

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RYAN WALDRON,

Case No. 3:24-cv-05193-TMC

Plaintiff,

ORDER GRANTING PLAINTIFF'S RULE  
52 MOTION FOR JUDGMENT AND  
DENYING DEFENDANT'S CROSS-  
MOTION

UNUM LIFE INSURANCE COMPANY OF  
AMERICA,

Defendant.

## I. INTRODUCTION

This dispute arises out of Plaintiff Ryan Waldron's claim for long term disability (LTD) benefits from Defendant Unum Life Insurance Company of America. Unum administered a disability benefits plan through Waldron's employer. When Waldron began suffering chronic and debilitating fatigue following his first dose of the COVID-19 vaccine, he could no longer work. Waldron was ultimately forced to make a claim for LTD benefits. Unum denied the claim, asserting that Waldron had failed to offer the necessary medical evidence to support his claim.

Waldron appealed the denial, and after his appeal was denied, he filed suit against Unum. Dkt. 1. Waldron then moved for judgment on the record under Federal Rule of Civil Procedure 52. Dkt. 15. Waldron argued that Unum had improperly denied his claim and he was owed LTD

ORDER GRANTING PLAINTIFF'S RULE 52 MOTION FOR JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION - 1

1 benefits. Unum cross-moved for judgment, claiming that the company did not owe Waldron any  
2 benefits. Dkt. 16.

3 Waldron bears the burden of showing by a preponderance that he was disabled within the  
4 meaning of the plan and was therefore entitled to LTD benefits. The Court finds that Waldron  
5 has met this burden. Thus, the Court GRANTS Waldron's motion (Dkt. 15) and DENIES  
6 Unum's cross-motion (Dkt. 16). The Court holds that Waldron was disabled within the meaning  
7 of the Plan with respect to his "regular occupation" and is entitled to receive LTD benefits.<sup>1</sup> The  
8 parties shall meet and confer regarding the amount of benefits owed and any prejudgment  
9 interest, and jointly submit a proposed judgment within ten (10) days of the date of this Order.  
10 Plaintiff's request for attorney's fees under 29 U.S.C. § 1132(g) must be filed no later than 14  
11 days after the entry of judgment as required by Federal Rule of Civil Procedure 54(b)(2). The fee  
12 petition shall be noted as a 21-day motion under this Court's local civil rules.

## 13                   **II. PROCEDURAL ISSUES**

14                   The Plan at issue here is governed by the Employee Retirement Income Security Act, 29  
15 U.S.C. §§ 1001, et seq. ("ERISA"). *See* AR 3666 (plan document explaining that the "policy is  
16 delivered in and is governed by the laws of the governing jurisdiction and to the extent  
17 applicable by" ERISA); Dkt. 15 at 5 ("This is an ERISA governed case regarding the denial of  
18 long term disability and waiver of premium for life insurance benefits.").

19                   ERISA allows a plan participant "to recover benefits due to him under the terms of his  
20 plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits  
21 under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *Metro. Life Ins. Co. v. Glenn*, 554 U.S.  
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23                   <sup>1</sup> Waldron's complaint also mentions Life Insurance (LI) benefits. But Waldron makes no  
24 argument pertaining to the LI benefits, *see* Dkt. 15, and the same is true for Unum. Thus, the  
Court's order focuses only on the request for LTD benefits.

1 105, 108 (2008) (ERISA “permits a person denied benefits under an employee benefit plan to  
2 challenge that denial in federal court.”). “District courts review a plan administrator’s denial of  
3 benefits ‘under a *de novo* standard unless the benefit plan gives the administrator or fiduciary  
4 discretionary authority to determine eligibility for benefits.’” *Kieserman v. Unum Life Ins. Co. of*  
5 *Am.*, 574 F. Supp. 3d 896, 899–900 (W.D. Wash. 2021) (citing *Firestone Tire & Rubber Co. v.*  
6 *Bruch*, 489 U.S. 101, 115 (1989)). The parties agree that the *de novo* standard of review applies.  
7 Dkt. 15 at 5; Dkt. 16 at 11 n.11.

