states that Defendant "must receive proof that Your Disability is a Catastrophic Disability, as defined." Policy at CERT 0010, Exh. A to Creitz Decl., ECF 288-1. The required "proof" is described in the "Claim Provisions," which state that upon notice of a claim, Defendant will send the insured "forms for giving Us Proof of Claim." Policy at CERT 0013. The provision titled "Filing a Claim" states as follows:

> **Filing a Claim:** The claim form will have instructions for completion of the form and documentation for Proof of Claim. *For Disability claims*, the form will instruct the claimant and his or her employer, if applicable, to fill out their own sections of the claim form *and give it to the claimant's attending Physician for completion of the Physician's section. The Physician should return the completed form directly to Our Claim Office.* For all other claims, the claimant should also complete the form in accordance with its instructions, and return it to Us at Our Claim Office.

Policy at CERT 0013 (emphasis added). Finally, the provision titled "Proof of Claim" states that "[f]or Disability claims, Proof of Claim means the documentation stated in the claim form," including certain enumerated information. *Id*. The Court read these provisions together to mean that an insured who wishes to submit a disability claim must submit a claim form which includes a section to be completed and returned to Defendant by the insured's physician. The physician's section in turn directs the physician to "include copies of all applicable office notes and test results" when returning the form to Defendant. Attending Physician's Statement CF 0035, ECF

76-38.[1] Thus, in the Court's view, the policy contemplated and required that medical evidence would be submitted as part of and with the initial claim form for disability claims. Plaintiff simply disagrees with the Court's interpretation.

Even if the instruction were erroneous, any such error would not have prejudiced Plaintiff. As he concedes in his reply brief, "[t]here was no dispute that Plaintiff had submitted some medical documentation, and the jury found that Plaintiff had satisfied all his contractual obligations." Reply at 1, ECF 294. Thus, the jury clearly understood that Plaintiff had satisfied the requirement set forth in the instruction that he had to submit *some* medical evidence in support of his claim. The Court instructed the jury that no specific amount of medical evidence was required, and that other, non-medical evidence could be considered. The Court emphasized that it was up to the jury to determine whether Plaintiff had submitted the evidence that the policy required. The most reasonable conclusion to be drawn from these circumstances is that the jury found that Plaintiff satisfied the requirement that he submit some medical evidence but ultimately failed to prove his claim of catastrophic disability.

C. Denial of *Daubert* Motion Re Dr. Perrillo

Plaintiff argues that the Court erred in denying his Motion in Limine No. 3, seeking to exclude the opinions and testimony of Defendant's expert neuropsychologist, Richard Perrillo, Ph.D. In a written order applying the analytical framework mandated by the Supreme Court in *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), this Court concluded that Dr. Perrillo's opinions regarding Plaintiff's asserted cognitive impairment and need for assistance or verbal cueing went to the heart of the case and therefore were relevant. Order Re Motions in Limine at 2-3, ECF 211. The Court found Dr. Perrillo's opinions to be sufficiently reliable in light of his education, training, and experience as a psychologist and clinician. *Id.* at 3. Rejecting the argument that Dr. Perrillo's opinions were unreliable because he did not conduct an in-person examination of Plaintiff, the Court observed that because Plaintiff had waited until *after* his

[1] Because the Court could not locate the Attending Physician's Statement in the materials submitted by the parties in connection with briefing on the motion for new trial, the Court refers to the copy of the Attending Physician's Statement that was submitted by Plaintiff in connection with briefing on the motion for summary judgment in this case.

alleged catastrophic disability abated to submit his insurance claim, it was "unclear what relevant information Dr. Perrillo could have obtained from an examination taken years later." *Id*. Under those circumstances, the Court found, "Dr. Perrillo necessarily had to rely on records dating back to the time period in which Plaintiff's alleged disability manifested." *Id*. The Court noted that many courts have upheld claims decisions based on an expert's review of the paper file. *Id*. The Court ultimately determined that the fact that Dr. Perrillo's opinions were based on a paper review rather than an in-person examination went "to the weight of his testimony rather than its admissibility." *Id*. at 3-4.

In the current motion for new trial, Plaintiff reiterates his argument that Dr. Perrillo's opinions were subject to exclusion because they were not based on in-person testing. Plaintiff asserts that "neuropsychologists perform and interpret neuropsychological tests, and since no such test was performed in this case, Dr. Perrillo's opinions lacked any foundation in his training and expertise." Motion for New Trial at 6, ECF 287. The only basis proffered for this asserted limitation on the expertise of neuropsychologists is a series of excerpts from the testimony of Dr. Perrillo himself, describing his normal practice of performing neuropsychological testing on the patient and then interpreting the tests to determine the existence of impairments. *Id*. at 7. However, Dr. Perrillo did not testify that neuropsychological testing is the only acceptable method for evaluating impairments. To the contrary, he testified that he has experience treating patients – specifically Vietnam War veterans – who are so impaired that neuropsychological testing cannot be performed. Trial Tr. 1045:3-23, Exh. A to Wall Decl., ECF 293-2. Dr. Perrillo described his 50-hour evaluation of Plaintiff's medical records and explained why in his opinion those records were not consistent with a major cognitive disorder. Trial Tr. 984:11-991:23. When challenged during cross examination as to what basis he had to quantify cognitive impairments in the absence of neuropsychological testing, Dr. Perrillo responded, "Well, I have, let's see, 40-something years of experience of looking at people, observing people, interviewing them, testing them. And at the extremes, I will represent to you that the error rate would be very small." Trial Tr. 1046:1-9.

