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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LYN PATRICK,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY
EMPLOYEE BENEFITS ORGANIZATION
INCOME PROTECTION PLAN, etc.; et
al.,

Defendants.

Case No. 06-CV-1506-JMA (McC)

**ORDER: GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
[Doc. 78] AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [Doc. 90]**

I. INTRODUCTION

This ERISA case involves the issue of whether claims administrator Voluntary Plan Administrators, Inc. ("VPA"), acting on behalf of Defendants, abused its discretion in denying Plaintiff's claim for long-term disability ("LTD") benefits under the Hewlett-Packard Company Disability Plan ("the Plan"). On January 23, 2009, Plaintiff Lyn Patrick ("Patrick" or "Plaintiff") and Defendants Hewlett-Packard Company Employee Disability Plan and Hewlett-Packard Company ("HP" or "Defendants") filed cross-motions for summary judgment ("MSJ") [Docs. 78, 90]. On March 2, 2009, each party filed an opposition to the other side's motion for summary judgment [Doc. Nos. 97-104]. On March 2, 2009, Plaintiff filed an Objection to evidence submitted by Defendants [Doc. 98], to which Defendants responded on April 6, 2009 [Docs. 107-108]. Defendants filed

1 Objections to evidence submitted by Plaintiff on March 3, 2009 [Doc. 102]. On April 6,
2 2009, the parties filed replies in support of their motions for summary judgment [Docs.
3 108, 111].

4 On June 24, 2009, the Court heard oral argument on the parties' cross-motions
5 for summary judgment. Upon due consideration of the written and oral arguments of the
6 parties and the record herein, the Court **GRANTS** Plaintiff's Motion for Summary
7 Judgment [Doc. 78] and **DENIES** Defendants' Motion for Summary Judgment [Doc. 90].
8 The Court **OVERRULES** Plaintiff's Objections to evidence submitted by Defendants,
9 [Doc. 98] and **SUSTAINS** Defendants' Objections to evidence submitted by Plaintiff.
10 [Doc. 102].

11 **II. BACKGROUND**

12 **A. Factual Background**

13 Plaintiff Lyn Patrick worked for Hewlett-Packard for nearly 20 years as a senior
14 technical and management employee. Declaration of Lyn Patrick filed in support of
15 Plaintiff's MSJ [Doc. 82] ("Patrick Decl." ¶2). On or about August 26, 2002, Plaintiff
16 applied for, and began receiving, workers' compensation benefits and short-term
17 disability benefits under the Plan due to right shoulder tendonitis, right forearm lateral
18 epicondylitis ("tennis elbow") and right hand carpal tunnel syndrome. Administrative
19 Record ("AR") 286.¹ The last day Patrick worked at HP due to her disabilities was
20 August 23, 2002. *Id.* Pursuant to the terms of the Plan, Plaintiff was paid short-term
21 disability benefits for one year, until August 24, 2003. See Ex. A, §(o)(I) at 10 (providing
22 that short-term disability be paid for a maximum of 52 weeks).

23 Before Plaintiff went on short-term disability, she was seen at least three times by
24 Dr. Joan Collins in 2002 for pain in her shoulder, forearm, elbow and/or fingers. AR 376-

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27
28 ¹ Defendants provided the Administrative Record ("AR") as Ex. C to their motion for
summary judgment. Defendants numbered their exhibits sequentially in the bottom right
corner. The Court will use these page numbers in providing citations to the AR.

1 78.² From Patrick's first day of disability on August 26, 2002 and over the next year,
2 Plaintiff was seen and examined by Dr. Rodney Henderson, her primary treating
3 physician, every month. Dr. Henderson indicated on October 7, 2002 that Patrick would
4 be "started on therapy" (AR 218), and on November 13, 2002, noted that she "needs
5 more therapy for her shoulder and elbow" and a repeat nerve study for her carpal tunnel.
6 AR 217. Each of the reports discussed Plaintiff's shoulder pain.³ On December 11,
7 2002, Dr. Henderson noted that although Patrick's "elbow is quite a bit better," she was
8 "now having intermittent pain in the shoulder." AR 216. On January 8, 2003, Dr.
9 Henderson concluded that Patrick was "**currently temporarily disabled** secondary to
10 her calcific tendinitis, epicondylitis, and right carpal tunnel syndrome and will be so for
11 probably the next three months." AR 189-191.⁴ Dr. Henderson performed right carpal
12 tunnel release surgery on Plaintiff on February 12, 2003. AR 180-181. On February 26,
13 2003, Dr. Henderson found she was "[t]emporar[ily] totally **disabled** until further notice."
14 AR 176-77.

15 On May 4, 2003, Patrick filed her claim for long-term disability benefits ("LTD
16 benefits") with VPA.⁵ AR 286-94. Patrick listed her right shoulder, elbow and hand as

18 ² While Defendants cite Dr. Collins' 8/8/02 report for its finding that Plaintiff had "normal
19 strength and sensation" in her right hand and "full range of motion at the elbow," (8/11/03
20 Denial Letter, AR 262; Def. MSJ at 5; Def. reply at 9) the report also indicates that: "Lynn has
21 been having increasing discomfort in her right forearm and elbow. . . [and] is intermittently
22 having numbness in her three fingers as well." AR 376. Furthermore, Dr. Collins' 3/26/02
report notes that Patrick "had problems years ago with right rotator cuff tenderness [tendinitis].
23 . . [and] her symptoms have flared again. She is having pain in her right shoulder and it is
24 keeping her awake at night." AR 378.

25 ³ "She is having constant pain in the shoulder;" "she is complaining of constant
26 numbness of the three fingers," and "[s]he is tender over the rotator cuff insertion posteriorly
27 and the elbow is tender." (11/13/02 rpt; AR 217). "She is still complaining of pain over the
28 anterolateral shoulder;" after injection, "patient really had no improvement in her pain and her
cuff strength remained diminished." (9/16/02 rpt, AR 219). "The elbow is exquisitely tender."
(8/26/02 report; AR 220).

⁴Emphasis here, as elsewhere, has been added unless otherwise indicated.

⁵ The Court previously granted VPA's motion for summary judgment on October 31,
2007, finding that it was not a proper defendant in this action. [Doc. 49] The Plan designates
the Hewlett-Packard Company Employee Benefits Organization as the Plan Administrator, and
ERISA specifies that any action to recover benefits shall be brought against the Plan and/or

1 the basis for her claim for LTD benefits, specifically: (1) right shoulder disorder of the
2 “bursa tendon,” (2) right forearm lateral epicondylitis (i.e. tennis elbow), and (3) right
3 hand carpal tunnel syndrome. AR 286. Patrick indicated that she had seen Dr. Joan
4 Collins and Dr. Rodney Henderson for treatment. *Id.*⁶

5 On May 14 and May 21, 2003, Dr. Henderson found that Patrick still had pain in
6 her elbow and shoulder and swelling and stiffness in her fingers, and that she could not
7 return to her previous job, but that she would be eligible for vocational rehabilitation,
8 working up to 4 hours per day, as long as she did no keyboard or mouse work, no
9 overhead work and no forceful or repetitive gripping. AR 278-280, 150-51. On June 25,
10 2003, Dr. Henderson concluded that Patrick had “reached a point of maximal medical
11 improvement and she will be considered permanent[ly disabled] and stationary.” AR
12 145-47.

13 1. VPA denies Plaintiff’s claim

14 On August 11, 2003, VPA denied Plaintiff’s initial claim for LTD benefits. AR 261-
15 64. The letter outlined Plaintiff’s medical history on one page (AR 262) and concluded
16 that Plaintiff could perform other jobs for which she might have been qualified. AR 263.
17 The letter indicated that Plaintiff’s file had been referred to a vocational specialist for
18 review, who determined that she could perform the following jobs: (1) Credit Analyst, (2)
19 Management Analyst, (3) Sales Agent and (4) Order Department Supervisor. *Id.* The

20 the Plan Administrator, not the Claims Administrator. *Ford v. MCI Comms. Health & Welfare*
21 *Plan*, 399 F.3d 1076, 1081-83 (9th Cir. 2005). Effective December 16, 2001, the Plan name
22 was changed from “Hewlett-Packard Company Employee Benefits Organization Income
23 Protection Plan” to the “Hewlett-Packard Company Disability Plan.” Declaration of Lauren A.
Deeb in support of Def. MSJ [Doc. 91], Ex. A at H585 [Doc. 91-3].

24 ⁶ Plaintiff also contends in her MSJ that her right vocal chord was paralyzed during a
25 cervical disc fusion surgery in April 2001, that she required neck surgery in October 19, 2001
26 to repair it, and that her speaking capacity has been limited to a maximum of three hours per
27 day since that time. Pl. MSJ at 1-2. However, there is no mention of this vocal chord injury in
28 Plaintiff’s LTD claim form or appeal, or anywhere in the Administrative Record, other than one
line in a medical record review performed by Dr. Christopher Behr which indicates that in
January 2001, Plaintiff was referred to Dr. Mahood Mahdavi for surgery to repair her right vocal
chord. Dr. Behr’s 12/16/02 report, AR 192-203 at 195. As there is no documentation in the
Administrative Record that Plaintiff’s vocal chord injury existed after Plaintiff’s LTD claim was
filed, the Court has not considered the alleged vocal chord injury in its analysis.

1 letter acknowledged that Dr. Henderson diagnosed Plaintiff with carpal tunnel syndrome,
2 lateral epicondylitis and calcific tendonitis, and recommended that any work should be
3 restricted by “no forceful or repetitive gripping, no keyboarding or mouse work and no
4 overhead work.” AR 262. However, there was no analysis or indication of whether these
5 four positions required computer, keyboarding or mouse work.