8 Under *de novo* review, “[t]he court simply proceeds to evaluate whether the plan  
9 administrator correctly or incorrectly denied benefits.” *Opeta v. Nw. Airlines Pension Plan for*  
10 *Cont. Emps.*, 484 F.3d 1211, 1217 (9th Cir. 2007) (quoting *Abatie v. Alta Health & Life Ins. Co.*,  
11 458 F.3d 955, 963 (9th Cir. 2006)). Thus, with few exceptions, the Court’s review is limited to  
12 the evidence the plan administrator possessed. *Kieserman*, 574 F. Supp. 3d at 900.

13 The Court’s review “can best be understood as essentially a bench trial ‘on the papers’  
14 with the District Court acting as the finder of fact.” *Id.* (quoting *Muller v. First Unum Life Ins.*  
15 *Co.*, 341 F.3d 119, 124 (2d Cir. 2003)). In assessing a Rule 52 motion for judgment, a court must  
16 ask “not whether there is a genuine issue of material fact, but instead whether [the claimant] is  
17 disabled within the terms of the policy.” *Id.* (quoting *Kearney v. Standard Ins. Co.*, 175 F.3d  
18 1084, 1094–95 (9th Cir. 1999)). The court “can evaluate the persuasiveness of conflicting  
19 testimony and decide which is more likely true.” *Id.* (quoting *Kearney*, 175 F.3d at 1094–95).  
20 Consequently, “the court may make factual findings, evaluate credibility, and weigh the evidence  
21 before it to determine whether the administrator correctly or incorrectly denied benefits.” *Id.*  
22 (citing *Anderson v. Liberty Mut. Long Term Disability Plan*, 116 F. Supp. 3d 1228, 1231 (W.D.  
23 Wash. 2015)).

On *de novo* review, the plan administrator's determination is given no deference, but the plan participant bears the burden of proving his entitlement to benefits. *Collier v. Lincoln Life Assurance Co. of Bos.*, 53 F.4th 1180, 1186 (9th Cir. 2022); *Baxter v. MBA Group Ins. Tr. Health and Welfare Plan*, 958 F. Supp. 2d 1223, 1227 (W.D. Wash. 2013). "Because the burden to prove entitlement to policy benefits rests on the claimant, the court must examine whether the participant has established, by a preponderance of the evidence, that the record supports the conclusion that he is entitled to benefits under the policy." *Louis v. Hartford Life & Accident Ins. Co.*, No. C19-56 MJP, 2020 WL 39145, at \*7 (W.D. Wash. Jan. 3, 2020) (citing *Muniz v. Amec Constr. Mgmt., Inc.*, 623 F.3d 1290, 1294, 1296 (9th Cir. 2010)).

### III. FINDINGS OF FACT

1. Plaintiff Michael Waldron began working at James Hardie in July 2019. AR 314. He managed the daily operation of a production line in Hardie's manufacturing. AR 3014. In a typical shift, Waldron managed twenty to twenty-five people. AR 3015. He spent about eighty percent of the time moving around the plant reviewing production and employee performance.

*Id.*

2. James Hardie offered its employees disability insurance through Unum Life Insurance Company of America. AR 3665. The policy is governed by ERISA. AR 3666.

3. The Unum plan offered both short- and long-term disability benefits. AR 717.

4. Unum defined an individual as disabled when the individual was limited from “performing the material and substantial duties of [their] regular occupation due to [their] sickness or injury; and [they] have a 20% or more loss in [their] indexed monthly earnings due to the same sickness or injury.” AR 3680. The plan explained that “[a]fter 24 months of payments, you are disabled when Unum determines that due to the same sickness or injury, you are unable

1 to perform the duties of any gainful occupation for which you are reasonably fitted by education,  
2 training, or experience.” *Id.*

3 5. Unum defined material and substantial duties as those that “are normally required  
4 for the performance of your regular occupation” and that “cannot be reasonably omitted or  
5 modified.” AR 134.

6 6. Unum defined regular occupation as “the occupation you are routinely performing  
7 when your disability begins.” AR 135. Unum looks “at your occupation as it is normally  
8 performed in the national economy, instead of how the work tasks are performed for a specific  
9 employer or at a specific location.” *Id.*

10 7. Unum defined sickness as “an illness or disease.” *Id.* Unum defined injury as “a  
11 bodily injury that is the direct result of an accident and not related to any other cause.” AR 133.