The Court concludes that Plaintiff has not presented any basis for reconsideration of the *Daubert* ruling regarding Dr. Perrillo.

D. Admission of Dr. Chamberlain's Testimony Regarding "Judgment"

Plaintiff argues that the Court erred in overruling his objection to the testimony of Defendant's expert psychiatrist, Jonathan Chamberlain, M.D., regarding Plaintiff's "judgment." Plaintiff's theory at trial was that he satisfied the policy's definition of "cognitively impaired" based on a deficiency in his "judgment as it relates to safety awareness." The policy defines "cognitively impaired" as:

> *a deficiency in* short or long-term memory, orientation as to person, place and time, deductive or abstract reasoning, *or judgment as it relates to safety awareness*. The impairment must be measurable according to generally accepted medical standards.

Policy at CERT 0005 (emphasis added), Exh. A to Creitz Decl., ECF 288-1. Plaintiff sought to prove a deficiency in his judgment by presenting evidence that he drove recklessly, exhibited confrontational behavior, and spent money erratically.

Defendant's expert psychiatrist, Jonathan Chamberlain, M.D., addressed this theory at trial, distinguishing between medically impaired judgment and simply making a bad decision. *See* Trial Tr. 1396:2-1397:24, 1420:2-8, 1422:1-11, 1429:16-1430:5 Exh. E to Creitz Decl., ECF 288-5. Plaintiff's counsel objected to Dr. Chamberlain offering any testimony on the subject of "judgment" on the ground that such testimony was outside the scope of Dr. Chamberlain's expert reports. Trial Tr. 1393:17-22, Exh. E to Creitz Decl., ECF 288-5. The Court addressed the objection in a sidebar discussion. Trial Tr. 1393:24-1395:25.

At sidebar, Plaintiff's counsel argued that Dr. Chamberlain's expert reports did not directly address whether Plaintiff had a deficiency in his "judgment" and in fact did not use the word "judgment" except when reciting the policy's provisions. *Id*. Defendant's counsel responded by arguing that even if Dr. Chamberlain's reports did not frame his opinions in the precise terms that he used in his testimony, Dr. Chamberlain's expert report clearly addressed Plaintiff's theory of cognitive impairment. Counsel pointed to portions of Dr. Chamberlain's expert report noting that none of Plaintiff's providers "put into place or recommends instructions, restrictions on finances, driving, personal assistance, resources for verbal cueing, guardians, hospitalizations and so forth." Trial Tr. 1395:16-19. Defendant's counsel argued that "[t]his gets to the core of judgment, Your Honor." Trial Tr. 1395:19-20. The Court overruled the objection and permitted Dr.

Chamberlain's testimony.

Plaintiff argues that the Court's ruling was in error because Dr. Chamberlain's reports did not state expressly that Plaintiff had failed to show a deficiency in judgment, and the Court's in limine rulings prohibited expert opinions that were not disclosed in discovery. *See* Order Re Motions in Limine at 6, ECF 211. Plaintiff's argument takes too narrow a view of Dr. Chamberlain's reports. "The purpose of expert reports is not to replicate every word that the expert might say on the stand." *Martinez v. United States*, No. 1:16-cv-01556-LJO-SKO, 2019 WL 266213, at *8 (E.D. Cal. Jan. 18, 2019) (internal quotation marks, citation, and brackets omitted). "The purpose is instead to convey the substance of the expert's opinion (along with the other background information required by Rule 26(a)(2)(B)) so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary." *Id*. (internal quotation marks and citation).

Dr. Chamberlain's expert report correctly quotes the policy's definition of "cognitively impaired" as "a deficiency in short or long-term memory, orientation as to person, place and time, deductive or abstract reasoning, or judgment as it relates to safety awareness." Dr. Chamberlain Report at 29, Exh. C to Creitz Decl., ECF 288-3. The report specifically addresses the conduct that is at the core of Plaintiff's claimed deficiency in judgment, including reckless driving, confrontational behavior, and erratic spending. *Id*. at 30-31. The report indicates that it is unclear whether those episodes were related to Plaintiff's bipolar disorder or merely were indicative of his personality traits. *Id*. The report emphasizes that neither Plaintiff's medical providers nor his wife attempted to restrict his ability to drive or manage his finances. *Id*. at 30. The report concludes that Plaintiff was not cognitively impaired under the terms of the policy. *Id*. Dr. Chamberlain's rebuttal report recaps Plaintiff's reckless driving, confrontational behavior, and spending, as well as the lack of any efforts to restrict Plaintiff, and again concludes that Plaintiff was not cognitively impaired. Dr. Chamberlain Rebuttal Report, Exh. D to Creitz Decl., ECF 288-4. Thus, while the reports do not specifically state that Plaintiff failed to show an impairment to his judgment, the reports clearly reject the theory that the conduct identified by Plaintiff establishes a cognitive impairment.