6 On August 27, 2003, Dr. Henderson continued to diagnose Patrick with disorders
7 of right shoulder bursa/tendon, elbow pain and lateral epicondylitis, and stated that these
8 restrictions continued to make Patrick disabled. AR 254-55. On November 19, 2003, Dr.
9 Henderson noted that Patrick’s symptoms were getting worse and were now in both
10 Plaintiff’s right and left hands. AR 253. On January 19, 2004, Dr. Henderson
11 recommended that Patrick be taken out of her vocational rehabilitation training because
12 it “is aggravating her symptoms.” He found that she was “demonstrating symptoms of
13 carpal tunnel reoccurrence on the right hand and a development on the left hand as
14 well.” He concluded that “[s]he is now **TTD [temporarily totally disabled]**.” AR 142-
15 43.

16 On February 3, 2004, Dr. Shack performed an EMG test which “reveal[ed] no
17 electrical evidence of entrapment neuropathy,” and “no evidence of carpal tunnel (post-
18 op on the right) or cubital tunnel slowing on either side.” AR 137-41. However, Dr.
19 Shack specifically qualified his findings by stating that “this is a difficult diagnosis to
20 make on EMG/NCV, and false negative tests are often seen.” AR 138.

21 **2. Patrick appeals the denial of her claim**

22 On February 5, 2004, Patrick (who was not represented by counsel at this time)
23 timely sent a letter to VPA appealing the denial of her claim for LTD benefits. AR 251-
24 255. She stated that since her LTD claim was denied on August 11, 2003, she
25 continued to have pain and swelling in her right wrist, arm and shoulder, and that due to
26 favoring her right arm, she was now experiencing pain and swelling in her left hand and
27 arm. AR 251 She indicated that she was “**again on ‘TTD’ (Temporary Total**
28 **Disability)**”, as per Dr. Henderson’s orders. *Id.* She stated that she had been in

1 vocational rehabilitation training as a Medical Assistant, but was “unable to complete my
2 externship because of my injuries. At this time my injuries do not make me a suitable
3 candidate for employment.” *Id.* In regard to the jobs listed in the denial letter, Patrick
4 stated that: “they all involve working on a computer and as Dr. Henderson stated . . .back
5 on May 14, 2003 ***I’m no longer a suitable candidate for any type of computer or***
6 ***repetitive motion employment.***” *Id.* Patrick also indicated that while during the first
7 part of 2003, her right hand and arm improved because she was participating in physical
8 therapy three times a week, and was otherwise using them minimally, the pain and
9 problems returned with normal use during her vocational rehabilitation. *Id.* She enclosed
10 copies of additional reports from Dr. Henderson, including Primary Treating Physician
11 (“PTP”) progress reports, a Physician’s Supplemental Certificate and a Supplemental
12 Report. *Id.*

13 On February 12, 2004, VPA wrote to Patrick, stating that it had received her
14 appeal and her supplemental reports from Dr. Henderson dated August 27, 2003,
15 November 19, 2003 and January 19, 2004. AR 246. It stated that Patrick had “not
16 submitted any evidence or documentation to substantiate [her] disability beyond August
17 24, 2003” (*Id.*), notwithstanding the fact that Dr. Henderson’s January 19, 2004 report
18 concluded that Patrick was temporarily ***totally disabled.*** VPA indicated that it would
19 give Patrick another 30 days to submit additional documentation in support of her claim.
20 *Id.* On March 3, 2004, VPA wrote Patrick informing her that it had requested medical
21 records from her worker’s compensation carrier, and that the initial 45-day review period
22 would be suspended pending receipt of this information. AR 245.

23 On April 7, 2004, VPA sent Patrick’s file to Dr. Richard Kaplan, a physiatrist,⁷ and
24 requested that he perform a Complete Medical Record Review. VPA 4/7/04 ltr to Dr.

25
26 ⁷ A physiatrist is a physician who specializes in physical medicine and rehabilitation with
27 a focus on restoring function to the patient. American Academy of Physical Medicine and
28 Rehabilitation, What is a Physiatrist?, at <http://www.aapmr.org/condtreat/what.htm>.
Specifically, the types of disorders physiatrists are trained to diagnose and treat include:
tendonitis, carpal tunnel syndrome, neck and back pain, chronic pain, and work-related
injuries. *Id.* While Plaintiff argues that Dr. Kaplan was unqualified to render an opinion, she
has submitted no evidence in support of her contention.

1 Kaplan, AR 130-131. VPA specified that the purpose of the review was to provide it
2 “with a second opinion regarding the claimant’s medical condition, restrictions and
3 limitations,” but that it was “not asking whether the claimant can return to work. We will
4 make a vocational determination.” AR 130.⁸ Dr. Kaplan prepared a 3-page report on
5 April 9, 2004, concluding that in his opinion, “there is no objective evidence of any
6 remaining restrictions at this time for this patient.” AR 127-29.

7 Dr. Kaplan referred to Dr. Henderson’s reports from 11/13/02, 2/26/03, 6/25/03
8 and 2/9/04, as well as the 2/3/04 EMG test. In regard to the more recent reports, he
9 acknowledged that Dr. Henderson’s 6/25/03 report documented “a permanent and
10 stationary” disability, “minimal pilar pain and mild provocative test for epicondylitis,” and
11 that Patrick should be restricted from using a computer keyboard or mouse and should
12 not perform forcible gripping, grasping or fine finger manipulation. AR 128. He also
13 acknowledged Dr. Henderson’s 2/9/04 report noting that Patrick had bilateral hand
14 swelling, numbness and tingling and that vocational rehabilitation had been discontinued,
15 and stated that the report found decreased sharp pain in her arms, no obvious edema as
16 well as good flexion and extension of the digits, and negative tests for Tinel’s and elbow
17 flexion. *Id.* Dr. Kaplan concluded: “There is no documentation of any objective
18 abnormalities on physical examinations which would result in limitations in reference to
19 the patient’s lateral tendonitis in her shoulder or calcific tendonitis. The patient is noted
20 to have full range of motion with essentially subjective symptoms of pain though no
21 objective evidence of synovitis or inflammation in any of those areas.” *Id.*

22 In his last report prior to the denial of Plaintiff’s appeal, dated June 7, 2004, Dr.
23 Henderson noted that Patrick reported a “**significant flare-up**” of symptoms in her
24 right upper extremity. AR 437-38. “She is now having worsening symptoms of her elbow

25
26 ⁸ Plaintiff contends that Dr. Kaplan did not spend adequate time performing his review,
27 and states that he “rendered his ‘report’ on the same day he was hired to do so.” Pltff Opp at
28 16. Defendants dispute this, stating that the file was sent to Dr. Kaplan on April 7, and he
provided his report 2 days later on April 9. Def. MSJ Reply at 6-7. In any event, it appears
from Dr. Kaplan’s report that he did prepare his review in one day, as the opening sentence
reads: “Today I had the opportunity at your request to perform a Complete Medical Record
Review on [Lyn Patrick].” AR 127.

1 wrist and even the shoulder. She is back in her elbow band and tunnel brace and using
2 ice with improvement.” *Id.* He stated that Patrick was “exquisitely tender over the
3 lateral epicondylar area and ERCB with pain with resisted wrist extension;” the “carpal
4 tunnel is minimally tender with negative provocative tests for carpal tunnel,” and that she
5 had “decreased grip strength.” *Id.* He indicated that her work status remained
6 unchanged from his January 19, 2004 report -- **temporarily totally disabled.** *Id.*

7 **3. VPA denies Plaintiff’s appeal**

8 On July 9, 2004, VPA denied Plaintiff’s appeal. AR 444-48. VPA described
9 certain medical reports, including several of Dr. Henderson’s reports, Dr. Kaplan’s report
10 and the EMG test. AR 446. The letter discussed Patrick’s complaints of pain,
11 tenderness, swelling, numbness and tingling, but relied heavily on the EMG test which
12 “was essentially a normal examination.” No mention was made of Dr. Henderson’s
13 findings of “temporary total disability.” The VPA acknowledged Dr. Henderson’s opinion
14 that Patrick should not use a computer keyboard or mouse, and should not perform
15 repetitive forceful gripping, grasping or other fine finger manipulation. *Id.*

16 VPA cited the vocational consultant report and stated that considering Patrick’s
17 education, training, expertise, and in light of her physical restrictions, she could perform
18 the following jobs: (1) Credit Analyst, (2) Management Analyst, (3) Sales Agent and (4)
19 Order Department Supervisor. *Id.* However, there was no analysis or indication of
20 whether these four positions required computer, keyboarding or mouse work. The letter
21 concluded that while Plaintiff “may be unable to return to [her] former position at Hewlett-
22 Packard, the medical and vocational information substantiates [she is] capable of
23 performing other qualifications for which [she is] or could become qualified.” *Id.* at 447.
24 Therefore, VPA reaffirmed its denial of Patrick’s claim for LTD benefits. *Id.*

25 **4. Plaintiff submits additional evidence to VPA after the denial of her** 26 **appeal**

27 On November 24, 2004, nearly five months after VPA denied Plaintiff’s appeal for
28 LTD benefits, Patrick, through her counsel, sent VPA and HP a letter requesting that

1 VPA reopen Plaintiff's claim file so that Plaintiff could file a "supplemental appeal." Ex. E
2 to Def. MSJ [Doc. 91-8] at 455. VPA did not respond to Plaintiff's counsel's request or
3 agree to reopen Plaintiff's file. Compl. ¶ 52.

4 Nonetheless, on February 9, 2006 -- over 1-1/2 years after Plaintiff's appeal was
5 denied on July 9, 2004 -- Plaintiff's counsel sent a second letter to VPA and HP,
6 purporting to "perfect" her appeal that VPA had denied back in July 2004. Ex. F to Def.
7 MSJ [Doc. 91-9]. Plaintiff demanded that HP and/or VPA grant Plaintiff "full LTD
8 benefits," and submitted several medical records regarding examinations conducted of
9 Plaintiff "[s]ince the time of HP's denial of her LTD benefits." *Id.* at 473, 499 and Exs. G-
10 O. Each of the medical records submitted by Plaintiff's counsel with his February 6,
11 2006 letter was dated between January and December 2005.⁹ As the medical records
12 were not in existence at the time VPA denied Plaintiff's appeal in July 2004, Defendants
13 had no obligation to consider the reports, and the Court may not consider these reports,
14 as addressed in Section IV below.