12 8. Unum’s policy required that an individual be “under the regular care of a  
13 physician in order to be considered disabled.” AR 3680. A physician includes: “a person  
14 performing tasks that are within the limits of his or her medical license; and a person who is  
15 licensed to practice medicine and prescribe and administer drugs or to perform surgery; or a  
16 person with a doctoral degree in Psychology (Ph.D. or Psy.D.) whose primary practice is treating  
17 patients; or a person who is a legally qualified medical practitioner according to the laws and  
18 regulations of the governing jurisdiction.” AR 134.

19 9. Unum’s policy also required that an individual be “continuously disabled through  
20 [their] elimination period.” AR 118. Unum would treat a disability as continuous if the disability  
21 “stops for 30 days or less during the elimination period.” *Id.* The elimination period was the later  
22 of 180 days or the date the short-term disability payments ended. *Id.*; AR 132.

23 10. On May 2, 2021, Waldron received the first dose of the COVID-19 vaccine.  
24 Waldron initially appeared to have common side effects of the vaccine. AR 3017.

1           11. After these initial symptoms abated, Waldron continued to experience headaches,  
2 chronic fatigue, brain fog, dizziness, sleep issues, and double vision. *Id.*

3           12. Following the onset of these symptoms, Waldron pursued medical care to  
4 determine the cause and find a treatment. *Id.*

5           13. On May 8, 2021, Waldron visited his family practice provider, Paul Surette, MS,  
6 PA-C, at Tumwater Family Practice Clinic (TFPC). AR 412.

7           14. On May 19, 2021, Waldron again visited Surette. The two discussed his  
8 symptoms. Waldron complained of mental fog, weakness, shortness of breath, fatigue, and  
9 intermittent low-grade fever. AR 3046. Surette referred Waldron to neurology and infectious  
10 disease as an initial step in determining his diagnosis. AR 3051.

11           15. Waldron ultimately visited Surette, and his colleagues at TFPC, Jennifer Calser,  
12 PA-C, and Calvin Kuo, PA-C, fifteen times between May 2021 and January 2022. AR 1903–04.  
13 These providers referred him for blood tests, AR 413; MRIs, AR 407; EKGs, AR 408; and x-  
14 rays, AR 408.

15           16. On May 27, 2021, Waldron had a neurology appointment with Dr. Greg Zoltani.  
16 AR 327–28. Waldron again complained of severe fatigue, headaches, generalized weakness, and  
17 eye pain. *Id.* Zoltani’s impression was that these symptoms were caused by Waldron’s COVID-  
18 19 vaccination. AR 327 (“Constellation of symptoms which I feel are secondary to the COVID  
19 vaccine.”).

20           17. Dr. Zoltani ordered an MRI of Waldron’s head to further investigate the  
21 symptoms. *Id.* The MRI results were normal and did not help Dr. Zoltani determine the cause of  
22 Waldron’s symptoms. AR 325.

23           18. On June 9, 2021, Waldron had a follow-up appointment with Dr. Zoltani. AR 320.  
24 Waldron continued to experience “fogginess” and “pressure” in his head. He reported that it was

1 difficult to drive. *Id.* But, given the lack of diagnostic results, Dr. Zoltani could not offer any  
2 other treatment options. *Id.* Dr. Zoltani “reassured him that he should continue to improve over  
3 further time and he should resume his normal levels of activity.” *Id.*

4 19. Waldron’s symptoms persisted, including ongoing brain fog, fatigue, shortness of  
5 breath, dizziness, and headaches. Casler referred Waldron to a cardiologist. AR 3108–09.  
6 Waldron underwent a chest x-ray, but the findings were normal. AR 3216.

7 20. On July 1, 2021, Waldron saw an infectious disease specialist, Dr. Britta Denman.  
8 AR 447, 3094. The treatment notes recorded the same symptoms, along with a loss of  
9 concentration and coordination and double vision. AR 3094.

10 21. The same day, Waldron requested a remote consultation with the Mayo Clinic,  
11 which had been exploring treatments for symptoms of “long-COVID.” AR 3405.

12 22. On July 2, 2021, Waldron had a real-time video consultation with a Mayo Clinic  
13 provider, Dr. Melanie Swift, M.D., M.P.H. Waldron again reported that he had a headache,  
14 severe fatigue, brain fog, dizziness, and blurred vision. AR 3083.