Plaintiff argues that Dr. Chamberlain conceded during cross-examination that his expert report did not encompass his testimony regarding Plaintiff's judgment. Plaintiff's counsel asked Dr. Chamberlain whether his expert report "says explicitly Plaintiff was not suffering from an impairment of judgment as it relates to safety awareness?" Trial Tr. 1534:20-23, Exh. E to Creitz Decl., ECF 288-5. Dr. Chamberlain replied, "I didn't use those exact words, no." Trial Tr. 1534:24. The Court does not view that reply as a concession, but as an accurate statement that Dr. Chamberlain's expert report did not frame his opinions using the particular words recited by counsel. However, for the reasons discussed above, Dr. Chamberlain's trial testimony was not outside the scope of his reports.

E. Denial of Request to Strike Dr. Chamberlain's Testimony Re ADLs

Finally, Plaintiff argues that the Court should have stricken Dr. Chamberlain's testimony regarding the policy's provision addressing Activities of Daily Living ("ADL"). Under the policy, an insured may establish catastrophic disability by showing either (1) that he lost the ability to safely and completely perform two or more "Activities of Daily Living" without another person's active assistance or verbal cueing, or (2) that he was cognitively impaired and needed another person's assistance or verbal cueing for his protection or for the protection of others. Because Plaintiff's claim was based solely on the second prong involving cognitive impairment, the Court granted Plaintiff's Motion in Limine No. 9 to exclude testimony regarding ADLs. Order Re Motions in Limine at 7, ECF 211.

Dr. Chamberlain testified that although Plaintiff was claiming disability only under the cognitive impairment prong, evidence regarding Plaintiff's ability to perform ADLs was relevant to determining the severity of his impairment. Trial Tr. 1389:14-1390:11, Exh. E to Creitz Decl., ECF 288-5. Plaintiff's counsel did not object at that point. However, when Dr. Chamberlain later returned to the topic of ADLs, Plaintiff's counsel objected. Trial Tr. 1411:3-12. The Court held a sidebar discussion after which it sustained the objection. Trial Tr. 1411:18-1413:8. The Court subsequently denied Plaintiff's motion to strike Dr. Chamberlain's testimony regarding ADLs, and instead modified Jury Instruction No. 33 to make clear that "Prongs 1 and 2 constitute separate and distinct bases for determining the existence of a catastrophic disability," and that Plaintiff

claimed benefits only under Prong 2. Trial Tr. 1488:3-1489:15; Jury Instruction No. 33, ECF 240. The Court declined a request by Plaintiff's counsel to give a more targeted limiting instruction regarding Dr. Chamberlain's testimony, but it stated that Plaintiff's counsel could argue to the jury that doctors do not interpret insurance policies and that the jury should disregard Dr. Chamberlain's testimony regarding use of ADLs to inform a determination of disability under the cognitive impairment prong. Trial Tr. 1489:8-1490:14. Plaintiff did just that in his closing argument, telling the jury that, "this insurance company doesn't get to just hire a forensic psychiatrist, have him stand up here and tell you that the ADL prong of this policy, that we've talked about before, remember two prongs, ADL and higher impairment, that the ADL prong somehow lends interpretive weight to the second prong. It doesn't. It just doesn't, and the judge has so instructed you." Trial Tr. 1587:13-19, Exh. C to Wall Decl., ECF 293-4.

Plaintiff contends that Dr. Chamberlain's opinions were "irretrievably tainted" by the testimony regarding ADLs, and that the Court did not go far enough to cure the taint. The Court disagrees. Dr. Chamberlain's testimony regarding ADLs was quite brief in the context of his testimony overall. The testimony was cut off as soon as Plaintiff's counsel objected. The Court is satisfied that the curative instruction, coupled with the closing arguments of Plaintiff's counsel, made clear to the jury that Prong 1 and Prong 2 were independent and that Plaintiff was proceeding only under Prong 2.

F. The Verdict was not a Miscarriage of Justice

"A trial court may 'grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.'" *Bright Harvest Sweet Potato Co., Inc. v. H.J. Heinz Co., L.P.*, No. 17-35058, 2019 WL 325157, at *3 (9th Cir. Jan. 25, 2019) (quoting *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007)). Plaintiff was given every opportunity to present evidence to the jury showing that he suffered a catastrophic disability within the meaning of the policy, and the jury was instructed consistently with virtually every policy interpretation offered by Plaintiff. Plaintiff nonetheless failed to persuade the jury that he suffered a covered loss. Plaintiff has failed to establish that the few rulings that went against him were erroneous. Consequently, Plaintiff has failed to show that a

new trial is required to prevent a miscarriage of justice.

IV. ORDER

Plaintiff's motion for a new trial is DENIED.

Dated: May 8, 2019

BETH LABSON FREEMAN
United States District Judge