15 **B. Pertinent Plan Terms**

16 **1. "Total disability" under the terms of the plan**

17 To be eligible for benefits under the Plan, the claimant must establish that she is
18 "Totally Disabled" as defined by the Plan. A member applying for short-term disability
19 benefits must show that "following the onset of the injury or sickness, the Member is
20 continuously unable to perform each and every duty of his or her "Usual Occupation."
21 See Plan, Ex. A to Def. MSJ, § 2(o)(l) at 10. A member's "Usual Occupation" is defined
22 as the normal work assigned to the member by HP. *Id.*, § 2(t) at 13. If a member
23 qualifies, she is entitled to receive up to a maximum of 52 weeks of short-term disability
24 benefits. *Id.*, § 2(o)(l) at 10.

25 A member who applies for long-term disability benefits must show that "the

26
27 ⁹ Exhibits G-O to the February 9, 2006 letter sent by Plaintiff's counsel consisted of
28 medical reports all prepared after VPA's July 9, 2004 denial of benefits -- Dr. Henderson's
4/22/05 report (Ex. G); Dr. Mahdavi's 1/31/05 report (Ex. H); Dr. Ron King's 5/9/05 report (Ex.
l); Dr. John Dorsey's CV and 10/20/05 report (Exs. J, K); Dr. Nudleman's CV and 9/26/05
report (Exs. L, M), and Dr. Goldfarb's CV and 12/12/05 report (Exs. N-O).

1 Member is continuously unable to perform any occupation for which he or she is or may
2 become qualified by reason of his or her education, training or experience.” *Id.*, § 2(o)(ii)
3 at 10. The Plan provides that “the determination of Total Disability shall be made by the
4 Claims Administrator on the basis of objective medical evidence. ‘Objective medical
5 evidence’ shall mean that evidence establishing facts or conditions as perceived without
6 distortion by personal feelings, prejudices or interpretations.” *Id.*, § 2(o) at 11.

7 **2. The Plan’s delegation of authority to VPA**

8 The Plan provides that:

9 The Company is the named fiduciary which has the
10 discretionary authority to act with respect to any appeal from
11 a denial of benefits. The Company’s discretionary authority
12 includes the authority to determine eligibility for benefits and
13 to construe the terms of the Plan. The Claims Administrator
14 shall administer the review of denied claims on the
15 Company’s behalf and make the decision on review.

16 Ex. A, § 8(a) at 51.

17 The Plan vests discretionary authority in VPA, as Claims Administrator, to
18 determine “Total Disability” and to “process[] claims.” *Id.* at § 2(o) and § 4(f) at 11 and
19 18. The Plan also states that the “Claims Administrator shall have the discretionary
20 power to construe the language of the Plan and make the decision on review on behalf
21 of the Company.” *Id.*, § 8(e).

22 **III. LEGAL STANDARDS**

23 **A. Summary Judgment Standard In ERISA Cases**

24 Normally, summary judgment is appropriate if the evidence presented “show[s]
25 that there is no genuine issue as to any material fact and that the moving party is entitled
26 to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Leisek v. Brightwood Corp.*, 278
27 F.3d 895, 898 (9th Cir. 2002). However, in the Ninth Circuit, “where the abuse of
28 discretion standard applies in an ERISA benefits denial case, a motion for summary
judgment is merely the conduit to bring the legal question before the district court and the
usual tests of summary judgment, such as whether a genuine dispute of material fact
exists, do not apply.” *Nolan v. Heald College*, 551 F.3d 1148, 1154 (9th Cir. 2009)

1 (noting that traditional rules of summary judgment may apply if, unlike here, there is a
2 structural conflict of interest). Thus, the issue before the Court is whether VPA abused
3 its discretion in denying Plaintiff's claim for long-term disability benefits on behalf of
4 Defendants.

5 **B. "Abuse of Discretion" Standard of Review Applies**

6 This Court previously ruled on September 7, 2007 that "the proper standard of
7 review of VPA's denial of LTD benefits in this action is abuse of discretion." [Doc. 48 at
8 15]. The Court confirmed for a second time, on December 1, 2008, that "VPA's decision
9 to deny Plaintiff's LTD benefits claim will be reviewed under the 'arbitrary and capricious'
10 (or, synonymously, 'abuse of discretion') standard." [Doc. 76 at 14]. Despite these
11 unambiguous rulings, Plaintiff yet again argues at length that the *de novo* standard of
12 review should apply because: (1) the Plan does not vest sufficient discretion in VPA to
13 trigger the "arbitrary and capricious" standard of review and/or HP improperly delegated
14 its fiduciary responsibility to VPA, and (2) procedural irregularities and/or structural
15 conflicts of interest require *de novo* review or must be considered as factors in abuse of
16 discretion review. Pl. MSJ at 9-13, Pl. Opp to Def. MSJ at 21-25. For the reasons set
17 forth below, and in the Court's previous Orders [Docs. 48, 76], the Court confirms that
18 the "abuse of discretion" standard of review applies.

19 **1. The Plan vests authority to administer claims with VPA**

20 Plaintiff extensively challenges the Plan's delegation of claims administration
21 authority to VPA, arguing (again) that the Court should give "no deference" to VPA in
22 reviewing its denial and conduct a *de novo* review. Pl. MSJ at 9-13, Pl. Opp to Def. MSJ
23 at 21-25. In granting Defendants' Motion for Summary Adjudication re the Proper
24 Standard for Review, this Court previously held that the Plan confers sufficient discretion
25 in VPA such that the "abuse of discretion" standard of review applies:

26 The language of the Plan and ASA sufficiently confers
27 discretionary authority to VPA as a matter of contractual
28 agreement to shift the standard of review to abuse of
discretion. Under the Plan and ASA, VPA is authorized to
process claims, determine eligibility for and the amount of any
benefits, and render decisions on appeals of denied claims.

1 Furthermore, VPA is unambiguously granted the discretion to
2 construe Plan language and make decisions on review on
3 behalf of HP.

3 See Doc. No. 48 at 7-8(9/7/07 Order granting MSJ) (internal citations omitted)

4 When Plaintiff attempted to reargue the issue in moving to compel additional
5 discovery from Defendants, the Court rejected Plaintiff's argument a second time:

6 This Court's ruling on the standard of review constitutes the
7 law of the case, and it is wholly inappropriate for Plaintiff to
8 re-argue this matter at this stage of the proceedings.

8 [Doc. No. 76 at 15].

9 In line with its previous rulings, the Court rejects Plaintiff's contention that "zero
10 deference applies to VPA." PI. MSJ at 12. Likewise, the Court rejects Plaintiff's
11 contention that HP improperly delegated its "fiduciary responsibility" to VPA. As
12 Plaintiff's own cited authorities recognize, it is settled that "[u]nder ERISA, a named
13 fiduciary may delegate its fiduciary responsibilities" to other named fiduciaries, or even to
14 non-fiduciaries. *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914
15 F.2d 1279, 1283 (9th Cir. 1990), citing 29 U.S.C. § 1105 (c)(1). Accordingly, when an
16 ERISA plan "expressly gives the administrator or fiduciary discretionary authority to
17 determine eligibility for benefits . . . [and the] named fiduciary properly designates
18 another fiduciary, delegating its discretionary authority, the 'arbitrary and capricious'
19 standard of review applies. . ." *Id.* at 1283-84. Here, the Plan directly vests VPA with
20 discretion to make benefits determinations and interpret Plan terms. Thus, Plaintiff's
21 "'failure to properly delegate' argument is irrelevant. . . given the Plan's direct assignment
22 of duties to [VPA]." *Riffey v. Hewlett-Packard Co. Disability Plan*, 2007 U.S. Dist. LEXIS
23 21847, *27 (E.D. Cal. Mar. 27, 2007) (arbitrary and capricious standard applied to HP's
24 Plan, as administered by VPA); see also *Lamantia v. Voluntary Plan Adm'rs, Inc.*, 401
25 F.3d 1114, 1123 (9th Cir. 2005) (same).

26 **2. There is no structural conflict of interest**

27 Plaintiff cites numerous cases for the proposition that a "structural conflict must be
28 weighed as a factor in evaluating whether the plan abused its discretion." See, e.g., PI.

1 MSJ at 13-14. However, the Court previously ruled that “[b]ecause the Plan at issue
2 herein was entirely funded by Defendant HP . . . while VPA had discretionary authority to
3 determine eligibility for and the amount of benefits . . . no structural conflict of interest
4 exists in this case.” [Doc. 76 at 9].

5 C. Abuse Of Discretion Analysis

6 An “abuse of discretion analysis allows a court to tailor its review to all the
7 circumstances before it.” *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 968 (9th
8 Cir. 2006). In *Abatie*, 458 F.3d at 970, the Ninth Circuit addressed the question of what
9 evidence the court may consider when reviewing a denial of LTD benefits, and
10 concluded that “in general, a district court may review only the administrative record
11 when considering whether the plan administrator abused its discretion, but may admit
12 additional evidence on *de novo* review.” The Ninth Circuit has confirmed that “ERISA
13 plan administrators do not have unbounded discretion.” *Booton v. Lockheed*, 110 F.3d
14 1461, 1463 (9th Cir. 1997).

15 The Supreme Court has recently reaffirmed the principle that ERISA “sets forth a
16 special standard of care upon a plan administrator” to exercise its discretion “solely in the
17 interests of the participants and beneficiaries of the plan,” providing a “full and fair
18 review” to claimants. *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2350 (2008).
19 As another court in this Circuit recently held, under the “abuse of discretion” standard,
20 “[t]he court **cannot simply ‘rubber stamp’** Defendant’s decision if it failed to provide a
21 full and fair review of the facts of this case.” *Beckstrand v. Elec. Arts Group Long Term*
22 *Disability Ins. Plan*, 2008 U.S. Dist. LEXIS 83195, *27 (E.D. Cal., Sept. 16, 2008). See
23 also *Ordway v. Metropolitan Life Ins. Co.*, 2007 U.S. Dist. LEXIS 61341 (S.D. Cal. 2007)
24 (denying defendant’s motion for summary judgment when “the evidence, when taken as
25 a whole, [wa]s not substantial” even though defendant’s finding of non-disability was
26 “supported by some evidence.”)