15 23. Dr. Swift concluded that Waldron’s “constellation of symptoms overlaps  
16 significantly with post-acute COVID syndrome (PACS), however he has not experienced  
17 infection and has been tested multiple times. Since it may be an inappropriate immune response  
18 that underlies PACS, he may have experienced an inappropriate immune response to the mRNA  
19 vaccine which is mimicking PACS. His history of prior allergies requiring desensitization may  
20 be evidence of a tendency to have a highly reactive immune system.” AR 284. But, because  
21 Waldron did not have a triggering COVID infection, Dr. Swift concluded he did not meet the  
22 long COVID diagnostic criteria. *Id.* Rather, “[i]n his case, the trigger may have been his COVID  
23 vaccination.” *Id.*

1           24. Dr. Swift advised Waldron to complete additional diagnostics locally, and, if no  
2 other source was determined for his symptoms, recommended “addressing his symptoms with a  
3 conservative approach that has provided benefit to our patients with PACS.” AR 3087. The  
4 doctor advised “that the most important part of treatment is engage in regular activity that does  
5 not cause a prolonged flare. . . Pt instructed to start with very minimal activity, like walking  
6 around the home and minimal household chores, and slowly increasing activity as long as flares  
7 . . . do not occur.” *Id.* The provider encouraged Waldron to resume his “normal daily schedule as  
8 possible,” but, “[g]iven the physical demands of his job,” advised him to “consult with his local  
9 treating provider to prescribe (and later modify) work restrictions when he is able to begin the  
10 process of returning to work. Starting with shorter hours, reductions in physical demand such as  
11 lifting/standing/walking restrictions, and restriction from safety-sensitive work would be  
12 advisable at first.” AR 284–85.

13           25. On July 13, 2021, Waldron saw a specialist in rehabilitation medicine,  
14 Dr. Christopher McMullen. AR 385. Again, Waldron reported the same symptoms. Waldron also  
15 reported feeling “down due to lack of available treatment” and “[f]rustrated with lack of  
16 available treatment.” AR 3076. Dr. McMullen offered several treatment options, including  
17 nutrition, potential medications, and a formal physical therapy program. AR 3078.

18           26. On July 28, 2021, Waldron began physical therapy at Providence Tumwater  
19 Valley Physical Therapy. AR 607. Though Waldron’s symptoms fluctuated, he still experienced  
20 dizziness and headaches, often exacerbated by exercise, movement, or time on the computer. *Id.*

21           27. On August 5, 2021, Waldron again visited Dr. Zoltani. AR 1346. Dr. Zoltani  
22 documented significant improvement in Waldron’s symptoms but noted that Waldron was still  
23 very limited in his ability to perform physical activities. *Id.*

1           28.    On August 9, Waldron's physical therapist similarly noted some improvements.  
2           AR 602. Waldron had increased his walking ability to 15-minutes, twice per day. *Id.* Though  
3           "very fatiguing" he was "doing much better" with the minimal movement. *Id.* This kind of mild  
4           exercise still caused a headache and dizziness. *Id.* His reading ability had also improved, but he  
5           could "still only read about ½ page on screen or paper before vision goes blurry and can't focus  
6           on it any longer." *Id.*

7           29.    On August 17, Waldron tried to return to work. He lasted only four hours, and felt  
8           exhausted by the end of the day, with a notable increase in head pressure and dizziness. AR 598.  
9           He reported to his physical therapist that he subsequently "had a rough time" and had  
10           "essentially crashed." AR 595. The physical therapist noted that he appeared "very fatigued  
11           today." *Id.*

12           30.    The next week, Waldron's therapist set a new goal of walking for 20 minutes each  
13           day without extreme exhaustion or increased symptoms. AR 591.

14           31.    Waldron saw Dr. Swift at the Mayo Clinic again on September 30, 2021. AR 278.  
15           Swift noted that, since their last visit in July, Waldron had enrolled in care at the University of  
16           Washington's post-COVID rehab program. AR 279. Though initially helpful, Waldron found  
17           that returning to activity and work made his symptoms rebound. *Id.* The subsequent flare lasted  
18           several weeks. *Id.* Dr. Swift's assessment was ultimately the same. *Id.*

19           32.    Waldron's progress continued, albeit slowly. At an assessment on November 15,  
20           2021, Waldron's physical therapist reported that he had a neck disability related to head pressure  
21           and fatigue. Waldron could not do recreation activities because of the pain, and continued to  
22           have moderate headaches, difficulty concentrating, and challenges sleeping. AR 3246. The  
23           physical therapist reported that he continued to have difficulty maintaining concentration and  
24

1 responded well to “gradual exercise progressions” and “mild vision training activities.”