27 In *Glenn*, 128 S.Ct. 2343, the Supreme Court held that “when judges review the
28 lawfulness of benefit denials, they will often take account of several different

1 considerations of which a conflict of interest [where applicable] is one.” *Id.* at 2351. The
2 Court explained:

3 This kind of review is no stranger to the judicial system. Not
4 only trust law, but also administrative law, can ask judges to
5 determine lawfulness by **taking account of several**
6 **different, often case-specific, factors**, reaching a result by
7 weighing all together. In such instances, any one factor will
 act as a tiebreaker when the other factors are closely
 balanced, the degree of closeness necessarily depending
 upon the tiebreaking factor’s inherent or case-specific
 importance.

8 *Id.* See also *Toven v. Metro. Life Ins. Co.*, 2008 U.S. Dist. LEXIS 100445, *24-25 (C.D.
9 Cal., Dec. 2, 2008) (“In theory, any number of factors might be relevant to such a
10 determination” of whether the administrator abused its discretion in denying LTD
11 benefits).¹⁰

12 The Supreme Court in *Glenn* affirmed the Sixth Circuit’s grant of LTD benefits
13 based on consideration of a combination of factors, including: (1) that “MetLife had
14 emphasized a certain medical report that favored a denial of benefits, and had
15 deemphasized certain other reports that suggested a contrary conclusion,” (2) that
16 MetLife failed to take into account evidence indicating that stress aggravated Plaintiff’s
17 condition, and (3) MetLife’s conflict of interest, which was “but one factor among many
18 that a reviewing judge must take into account.” *Id.* at 2347-52. The Supreme Court
19 concluded that “[a]ll these serious concerns, taken together with some degree of
20 conflicting interests on MetLife’s part, led the court to set aside MetLife’s discretionary
21 decision. We can find nothing improper in the way in which the court conducted its
22 review.” *Id.* at 2352.

23 Likewise, in *Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1473 (9th Cir.
24 1993), the district court held that the defendant abused its discretion in terminating

26 ¹⁰ Although there is no structural conflict in this case, a structural conflict is not a
27 prerequisite to finding an abuse of discretion. When there is no conflict of interest, the Court
28 applies a “straightforward abuse of discretion analysis.” *Abatie* 458 F.3d at 968. Courts may
take into account a number of “different, often case-specific factors” (*Glenn*, 128 S.Ct. at 2351),
and “conflict of interest is **but one factor**.” *Beckstrand*, 2008 U.S. Dist. LEXIS 83195 at *20
(emphasis in original). Accordingly, the Court will conduct its review of VPA’s denial of LTD
benefits taking into account all relevant factors exclusive of any purported conflict of interest.

1 plaintiff's LTD benefits, and plaintiff appealed. Defendant argued to the Ninth Circuit that
2 because it gave an explanation for terminating benefits, the court's "analysis should go
3 no further." *Id.* The Ninth Circuit disagreed, finding that "**abuse of discretion review is**
4 **not that limited.**" *Id.* The court held that "an administrator also abuses its discretion if it
5 relies on clearly erroneous findings of fact in making benefit determinations." *Id.* The
6 court went on to analyze the substance of the reports to ascertain whether they were
7 clearly erroneous, concluding that they were not. *Id. See also Bendixen v. Standard Ins.*
8 *Co.*, 185 F.3d 939, 944 (9th Cir. 1999) (holding that an "administrator also abuses its
9 discretion if it relies on clearly erroneous findings of fact in making benefit
10 determinations").

11 In determining the amount of deference to which the insurer is entitled, the factors
12 the district court may consider include: (1) whether the defendant ignored plaintiff's
13 complaints of pain, which are inherently subjective and not easily determined by
14 objective measurement; (2) whether defendant had a "meaningful dialogue with its
15 beneficiary in deciding whether to grant or deny benefits," and (3) whether defendant
16 "took various of [plaintiff's] doctors' statements out of context, or otherwise distorted
17 them," or "omit[ted an] important qualifier." *Saffon v. Wells Fargo & Co. Long Term*
18 *Disability Plan*, 522 F.3d 863, 872-73 (9th Cir. 2008). If so, such factors suggest that
19 "less deference should be given to the decision of the claims administrator." *Id.* at 873

20 **IV. MEDICAL RECORDS SUBMITTED BY PLAINTIFF AFTER VPA DENIED HER** 21 **APPEAL**

22 As indicated above, VPA denied Plaintiff's appeal on July 9, 2004. AR 444-48.
23 Five months later, on November 24, 2004, Patrick's counsel sent VPA and HP a letter
24 requesting that VPA reopen Plaintiff's claim file so that Plaintiff could file a "supplemental
25 appeal." Ex. E to Def. MSJ [Doc. 91-8] at 455. VPA did not respond. Compl. ¶ 52. On
26 February 9, 2006 -- over 1-1/2 years after Plaintiff's appeal was denied on July 9, 2004 --
27 Plaintiff's counsel sent a second letter to VPA and HP demanding HP
28

1 grant her claim for LTD benefits, attaching several medical records, all from 2005 -- at
2 least 6 months after VPA's denial of her appeal. Ex. F to Def. MSJ [Doc. 91-9].

3
4 **A. VPA Did Not Abuse Its Discretion By Failing To Consider Evidence
Submitted After Plaintiff's Appeal Was Denied**

5 Plaintiff argues at length that VPA abused its discretion in failing to consider the
6 medical records and letters submitted after her appeal was denied. See, e.g. Pl. MSJ at
7 16-18; Pl. reply at 7-10. However, it is settled law that a claims administrator cannot
8 abuse its discretion "by **failing to consider evidence not before it**" at the time of its
9 determination. *Taft*, 9 F.3d at 1472; *Alford v. DCH Foundation Group Long-Term*
10 *Disability Plan*, 311 F.3d 955, 959-60 (9th Cir. 2002) (administrator did not abuse its
11 discretion in failing to consider medical evidence that Plaintiff submitted several weeks
12 after the deadline set forth in the denial letter, and such documents were not part of the
13 administrative record); see also *Bendixen*, 185 F.3d at 944 ("it was not error to refuse to
14 consider Dr. High's report because the report was given to Standard after its second
15 review had been completed and a final determination had been made").

16 Furthermore, the Plan does not obligate VPA to consider evidence submitted after
17 an appeal is denied. The Plan sets forth the procedures VPA must follow in reviewing
18 appeals of denied claims, Plan, Ex. A, § 8(a)-(f) at 51-54. Under that procedure, the
19 claimant has the right to a single appeal of an adverse decision by VPA. *Id.*, § 8(b).
20 VPA must then give the claimant written notice of its decision within 45 days of receiving
21 the appeal, unless special circumstances warrant additional time for review, in which
22 case it must render a decision within 90 days. *Id.*, § 8(c). If VPA denies the appeal, the
23 claimant has exhausted her administrative remedies under the Plan and may then file a
24 lawsuit "to recover benefits under the Plan." *Id.*, § 8(g) at 54-55.

25 Plaintiff filed an evidentiary objection on March 2, 2009 [Doc. 98], essentially
26 arguing that the administrative record submitted by Defendants was incomplete because
27 it did not include documents (such as Plaintiff's counsel's two letters with exhibits) that
28 were submitted to VPA after it had already denied Plaintiff's claim and appeal. For the

1 reasons set forth herein, Plaintiff's evidentiary objection is **OVERRULED**. Defendants
2 filed an evidentiary objection on March 3, 2009 [Doc. 102] objecting to the declarations
3 (including exhibits) of Lyn Patrick, Howard Hellen, Dr. John Dorsey, Dr. Rodney
4 Henderson, Dr. Byron King, Dr. M. Mahdavi, Dr. Kenneth Nudleman and Dr. Howard
5 Goldfarb. Defendants' primary objection is that such declarations and exhibits are
6 irrelevant in that Plaintiff seeks to admit evidence that was not contained in the
7 administrative record for Plaintiff's LTD claim that existed at the time VPA denied
8 Plaintiff's appeal on July 9, 2004.¹¹ For the reasons set forth herein, Defendants'
9 evidentiary objections are **SUSTAINED**.

10
11 **B. This Court May Not Consider Reports Outside The Administrative
Record As Plaintiff Has Not Demonstrated Procedural Irregularities**

12 The Ninth Circuit recently confirmed that "[i]t is the general rule, of course, that
13 when applying an abuse of discretion standard to an ERISA plan, the district court's
14 review is limited to the administrative record." *Burke v. Pitney Bowes Inc. Long-Term*
15 *Disability Plan*, 544 F.3d 1016, 1027 (9th Cir. 2008), citing *Abatie*, 458 F.3d at 970.
16 However, "the district court may consider evidence outside the administrative record if it
17 determines that procedural irregularities prevented the full development of the
18 administrative record." *Burke*, 544 F.3d at 1028, citing *Abatie*, 458 F.3d at 973; *see also*
19 *Saffon*, 522 F.3d at 872, n. 2 ("*Abatie* held that district courts may take additional
20 evidence whenever procedural irregularities have prevented full development of the
21 administrative record, and to the extent that our earlier cases conflict with *Abatie* . . .
22 those cases are no longer good law.")

23 Here, the Court finds that Plaintiff has failed to demonstrate that procedural
24 irregularities prevented the full development of the administrative record. Indeed, the
25 reports could not have been excluded due to a procedural error, because they did not
26

27 ¹¹ Defendants also object to the Patrick Declaration on additional grounds such as
28 conclusion, opinion, assumes facts not in evidence, lack of foundation, argument, vague and
ambiguous, immaterial and hearsay. As the Court has relied on the Administrative Record for
the pertinent facts, rather than the Patrick Declaration, it is not necessary to reach these
additional grounds for objection.