2 AR 3247.

3 33. The physical therapist set several goals for Waldron. One was to perform forty-  
4 five minutes of exercise with short breaks without increased symptoms, or flare-ups, following  
5 the exercise. The therapist reported that the goal was “nearly met.” AR 3248.

6 34. But at another visit on November 22, Waldron reported a “significant return of his  
7 headaches last week, pain severe for about 4 days.” AR 3250. Returning to a discontinued  
8 medication had helped some, but Waldron quickly fatigued with activity. There was no increase  
9 in headache symptoms. *Id.*

10 35. On December 6, 2021, Unum notified Waldron that his short-term disability  
11 benefits would soon end and his claim would be considered instead for long-term disability  
12 (LTD) benefits. AR 59. Unum explained that, although Waldron had been approved for short  
13 term disability, he was not considered “automatically eligible” for LTD benefits. AR 60.

14 36. Unum requested information to support Waldron’s request for benefits. Unum  
15 sought information from both Waldron and his health care providers. Surette responded that  
16 Waldron had experienced severe fatigue and shortness of breath following his vaccination on  
17 May 2, 2021. AR 94. Surette explained that Waldron had “extensive workup” with various  
18 specialists for ongoing symptoms including headache, vision disturbance, and sleep disruption.  
19 *Id.*

20 37. In response to a question asking whether Waldron would be “incapacitated for a  
21 single continuous period of time[,]” Surette entered begin and end dates of May 3, 2021 through  
22 May 2, 2022. *Id.* He indicated that the condition caused ongoing flare ups. *Id.*

1           38. In response to a question asking about Waldron's restrictions and limitations,  
2 Surette wrote, "shortness of breath and fatigue limit even minimal activities of daily living. Also  
3 has blurred vision that limits reading/computer work along with headache." AR 95.

4           39. On December 7, 2021, Waldron visited TFPC and saw Surette, who affirmed that  
5 the same symptomology continued. AR 751. He explained "Patient is here today for follow-up  
6 on chronic fatigue and headache with dyspnea on exertion[.]" *Id.* "Patient complains of having  
7 some days that are better than others and [ ]he cycles between 1 week of having improved energy  
8 level and the next week he may be fatigued and can't get out of bed." *Id.* Surette concluded,  
9 "[o]verall, patient seems to be improving with regards to his symptoms, however still significant  
10 disability from postviral or postvaccine syndrome." AR 752.

11          40. On December 14, a representative from Unum called Waldron to discuss his  
12 application for LTD benefits. AR 227. Waldron detailed the above medical history and  
13 symptomology. Waldron also explained that he had tried to return to work several times.  
14 AR 228. But each time the "price [he] would pay afterwards" would leave him unable to move  
15 for anywhere from a day to a week. AR 228. Waldron told the Unum representative that his last  
16 attempt to return to work left him bedridden for an entire month. *Id.*

17          41. Waldron believed the symptoms were related to the COVID-19 vaccine, but he  
18 was open to other possibilities (such as a COVID infection itself). He pursued testing for  
19 COVID-19 antibodies. AR 228–29. He received testing from a company called Innovative  
20 Bioanalysis Laboratory. AR 3209. The testing panel is not approved by the Food and Drug  
21 Administration for accuracy. *Id.* The test result, however, was positive. *Id.*

22          42. On December 1, 2021, Waldron provided Unum with a disability certification  
23 from Surette. AR 95. The form explained that "[s]hortness of breath and fatigue limit even

1 minimal activities of daily living. Also has blurred vision that limits reading/computer work  
2 along with headache.” *Id.* Surette could not provide a return-to-work date for Waldron. *Id.*

3 43. On January 6, 2022, Waldron had an appointment with the University of  
4 Washington’s neurology headache clinic. AR 504. He met with Dr. Natalia Murinova. AR 1150–  
5 51. She documented continued uncontrolled headaches. *Id.* She noted that the headaches were  
6 exacerbated by exertion, work, and eye strain. AR 1151; AR 504–10.