1 even exist at the time VPA denied Plaintiff's claim. The Ninth Circuit recently rejected
2 the same argument made by Plaintiff here that the district court should consider medical
3 reports that did not exist at the time benefits were denied:

4 [Plaintiff] argues that the district court erred in failing to
5 consider doctors' reports outside the administrative record.
6 The reports were written after. . . VPA issued its decision
7 denying [plaintiff's] claim. These reports do not fall into any of
8 the narrow exceptions pursuant to which the reports could be
9 considered. The **reports were not excluded due to any**
10 **procedural error, Abatie, 458 F.3d at 973, because they**
11 **did not exist at the time of the administrative**
12 **determination.** Nor do the reports provide any evidence of
13 conflict necessary to determine how much weight to give a
14 conflict of interest under the abuse of discretion standard. *Id.*
15 at 970. We do not engage in a *de novo* review that would
16 permit admission of the reports.

17 *Lamantia v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 2008 U.S.
18 App. LEXIS 12172, *5 (9th Cir. June 2, 2008); *see also Alford*, 311 F.3d at 959
19 (“Permitting a district court to examine evidence outside the administrative record would
20 open the door to the anomalous conclusion that a plan administrator abused its
21 discretion by failing to consider evidence not before it.”)

22 Similarly, in *Toven*, 2008 U.S. Dist. LEXIS 100445 at *32, the plaintiff attempted to
23 submit additional medical evidence that was not provided to defendant MetLife during
24 the original processing of the claim. In holding that it was “not the type of evidence this
25 Court can consider,” the court reasoned that it could not have been excluded from the
26 claim file due to procedural irregularities because it did not exist at the time of denial:

27 Here, however, the evidence submitted by Plaintiff postdates
28 MetLife's final decision. If evidence had existed at the time of
MetLife's denial that should have been in the claim file, but
was not there because of MetLife's misconduct, it could have
been presented to the Court now. But **there is no way the**
evidence at issue could have been in the claim file at any
time, since it did not yet exist. Accordingly, this Court has
not considered Plaintiff's additional proffered evidence.

Therefore, because the additional medical reports and materials submitted by
Plaintiff did not exist at the time of VPA's denial of her appeal, these documents could

1 not have been excluded from the claim file due to procedural irregularities. Accordingly,
2 this Court has not considered them, and VPA did not abuse its discretion in failing to
3 consider them.

4 **V. VPA ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S CLAIM FOR**
5 **LONG-TERM DISABILITY BENEFITS**

6 For the reasons set forth below, the Court finds that the following factors, when
7 considered in their totality, demonstrate that VPA abused its discretion in denying
8 Plaintiff's claim for LTD benefits.

9 **A. VPA Failed To Consider Whether Returning To Work Would Cause**
10 **Plaintiff's Condition to Worsen**

11 In *Toven*, 2008 U.S. Dist. LEXIS 100445 at *43, defendant MetLife denied
12 plaintiff's claim for LTD benefits, and the court, reviewing the denial under an abuse of
13 discretion standard, held that Plaintiff was entitled to recover LTD benefits.¹² One of the
14 primary factors the court considered in regard to whether defendant MetLife properly
15 investigated or evaluated Plaintiff's claim was that it completely "fail[ed] to ask the
16 question of whether Plaintiff, whose condition had improved after leaving work, would be
17 able to return to work without a concomitant worsening of his condition." *Id.* at *37-38.
18 "In other words . . . the question of whether he could go back to work without danger was
19 never posed, let alone answered." *Id.*

20 Likewise, the medical records here show that when Plaintiff was not working and
21 was undergoing physical therapy, her symptoms improved. However, when she began
22 working again, through her vocational rehabilitation and externship, her symptoms (pain,
23 swelling, numbness and tingling in all fingers, and paresthesia in the median nerve
24 distribution) returned. AR 142-43. As a result, Dr. Henderson recommended that she "be
25 taken out of her vocational rehabilitation training," because it was "aggravating her
26 symptoms," including "carpal tunnel reoccurrence on the right hand and a development
27 on the left hand as well," and concluded that "[s]he is now TTD [temporarily totally

28 ¹² Although there was a conflict of interest in that case, the court found that it "was not 'egregious,' and [did] not weigh particularly heavily either for or against [MetLife]." *Id.* at *30.

1 disabled].” *Id.* In light of this, VPA’s failure to consider whether Plaintiff’s condition would
2 worsen upon returning to work is a factor that weighs in favor of a finding that it failed to
3 adequately investigate or evaluate her claim.

4 **B. VPA Failed to Have a “Meaningful Dialogue” with Plaintiff**

5 The Ninth Circuit held over ten years ago in *Booton*, 110 F.3d at 1463, that ERISA
6 regulations call for a “‘meaningful dialogue’ between claims administrator and
7 beneficiary.” *Saffon*, 522 F.3d at 870, citing *Booton*, 110 F.3d at 1463. The Ninth Circuit
8 explained:

9
10 In simple English, what this regulation calls for is a
11 meaningful dialogue between ERISA plan administrators and
12 their beneficiaries. If benefits are denied in whole or in part,
13 the reason for the denial must be stated in reasonably clear
14 language. . . ; if the plan administrators believe that more
information is needed to make a reasoned decision, they
must ask for it. There is nothing extraordinary about this; it’s
how civilized people communicate with each other regarding
important matters.

15 *Booton*, 110 F.3d at 1463.

16 The Supreme Court recently confirmed in *Glenn* that there is a fiduciary-like
17 relationship between administrator and beneficiary to act in the best interests of the plan
18 beneficiaries:

19 ERISA imposes higher-than-marketplace quality standards on
20 insurers. It sets forth a special standard of care upon a plan
21 administrator, namely, that the administrator discharge its
22 duties in respect to discretionary claims processing ***solely in***
the interests of the participants and beneficiaries of the
plan, § 1104(a)(1); it simultaneously underscores the
23 particular importance of accurate claims processing by
insisting that administrators provide a full and fair review of
claim denials.

24 *Glenn*, 128 S. Ct. at 2350.

25 In analyzing whether a “meaningful dialogue” had taken place, the court in *Saffon*
26 noted that, as here, the administrator had referred plaintiff’s appeal to a doctor who
27 neither examined nor interviewed her. 522 F.3d at 869. Also as here, the reviewing
28 doctor concluded that plaintiff had failed to provide sufficient “objective medical
evidence” of her alleged disability. *Id.* at 869-70. Similarly, the denial letter informed

1 plaintiff that she could appeal by providing evidence of her disability, but “does not
2 explain why the information [plaintiff] has already provided is insufficient for that
3 purpose.” *Id.* at 870. Moreover, as here, the court found that defendant “did not meet its
4 duty . . . to have a meaningful dialogue with its beneficiary . . . [by taking] various of her
5 doctors’ statements out of context or otherwise distort[ing] them in an apparent effort to
6 support a denial of benefits.” *Id.* at 873. The court in *Saffon* also found that defendant
7 “failed to have a meaningful dialogue” with plaintiff by failing to consider her complaints
8 of pain, or the fact that “individual reactions to pain are subjective and not easily
9 determined by reference to objective measurements.” *Id.* at 872.

10 The facts here likewise demonstrate that VPA failed to have a meaningful
11 dialogue with Patrick. Rather than having a full and open communication with her
12 regarding the problems she was having with her carpal tunnel syndrome, elbow and/or
13 shoulder, including the pain she was experiencing that might be difficult to substantiate
14 with objective evidence, VPA merely told Plaintiff to submit evidence to substantiate her
15 disability. 2/12/04 VPA letter, AR 246. VPA claimed Plaintiff had “not submitted any
16 evidence or documentation to substantiate [her] disability beyond August 24, 2003” (AR
17 246), notwithstanding the fact that Plaintiff submitted a January 19, 2004 report from Dr.
18 Henderson (which VPA acknowledged it received) in which he stated that she had
19 worsening symptoms, should quit vocational training and was temporarily totally
20 disabled. See Dr. Henderson’s 1/19/04 report, AR 142-43. Likewise, VPA’s final denial
21 letter claimed that there was no objective evidence of Plaintiff’s limitations or disability
22 without explaining why the information Plaintiff had previously provided was insufficient
23 and without specifying the additional evidence required. AR 444-48. VPA’s failure to tell
24 Plaintiff what “objective evidence” was required was insufficient. See *Volynskaya v.*
25 *Epicentric, Inc. Health & Welfare Plan*, 2007 U.S. Dist. LEXIS 81208, *18 (N.D. Cal., Oct.
26 16, 2007) (“It is insufficient to simply inform a claimant that there is no ‘objective’
27 evidence to support a disability claim without specifying what type of ‘objective’ evidence
28 would substantiate a claim.”)

1 In addition to not telling Patrick what type of evidence she could submit to
2 substantiate her claim, VPA did not examine or interview her, or let her know specifically
3 why the reports from Dr. Henderson in which he found that she was disabled were not
4 sufficient to establish her disability. VPA also did not investigate Plaintiff's claims in her
5 appeal that she was unable to work at other jobs because she had developed carpal
6 tunnel in both hands and had a flare-up of symptoms in her elbow and shoulder, and that
7 her symptoms were aggravated by attempting to return to work (in an externship).
8 Therefore, this factor weighs in favor of a finding that VPA did not conduct a "full and fair"
9 investigation of Patrick's disability claim or have a meaningful dialogue with her.

10 **C. VPA Abused Its Discretion In Relying On a Vocational Consultant**
11 **Report Which Contained Clearly Erroneous Findings Of Fact And Was**
12 **Not Revised To Reflect Plaintiff's Worsening Condition**

13 An ERISA administrator abuses its discretion if it relies on clearly erroneous
14 findings of fact. *Boyd v. Bell*, 410 F.3d 1173, 1178 (9th Cir. 2005); *Taft*, 9 F.3d at 1473.
15 The Supreme Court has found that a "finding is clearly erroneous when although there is
16 evidence to support it, the reviewing body on the entire evidence is left with the definite
17 and firm conviction that a mistake has been committed." *Concrete Pipe and Prods. v.*
18 *Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993).