7 44. Dr. Murinova diagnosed Waldron with new daily persistent headache (NDPH)  
8 because he met “International Headache Society Criteria for NDPH in the context of COVID  
9 vaccine.” AR 1154. Waldron seemed intent on following the treatment plan. AR 1156.

10 45. On January 13, 2022, Waldron again saw Surette. He reported the same  
11 symptoms. AR 3037.

12 46. On January 19, a representative from Unum called Waldron to discuss extending  
13 the time for the company to complete their review of his file. AR 497. Waldron agreed. *Id.* The  
14 representative confirmed the extension in writing. *Id.*

15 47. Unum first had Joshi Vikrant, MBBS, review Waldron’s claim file. AR 522.  
16 Vikrant determined that the records failed to establish that Waldron was limited from performing  
17 the duties of his regular occupation. Vikrant sought further review. AR 694.

18 48. On February 8, 2022, Unum had internal medicine doctor Maribelle Kim review  
19 Waldron’s records. AR 696. Dr. Kim noted that Waldron had undergone an “extensive  
20 diagnostic workup,” but felt the “[r]ecords overall indicate that his reported symptoms are  
21 inconsistent with and out of proportion to his extensive diagnostics, exam findings by multiple  
22 providers, as well as the initial [con]sult.” AR 697. Under the “whole person analysis” portion of  
23 her report, Dr. Kim noted that, “although the records indicate that the insured was  
24 evaluated/treated/prescribed meds for conditions including vitamin D deficiency and

1 depression/anxiety, the medical evidence does not support that these conditions would give rise  
2 to any additional restrictions and limitations. When all of the insured's multiple and comorbid  
3 conditions are analyzed, both individually and collectively as a whole, there are no additional  
4 restrictions and limitations from these co-morbid conditions that affect the functionality of the  
5 whole person." AR 698.

6 49. Dr. Kim sent letters to Dr. Murinova and Surette, requesting they indicate  
7 agreement with the statement that "the medical evidence does not support that Ryan Waldron  
8 was/is precluded from 10/25/21 forward from performing sustained full-time (forty hours per  
9 week) activities which include: Exerting up to 20 lbs occasionally; frequent sitting; occasional  
10 walking, standing, reaching, handling, fingering, keyboard use, Mental/cognitive demands  
11 include: directing, controlling or planning activities for others; influencing people in their  
12 options, attitudes and judgments; performing a variety of duties; attaining precise set limits,  
13 tolerances and standards; dealing with people; making judgments and decisions." AR 689.

14 50. Dr. Murinova did not respond. Dkt. 16 at 7.

15 51. Surette did respond, indicating by checking a box marked "Yes" that he agreed  
16 that the medical evidence did not support that Plaintiff was precluded from working as of  
17 October 25, 2021. AR 689.

18 52. Dr. Kim determined that, as of October 25, 2021, Waldron could fulfill his "light  
19 demand level occupational duties full-time." *Id.* On October 25, 2021, Waldron had received an  
20 echocardiogram which had been "normal." AR 688.

21 53. Dr. Kim noted, however, that the review was "recommended because the issue is  
22 not one of adequate information but rather of interpretation of the data in terms of functional  
23 capacity." AR 698. As a result, she asked that another reviewer consider the file. *Id.*

1           54. Unum next appointed internal medicine doctor Zachary Gross to review  
2 Waldron's file. AR 704–05. Dr. Gross agreed with Dr. Kim's assessment that Waldron was not  
3 disabled after October 25, 2021. AR 704.

4           55. Dr. Gross found that “[t]here are no specific physical findings in the medical  
5 reports to support that the claimant would be unable to perform occupational demands as  
6 outlined. Treatment intensity has been of mild intensity consisting of medications, follow-up  
7 with headache clinic, physical therapy, possible sleep study, and periodic follow-up  
8 appointments with PCP. This is inconsistent with restrictions and limitations. Diagnostic work-  
9 up has been essentially unremarkable as well.” *Id.*

10          56. Dr. Gross pointed out that Waldron's occupational medicine provider, Dr. Swift  
11 “noted that the claimant may have experienced an inappropriate immune reaction to the COVID  
12 vaccine which is mimicking post-acute COVID syndrome, and she encouraged the resumption of  
13 a normal daily schedule as possible. This is inconsistent with restrictions and limitations.”  
14 AR 705.

15          57. Dr. Gross also noted that “[t]here have been no referrals or neuropsychological  
16 evaluations. This is inconsistent with restrictions and limitations.” *Id.*

17          58. Dr. Gross disregarded the COVID-19 lab results, explaining that although “the  
18 innovative bioanalysis labs revealed an elevated long hauler index score these labs are not based  
19 on traditional or evidence-based approaches to evaluation and treatment. It is noted that these  
20 results may be helpful for research purposes and getting a better understanding of the  
21 pathophysiology of immunological, infectious, or inflammatory disorders. Furthermore, the term  
22 long hauler has been applied to patients who have had a history of positive COVID-19 infection  
23 which he has not had. This is inconsistent with restrictions and limitations.” *Id.*

1           59. Thus, Dr. Gross concluded, “There are no clinical findings present in the available  
2 records to support the degree of the insured’s self-reported impairment precluding the  
3 performance of the outlined occupational demands.” *Id.*

4           60. Thus, on February 28, Unum denied Waldron’s claim for LTD benefits. AR 717–  
5 23.

6           61. Unum’s denial explained that the policy provided by Waldron’s employer, James  
7 Hardies, requires that an insured be continuously disabled through an “elimination period” to be  
8 eligible to receive LTD benefits. In Waldron’s case, the elimination period began May 2, 2021  
9 and ended November 9, 2021. AR 717.

10          62. Unum determined that Waldron’s records did not support the restrictions and  
11 limitations of his functional capacity, “as stated by Dr. Murinova and Paul Surette” beyond  
12 October 25, 2021. AR 718. They found that his records suggested that he did not meet the  
13 definition of disability after that date.

14          63. Unum pointed to the medical evidence indicating that no formal diagnosis had  
15 been determined, and that many test results were “normal.” *See* AR 718–19. Unum also noted  
16 that Waldron did not indicate a referral for a neuropsychological evaluation, “which would be  
17 expected if you were thought to have an impairing cognitive condition.” AR 719. Unum thus  
18 concluded that Waldron’s “treatment plan of medication, continued follow-up with the headache  
19 clinic, physical therapy, possible sleep study and periodic follow-up appointments with your  
20 primary care can typically be provided concurrently while performing your noted light demand  
21 level occupational duties, full-time.” *Id.*

22          64. On August 22, 2022, Waldron appealed Unum’s determination. He explained that  
23 “[h]e was open to seeing any doctor or performing any test that Unum recommended to

1 substantiate his disability claim” and asked Unum to “let me know” what those were, as “I want  
2 my life back.” AR 846.

3 65. In his appeal, Waldron included quantitative EEG study findings indicating “some  
4 slowing in the brain, but also some fast wave activity in other areas which could be contributing  
5 to memory problems and reported problems with cognition.” AR 981.

6 66. Waldron also reported that he was seeking treatment from Dr. Daniel Hanson, a  
7 neurologist, a second different neurologist in Utah, Neuro-Wave Brain Performance Center, an  
8 infectious disease doctor, and a neuropsychiatrist. AR 834. Waldron detailed various  
9 experimental therapies he had tried as well. *Id.*

10 67. Waldron attached a letter from Dr. David Palacios—a naturopathic physician he  
11 had begun seeing on April 5, 2022—who explained that the patient had been disabled as of May  
12 2, 2022, and would be disabled for an “undetermined” amount of time. AR 941. The assessment  
13 was sent to Unum on August 10, 2022. *Id.*

14 68. Shortly after, Waldron withdrew his appeal, AR 1018, and hired counsel to help  
15 him initiate a new appeal, AR 1024.

16 69. On February 27, 2023, Waldron submitted his second appeal. AR 2983–3031.  
17 The appeal detailed several additional medical visits that Waldron had undertaken following the  
18 denial.

19 70. On January 10, 2023, Waldron visited with Dr. Steven Plaza, a naturopathic  
20 doctor, who confirmed Waldron’s symptomology. AR 3030.

21 71. On January 19, 2023, Waldron saw Scott Marsland, a Nurse Practitioner at the  
22 Advanced COVID Care Center. Marsland wrote: “The very idea that [Waldron] would be able to  
23 work an eight hour shift which demanded standing and physical exertion, let alone mental focus  
24 and multi-tasking, in his current state is neither realistic nor likely in the near future.” AR 3033.