19 Here, the administrator relied heavily on the report of a vocational consultant in
20 determining that Plaintiff could perform other jobs. See 8/11/03 denial ltr (AR 261-64)
21 and 7/9/04 denial ltr (AR 444-48). However, the vocational report was clearly
22 erroneous, because it concluded that Patrick could perform four other jobs, when in fact,
23 Plaintiff could not perform typing, or keyboard or mouse work, which each of these jobs
24 required. Plaintiff's treating doctor, Dr. Henderson, consistently concluded that Plaintiff
25 could not and should not perform any typing, writing keyboard or mouse work.¹³ VPA

26 ¹³ See (1) Dr. Henderson's 3/19/03 report -- if plaintiff returns to work, she should not
27 use her right upper extremity at all. (AR 167-68); (2) Dr. Henderson's 5/14/03 report -- plaintiff
28 should perform no forceful or repetitive gripping, no keyboard or mouse work, and no overhead
work. (AR 278-280); (3) Dr. Henderson's 5/21/03 report -- Plaintiff should perform "no [mouse]
or keyboard work, and no repetitive forceful gripping, grasping or fine manipulation of the right
hand." (AR 151); (4) Dr. Henderson's 6/25/03 report -- Patrick "should be precluded from the
use of computer keyboard and mouse work. She also should not perform repetitive forceful

1 cited this recommendation in its initial denial letter and did not dispute it (AR 262), but
2 relied upon the vocational consultant report to conclude that there were other jobs that
3 Plaintiff could perform. AR 261-64.

4 The Vocational Rehabilitation Consultant, Renee Lange, did not interview Patrick
5 or request a physical examination of her. Instead, according to Lange's three-page
6 report, she spent approximately 4 hours reviewing Patrick's qualifications, and running a
7 search on the OASYS software program which identified occupations that could be
8 consistent with Patrick's qualifications and abilities. See 6/25/03 report, AR 269-72. The
9 occupations Ms. Lange concluded Patrick could perform were: (1) Credit Analyst, (2)
10 Management Analyst, (3) Sales Agent and (4) Order Department Supervisor. *Id.* at 270.

11 The vocational report cites and acknowledges the restrictions set forth in Dr.
12 Henderson's 5/14/03 report -- that Patrick must "avoid forceful or repetitive gripping and
13 grasping [and]. . . avoid overhead work and keyboard or mouse work with the right
14 upper extremity." *Id.* at 270. However, Ms. Lange performed no analysis regarding
15 whether these four potential occupations required any keyboard or computer work. In
16 fact, Ms. Lange implied that these jobs did require computer and keyboard work, as she
17 stated that "some accommodations might need to be made for these positions with
18 regards to keyboarding, such as work station modifications and extra break times." *Id.*
19 However, there is no evidence that accommodations **could** have been made, and the
20 facts suggest that accommodations could not have been made, because when Plaintiff
21 tried to return to work in an externship in the summer of 2003 (where such
22 accommodations were requested), her injuries worsened. See Dr. Henderson's reports
23 dated 1/19/04 (AR 142-43) (her vocational training "is aggravating her symptoms") and
24 2/9/04 (AR 135-36) ("It appears that the patient's work restrictions have not been
25 adhered to").

26 VPA relied upon this vocational consultant report in its initial and final denial of
27

28 gripping, grasping or fine finger manipulation to the right hand." (AR 145); (5) Dr. Henderson's
1/19/04 report -- Patrick is temporarily totally disabled. (AR 142-43); (6) Dr. Henderson's 6/7/04
report -- Patrick is still disabled from working (AR 437-38).

1 Plaintiff's claim for LTD benefits, finding that the vocational consultant determined
2 Patrick could perform the four jobs listed, considering her "education, training, and
3 experience, and in light of the physical restrictions." See 8/11/03 denial ltr (AR 261-64)
4 and 7/9/04 denial ltr (AR 444-48). As discussed below, the report was clearly erroneous
5 in reaching this conclusion.

6 **1. Job descriptions for the positions listed in the report**

7 The vocational report contains a very brief (three-line) description of each of the
8 four jobs, compiled from the DOT (Dictionary of Occupational Titles), along with each
9 job's DOT identification number. *Id.* A similar directory, also compiled by the U.S.
10 Department of Labor, is the Occupational Outlook Handbook (O*NET).

11 **a. Credit Analyst**

12 A Credit Analyst reviews files and customer records to analyze the paying habits
13 of customers who are delinquent in paying bills and recommends action. DOT #241.267-
14 022. The analyst then prepares reports with this credit information for use in decision
15 making. O*NET 13-2041.00. As this job involves reviewing files (presumably either on
16 paper or electronically) and preparing a written report, it will necessarily involve computer
17 keyboard/typing and/or fine manipulation.

18 **b. Management Analyst**

19 A Management Analyst analyzes business or operating procedures to devise the
20 most efficient methods of accomplishing work. DOT #161.167-018. The analyst analyzes
21 data to determine the nature and extent of the problem he or she is being asked to solve,
22 develops solutions to the problem, and then reports the findings and recommendations
23 to the client "usually . . . in writing." O*NET 13-111.00. The fact that the job involves
24 reviewing data and compiling written reports means, necessarily, that it will require
25 typing/keyboard and mouse work, as well as gripping/fine manipulation. Indeed, the
26 photograph depicting a "management analyst" in the O*NET directory shows a person
27 sitting at a desk, typing on a computer keyboard. *Id.*

1 **c. Sales Agent**

2 A Sales Agent sells financial products and services to clients for investment
3 purposes, which involves soliciting clients, conducting research regarding products and
4 providing clients with information, completing sales order tickets and performing
5 calculations to monitor client accounts and verify transactions. DOT #250.257-018.
6 Agents also analyze information, prepare reports and handle administrative duties, such
7 as filing and scheduling appointments. O*NET 41-4011.00. Thus, it is apparent that a
8 sales agent position would involve computer work and typing.

9 **d. Order Department Supervisor**

10 An Order Department Supervisor coordinates activities of personnel in an order
11 writing department. The Supervisor plans and initiates order-writing procedures,
12 supervises workers writing master orders and directs the establishment and
13 maintenance of customer order records. DOT # 169.167-038. The O*NET does not
14 contain a description of Order Department Supervisors, but indicates in regard to Order
15 Clerks that they “sit for long periods of time in front of computer terminals,” and that
16 “[p]roficiency with computer software is increasingly important because most orders are
17 being filled and filed electronically.” O*NET 43-4151.00. Accordingly, this position would
18 necessarily involve computer keyboard work reviewing the orders and order procedures.

19 **2. VPA did not request an updated vocational report after receiving
20 Plaintiff’s appeal**

21 Plaintiff told VPA in her appeal that she could not perform any of these jobs, as
22 they all involved keyboard work. AR 251. Plaintiff informed VPA that this was especially
23 so, as now symptoms had flared up in her left hand, elbow and arm, in addition to her
24 right hand, elbow and shoulder. *Id.* However, despite this information and Plaintiff’s
25 recent medical reports, VPA did not ask the vocational consultant to re-run the search,
26 update its report or do any further analysis. Instead, in its July 9, 2004 denial of Plaintiff’s
27 appeal, VPA relied on the same (erroneous) Vocational Report from June 25, 2003 - over
28 a year earlier. See 7/9/04 denial letter (AR 444-48), referencing 6/25/03 vocational report
(AR 269-272). In *Archuleta v. Reliance Standard Life Ins.*, 504 F.Supp.2d 876, 885 (C.D.

1 Cal. 2007), the court found that a vocational report which had not been updated and “was
2 more than a year old, render[ed] it of dubious value at the time of the decision.” The court
3 also found the report was flawed in that it failed to consider the impact of the side effects
4 of plaintiff’s medication on her ability to work and in that “it failed to ask its vocational
5 consultant to update her report based on the new medical information from plaintiff’s
6 doctor.” *Id.* at 885-86. Likewise, the report here is flawed and of dubious evidentiary
7 value in that it was over a year old, had not been updated to reflect Plaintiff’s new medical
8 reports from Dr. Henderson, and failed to take into account the impact that working had
9 on aggravating her symptoms.

10 In summary, the report’s conclusion that Plaintiff could perform these four jobs
11 was erroneous. VPA’s reliance on this report to deny Plaintiff’s claim for LTD benefits,
12 and its continued reliance on the report without any further analysis -- even after Plaintiff
13 stated in her appeal that she could not do these jobs because they all involved computer
14 work and notwithstanding Dr. Henderson’s consistent findings that she was unable to do
15 such work -- supports a finding that VPA abused its discretion, especially when
16 considered in conjunction with the other factors discussed herein.

17 **D. VPA’s Failure To Conduct A Physical Examination**

18 An administrator’s reliance on a paper review “does not, standing alone, require
19 the conclusion that the plan administrator acted improperly.” *Beckstrand*, 2008 U.S. Dist.
20 LEXIS 83195 at *26, citing *Calvert v. Firststar Fin. Inc.*, 409 F.3d 286, 294 (6th Cir. 2005).
21 However, “the failure to conduct a physical examination -- especially where the right to do
22 so is specifically reserved in the plan -- may, in some cases, raise questions about the
23 thoroughness and accuracy of the benefits determination.” *Calvert*, 409 F.3d at 295.
24 Additionally, when issues of the claimant’s credibility are involved, “reliance on such a
25 [paper] review may be inadequate.” *Id.* at 297, n.6. *See also Beckstrand*, 2008 U.S. Dist.
26 LEXIS 83195 at *26-27 (granting plaintiff’s motion for summary judgment for
27 reinstatement of LTD benefits and holding that failure to conduct further examinations,
28 especially given conflicting opinions, “raises questions about the thoroughness and
accuracy of the Plan’s benefits determination.”)

1 The VPA claims manual specifically conferred the right to conduct a physical
2 examination -- "on internal appeal, ***an IME may be requested*** for physical examination to
3 substantiate a disability." See Def. MSJ Opp at 15, n. 6. Nonetheless, VPA did not --
4 either upon the initial review or after Plaintiff's appeal -- interview Plaintiff or conduct a
5 physical examination of her. Such an examination would have been particularly helpful in
6 this case, as Plaintiff's credibility was at issue - Patrick complained of extensive pain, yet
7 VPA felt it was not sufficiently substantiated by objective evidence. This is especially true
8 in light of the fact that the primary objective evidence relied on by VPA in denying benefits
9 -- the EMG test -- is known to elicit false negative results. AR 138. Thus, the Court finds
10 that VPA's failure to interview and/or conduct a physical examination of Patrick raises
11 questions about the thoroughness and accuracy of its investigation and benefits
12 determination, and weighs in favor of a finding of abuse of discretion.

13 **E. VPA Disregarded Plaintiff's Subjective Evidence of Pain**

14 After Plaintiff entered vocational therapy and began working at an externship, her
15 pain and symptoms in her shoulder, elbow and hand began to worsen. As she indicated
16 in her February 5, 2004 appeal letter, she had pain and swelling in her right wrist, arm
17 and shoulder, and due to favoring her right arm, she was now experiencing pain and
18 swelling in her left hand and arm. AR 251-255. She stated that she had "[n]umbness in
19 the fingers, and my hand is constantly swollen. I'm unable to close my hand at all in the
20 morning." *Id.* She complained that her "[w]rist and arm have pain and swelling with use,"
21 and that she had "[s]houlder pain and stiffness." *Id.* She estimated that her "[p]ain
22 intensity is 3-8 and is on a daily basis." *Id.* Dr. Henderson noted her symptoms of pain,
23 swelling, numbness and tingling in the fingers in both hands in his January 19, 2004
24 report, and recommended that she be "taken out of her vocational rehabilitation training."
25 AR 142-43. On June 7, 2004, Dr. Henderson noted a "significant flare-up" of symptoms,
26 stating that "[s]he is now having worsening symptoms of her elbow wrist and even the
27 shoulder," and was "exquisitely tender over the lateral epicondylar area and ERCB with
28 pain with resisted wrist extension." AR 437-38

While VPA cited some of Plaintiff's complaints of pain and symptoms in its denial

1 letters, it ultimately disregarded her complaints of pain, swelling, stiffness and tenderness,
2 and concluded that she had failed to produce sufficient objective evidence that she could
3 not perform other jobs for which she was qualified. AR 444-48. VPA's approach of
4 "disregarding subjective evidence of pain is disapproved in Ninth Circuit precedent."
5 *Caplan v. CNA Fin. Corp.*, 544 F.Supp.2d 984, 992-993 (N.D. Cal. 2008), citing *Saffon*,
6 511 F.3d at 1216 (noting that "individual reactions to pain are subjective and not easily
7 determined by reference to objective measurements")¹⁴ Thus, VPA's failure to give
8 credence to Plaintiff's complaints of pain or to investigate whether her pain would prevent
9 her from performing other jobs is a factor that weighs in favor of a finding of abuse of
10 discretion.

11
12 **F. The EMG Test On Which VPA Heavily Relied Was Stated To Produce False Negatives**

13 The primary "objective" report on which VPA relied in rejecting Plaintiff's claim for
14 benefits was Dr. Shack's February 3, 2004 EMG report. AR 137-41. VPA cited Dr.
15 Shack's statements that the "electrodiagnostic study reveals no electrical evidence of
16 entrapment neuropathy," and that there was "no evidence of carpal tunnel (post-op on the
17 right) or cubital tunnel slowing on either side." AR 138; 7/9/04 Denial ltr (AR 447).
18 However, VPA's denial letter omitted that Dr. Shack specifically qualified his findings by
19 stating: "However, ***this is a difficult diagnosis to make on EMG/NCV, and false***
20 ***negative tests are often seen.***" AR 138. The fact that the EMG test often yields false
21 negatives weakens the reasonableness of VPA's reliance on this report in denying
22 Plaintiff LTD benefits.

23
24 **G. VPA Disregarded Dr. Henderson's Conclusion That Plaintiff Was**

25 ¹⁴ See also *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989) ("[D]espite our inability to
26 measure and describe it, pain can have real and severe debilitating effects; it is, without a
27 doubt, capable of entirely precluding a claimant from working. Because pain is a subjective
28 phenomenon, moreover, it is possible to suffer disabling pain even when the degree of pain, as
opposed to the mere existence of pain, is unsupported by objective medical findings."); *Prado*
v. Allied Domecq Spirits and Wine Group Disability Income Policy, 2008 U.S. Dist. LEXIS
4295, *26-27 (N.D. Cal., Jan. 22, 2008) (Defendant "may not ignore Plaintiff's subjective pain
complaints and instead rely solely on objective evidence if evidence of Plaintiff's pain is not
available.")

1 **Disabled And Omitted Important Findings From His Reports**

2 While Defendants are correct that VPA need not “accord special weight to the
3 opinions of a claimant’s physician,” it nonetheless may not “arbitrarily refuse to credit a
4 claimant’s reliable evidence, including the opinions of a treating physician.” *Black &*
5 *Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003). The Supreme Court affirmed
6 last year in *Glenn*, 128 S.Ct. at 2352, that an administrator abused its discretion when it
7 “emphasized a certain medical report that favored a denial of benefits, [and]
8 deemphasized certain other reports that suggested a contrary conclusion.”

9 Here, VPA relied heavily on the report of Dr. Kaplan (AR 127-29) in support of its
10 denial of LTD benefits. However, numerous deficiencies with respect to Dr. Kaplan’s
11 report undermine VPA’s reliance on it, particularly in light of Dr. Henderson’s consistent
12 findings that Plaintiff was disabled: (1) Dr. Kaplan did not examine or interview Plaintiff;
13 (2) he spent only one day reviewing Plaintiff’s medical records and files spanning over a
14 year; (3) he was not asked to and did not analyze whether Plaintiff could perform other
15 jobs; (4) he did not analyze whether Plaintiff’s complaints of pain would preclude her from
16 working at other jobs, or request a medical examination to investigate her complaints of
17 pain; (5) he did not address at all Dr. Henderson’s findings that Plaintiff was totally
18 disabled, and (6) he was not asked, before the final denial letter was issued, to consider
19 more recent medical reports prepared after his report was written, including Dr.
20 Henderson’s June 7, 2004 report which indicated a “significant flare-up” and “worsening
21 symptoms.” (AR 437-38).

22 The reports of Plaintiff’s treating doctor, Dr. Henderson, contained his opinion that
23 Plaintiff was “temporarily totally disabled” from January 8, 2003 until May 14, 2003 and
24 again from January 19, 2004 through at least June 7, 2004 -- the date of his last report
25 prior to VPA’s denial of Plaintiff’s appeal. See Dr. Henderson’s reports dated 1/18/03 (AR
26 189-91); 5/14/03 (AR 278-80); 1/19/04 (AR 142-43) and 6/7/04 (AR 437-38).¹⁵ However,

27
28 ¹⁵ VPA discussed Dr. Henderson’s 1/19/04 report (AR 142-43) in its final denial letter,
but omitted Dr. Henderson’s finding that Patrick was temporarily totally disabled. 7/9/04 denial
ltr, AR 446.

1 neither the initial nor final denial letter mentioned Dr. Henderson’s findings of “temporary
2 total disability.” (AR 261-64, 444-48)

3 VPA also disregarded Dr. Henderson’s conclusion that once Plaintiff began
4 working again (at an externship), it “aggravat[ed] her symptoms” and caused her to
5 “demonstrat[e] symptoms of carpal tunnel reoccurrence on the right hand and a
6 development on the left hand as well,” such that he recommended that she “be taken out
7 of her vocational rehabilitation training.” Dr. Henderson’s 1/19/04 report, AR 142-43.
8 Finally, VPA disregarded Dr. Henderson’s recommendations that Patrick not perform any
9 computer keyboard and mouse work” or “repetitive forceful gripping, grasping or fine
10 finger manipulation to the right hand.” Dr. Henderson 6/25/03 report, AR 145-47.

11 Another factor that may tend to show an abuse of discretion is a defendant’s
12 “cherry-picking” or omission of language from medical records to support a denial of
13 benefits. For example, in *Saffon*, 522 F.3d at 873, the Ninth Circuit found that the
14 administrator “did not meet its duty to have a meaningful dialogue with its beneficiary in
15 deciding whether to grant or deny benefits” by taking “various of her doctors’ statements
16 out of context or otherwise distort[ing] them in an apparent effort to support a denial of
17 benefits.” The court held that because the denial letter omitted relevant language from
18 the report that might support a grant of benefits “it suggests **less deference** should be
19 given to the decision of the claims administrator.” *Id.* Here, VPA’s initial and final denial
20 letters omit the following relevant language from Dr. Henderson’s reports:

21 **1. Dr. Henderson’s 1/8/03 report**

22 This report (which VPA failed to mention in either denial letter) indicated that Dr.
23 Henderson would continue to treat Patrick under her private insurance for her right
24 shoulder, calcific tendinitis, right lateral epicondylitis, and right carpal tunnel syndrome.
25 He concluded that Patrick “is **currently temporarily disabled** secondary to her calcific
26 tendinitis, epicondylitis, and right carpal tunnel syndrome and will be so for probably the
27 next three months.” AR 189-91.

28 **2. Dr. Henderson’s 2/26/03 report**

VPA cited this report from Patrick’s first post-surgery visit (AR 176-77) for the

1 proposition that Patrick was "doing very well" after surgery, and noted the finding in the
2 report that Patrick had "good extension and can almost make a full composite fist" when it
3 initially denied Plaintiff's claim for LTD benefits. Def. reply at 9; VPA 8/11/03 denial ltr,
4 AR 262. However, VPA and **omitted** Dr. Henderson's conclusion that Patrick was
5 "**[t]emporarily totally disabled until further notice.**" 2/26/03 report, AR 176.

6 **3. Dr. Henderson's 5/21/03 report**

7 VPA cited this report for its findings that Patrick had full shoulder motion and
8 "negative provocative test for carpal tunnel syndrome." 5/21/03 report (AR 150-51); Def.
9 reply at 9; 7/9/04 final denial ltr, AR 445. However, VPA **omitted** that the report stated
10 that Patrick still "**reports really no significant change. She still has pain** in the
11 anterolateral shoulder. It is worse with overhead activity. The pain in the elbow is the
12 same. It is down the lateral epicondylar area and radiates into the dorsum of the forearm.
13 She still reports swelling and stiffness in the fingers, mainly in the morning and pain at the
14 base of the thumb." AR 150.

15 **4. Dr. Henderson's 1/19/04 report**

16 Dr. Henderson indicated in this report that as a result of Patrick's working at an
17 externship, she complained of symptoms in her left hand, pain, swelling, numbness and
18 tingling in all fingers, and a return of paresthesia in the median nerve distribution. (AR
19 142-43). Given her worsening symptoms, Dr. Henderson recommended that she be
20 "taken out of her vocational rehabilitation training," because it "is aggravating her
21 symptoms." He stated that Patrick was "demonstrating symptoms of carpal tunnel
22 reoccurrence on the right hand and a development on the left hand as well." He
23 concluded that "[s]he is now **TTD** [temporarily totally disabled]." VPA discussed this
24 report in its final denial letter and the fact that plaintiff was "in vocational rehabilitation,"
25 but **omitted** that Plaintiff was **unable to continue her rehabilitation** due to her pain and
26 symptoms, and omitted Dr. Henderson's conclusion that she was now temporarily totally
27 **disabled**. See 1/19/04 rpt (AR 142-43); 7/9/04 denial ltr, AR 446.

28 **5. Dr. Henderson's 2/9/04 report**

While VPA's final denial letter cited Dr. Henderson's 2/9/04 report for certain

1 positive findings and noted Plaintiff's swelling, numbness and pain (AR 446), it failed to
2 acknowledge Dr. Henderson's finding that "[s]he is really **not having any significant**
3 **improvement.**" 2/9/04 report, AR 135

4 **6. Dr. Henderson's 6/7/04 report**

5 VPA's final denial letter **omitted** entirely Dr. Henderson's June 7, 2004 report, in
6 which he reported a "**significant flare-up**" of symptoms in Patrick's right upper
7 extremity. AR 437-38. Dr. Henderson stated: "She is now having **worsening symptoms**
8 **of her elbow wrist and even the shoulder.** She is back in her elbow band and tunnel
9 brace and using ice with improvement." AR 437. He stated that she was "exquisitely
10 tender over the lateral epicondylar area and ERCB with pain with resisted wrist
11 extension," the "carpal tunnel is minimally tender with negative provocative tests for
12 carpal tunnel," and that she has "decreased grip strength." *Id.* Dr. Henderson indicated
13 that Plaintiff remained **temporarily totally disabled.** *Id.* VPA's failure to consider or
14 discuss this most recent report of Plaintiff's worsening condition was indeed a serious
15 omission.¹⁶

16
17 ¹⁶ Defendants contend in their reply that "VPA's denial of Plaintiff's claim was supported
18 by overwhelming evidence," and list six examples of this "overwhelming evidence" (Def's
19 Reply at 9). However, Defendants omit other important material from these six reports or take
20 them out of context. For example:

21 ● **Dr. Collins' 8/8/02 report** - Defendants cite this report for the contention that
22 Plaintiff had "normal strength and sensation" in her right hand and "[f]ull range of
23 motion at the elbow." Dr. Collins' 8/8/02 Rpt. (AR 376); Def. MSJ at 5; Def. reply
24 at 9. However, Defendants omit that the report also found that Plaintiff had
25 "increasing discomfort in her right forearm and elbow," and "numbness in her
26 three fingers." AR 376. Furthermore, this report was written nearly two years
27 before the final denial of benefits, and Patrick's hand, elbow and shoulder
28 worsened again in 2004.

● **Dr. Henderson's 12/11/02 report** - Defendants cite this report for its
statements that Plaintiff is "better" and her "elbow is quite a bit better." Dr.
Henderson's 12/11/02 Rpt (AR 216); Def. MSJ at 6; Def. reply at 9. However,
Defendants omit that the report indicated that Patrick "is now having intermittent
pain in the shoulder," (AR 216) and that this report was written 1-1/2 years
before VPA's final denial of benefits, and disregard the fact that Patrick's
symptoms in her elbow, shoulder and hand flared up again in 2004. AR 216.

● **Dr. Henderson's 2/19/03 report** - Defendants cite this report for its finding that
Plaintiff could stand, walk and sit for 8 hours at a time. (AR 326-327); Def. MSJ
at 6; Def. reply at 9. However, the report also stated that Plaintiff could not drive,
could only occasionally do simple grasping and fine manipulation, and could

1 **H. The Totality of Factors**

2 As the Supreme Court held in *Glenn*, 128 S.Ct. at 2351, in determining whether a
3 claims administrator abused its discretion in denying benefits, the court should take into
4 account “several different, often case-specific, factors, reaching a result by weighing all
5 together,” where “any one factor will act as a tiebreaker when the other factors are closely
6 balanced.” See also *Toven*, 2008 U.S. Dist. LEXIS 100445 at *24-25 (“In theory, any
7 number of factors might be relevant to such a determination” of whether the Plan abused
8 its discretion in denying LTD benefits); *Abatie*, 458 F.3d at 968 (“abuse of discretion
9 analysis allows a court to tailor its review to all the circumstances before it”).

10 Here, VPA failed to ask the question of whether Plaintiff, whose condition improved
11 after leaving work, having surgery and undergoing physical therapy, but worsened after
12 working in an externship, would be able to return to another job without her condition
13 worsening again. VPA also failed to have a meaningful dialogue with Plaintiff about the
14 extent and severity of her symptoms, her pain, and specific evidence she would need to

15 never do pushing or pulling w/ her right hand. AR 326-27.

16
17 ● **Dr. Henderson’s 2/26/03 report** - Defendants cite this report for its statement
18 that Plaintiff was “doing very well” after surgery for carpal tunnel syndrome.
19 2/26/03 Rpt (AR176-77); Def. MSJ at 6; Def. reply at 9. However, Defendants
20 omit the doctor’s finding that Plaintiff is “[t]emporarily totally disabled until
21 further notice.” AR 176.

22 ● **Dr. Henderson’s 5/14/03 report** - Defendants cite this report for the findings
23 that Plaintiff was “[i]mproved,” “[a]mbulatory” “capable of clerical/ administrative”
24 work and not “totally disabled from any other work.” (AR 278-280); Def. MSJ at
25 6; Def. reply at 9. However, Defendants omit the restrictions Dr. Henderson
26 recommends (no keyboard/mouse work, etc.). Furthermore, Defendants neglect
27 to mention that Plaintiff’s symptoms flared up again after her externship work,
28 and that Dr. Henderson again found her totally temporarily disabled on January
19, 2004. AR 142-43.

● **Dr. Henderson’s 5/21/03 report** - Defendants cite this report for its findings
that Plaintiff had full shoulder motion and “negative provocative test for carpal
tunnel.” (AR 150-51); Def. reply at 9. However, the report also noted “no
significant change,” plaintiff “still has pain in the anterolateral shoulder,” and “pain
in the elbow,” “swelling and stiffness in the fingers,” and “pain at the base of the
thumb.” AR 150. Dr. Henderson concluded that Patrick “will not be able to return
to her pre-injury occupation and would be eligible for vocational rehabilitation,”
and reiterated his restrictions for no computer work. AR 151. Again, Defendants
make no mention of the fact that after this vocational training, her symptoms
flared up and worsened, and that Dr. Henderson found her disabled again on
January 19, 2004.

1 submit to convince them that she was disabled, and/or why her doctor's conclusion that
2 she was disabled was insufficient. VPA relied on a vocational consultant report which did
3 not analyze whether Plaintiff could actually perform the jobs it listed in view of the fact that
4 she could not perform computer keyboard/mouse work or gripping, and did not request an
5 updated vocational report one year later after receiving Plaintiff's appeal, despite the fact
6 that Plaintiffs' symptoms had significantly worsened since the initial report was prepared.
7 VPA failed to interview Plaintiff or conduct a physical examination, even though its claims
8 manual specifically authorized it do so. VPA disregarded Plaintiff's complaints of
9 significant pain. The EMG test on which VPA heavily relied was not sufficient to justify
10 denial of benefits, as it was stated to produce false negatives. VPA's reliance and
11 emphasis on Dr. Kaplan's report is undermined by the fact that he spent only one day
12 preparing his report, did not examine Plaintiff, did not analyze whether she could perform
13 other jobs or whether her pain would preclude her from working at other jobs, did not
14 address Dr. Henderson's findings that Plaintiff was totally disabled, and did not consider
15 Plaintiff's most recent medical record which indicated a "significant flare-up" and
16 "worsening symptoms." And finally, although VPA made reference to several of Dr.
17 Henderson's reports, it disregarded his repeated conclusion that Plaintiff was disabled,
18 omitted important findings from his reports, and in its final denial letter failed to consider at
19 all his most recent report confirming Plaintiff's flare-up of symptoms and reiterating his
20 finding that she was disabled.

21 Based upon the review of the entire Administrative Record, the Court finds and
22 concludes that all of these factors and serious concerns, taken together, demonstrate that
23 VPA abused its discretion in denying Patrick's claim for LTD benefits. The Court
24 accordingly grants summary judgment in favor of Plaintiff.

25

26 **VI. CONCLUSION**

27 For the reasons set forth herein, the Court:

- 28 1. **GRANTS** Plaintiff's Motion for Summary Judgment [Doc. 78];
2. **DENIES** Defendants' Motion for Summary Judgment [Doc. 90];

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3. **OVERRULES** Plaintiff's evidentiary objections [Doc. 98]; and

4. **SUSTAINS** Defendants' evidentiary objections [Doc. 102].

The Court orders the Clerk of Court to enter judgment in favor of Plaintiff, close the case file and terminate this case.

IT IS SO ORDERED

DATED: July 13, 2009



Jan M. Adler
U.S. Magistrate Judge