72. On January 20, 2023, Waldron underwent a neuropsychology evaluation with Dr. Meghan Callahan. The objective testing showed there was “no evidence of severe psychiatric illness, conversion disorder, or malingering.” AR 3026. The evaluation documented issues with processing speed and verbal fluency. AR 3026–27.

73. The neuropsychologist explained, "Mr. Waldron reported difficulty with short term memory, concentration, word finding, processing speed, and complex thinking. He finds many cognitive skills to be 10 times more difficult than before . . . . He forgets his medications 2-3 times a week. . . . he forgets his intentions and loses items often. . . . He has word finding problems, though this has improved. His simple attention is intact, but concentration is taxing and more difficult. He does better with minimal distractions. He additionally has trouble with reading, writing, and performing mental calculations. He denied reading comprehension concerns, but he sees double when reading sentences and fatigues quickly. He attended school for mechanical engineering and now must stop and think about multiplication tables." AR 3020.

74. The neuropsychologist also noted that Waldron's labs, completed in May 2021, "revealed Epstein Barr Virus (EBV), low vitamin D, elevated liver enzyme (ALT), and other abnormal results." AR 3021.

75. Ultimately, Unum upheld its initial decision. Dr. Steven Winkel reviewed and opined that there was no diagnosis to explain Waldron's symptoms. AR 3567. Unum sent Winkel's findings to Waldron's counsel. Counsel responded, contesting Winkel's findings, AR 3577-91, but Unum upheld its denial on May 12, 2023. AR 3595-3609.

#### **IV. FINDINGS OF LAW**

1           **A. Statements of Waldron’s providers—including those detailing his self-described**  
2           **symptoms—are reliable evidence of disability.**

3           The Ninth Circuit has repeatedly found that certain conditions are “largely []self-reported  
4           illness[es] that cannot be diagnosed through any objective medical test.” *Perryman v. Provident*  
5           *Life & Accident Ins. Co.*, 690 F. Supp. 2d 917, 945 (D. Ariz. 2010) (first citing *Reddick v.*  
6           *Chater*, 157 F.3d 715, 726 (9th Cir. 1998)); and then citing *Friedrich v. Intel Corp.*, 181 F.3d  
7           1105, 1112 (9th Cir. 1999)); *see also* *Veronica L. v. Metro. Life Ins. Co.*, 647 F. Supp. 3d 1028,  
8           1040–44 (D. Or. 2022) (“Plaintiff claims that in denying her benefits, Defendant wrongly  
9           discredited her self-reported symptoms. In cases involving conditions like CFS [chronic fatigue  
10          syndrome], for which no objective tests exist, the plan administrator must consider self-reported  
11          symptoms in determining disability.”); *Orzechowski v. Boeing Co. Non-Union Long-Term*  
12          *Disability Plan, Plan No. 625*, 856 F.3d 686, 696 (9th Cir. 2017) (“But as we have previously  
13          acknowledged, [CFS is] not established through objective tests or evidence.”); *Ayers v. Life Ins.*  
14          *Co. of N. Am.*, 869 F. Supp. 2d 1248, 1253–54 (D. Or. 2012). This is especially true for certain  
15          difficult to diagnose conditions, such as chronic fatigue syndrome (CFS), *see, e.g.*, *Tam v. First*  
16          *Unum Life Ins. Co.*, 491 F. Supp. 3d 698, 710–12 (C.D. Cal. 2020); headaches, *Hegarty v. AT&T*  
17          *Umbrella Benefit Plan No. 1*, 109 F. Supp. 3d 1250, 1256–57 (N.D. Cal. 2015); fibromyalgia,  
18          *Eisner v. The Prudential Ins. Co. of Am.*, 10 F. Supp. 3d 1104, 1114–15 (N.D. Cal. 2014); and  
19          long-COVID, *Abrams v. Unum Life Ins. Co. of Am.*, 647 F. Supp. 3d 1061, 1065 (W.D. Wash.  
20          2022).

21           Further, many courts have held that it is unreasonable to reject a claimant’s self-reported  
22          evidence when the plan administrator has no basis for believing the reports are unreliable and  
23          where the plan does not limit proof to “objective” evidence. *See, e.g.*, *Shaw v. Life Ins. Co. of N.*  
24          *America*, 144 F. Supp. 3d 1114, 1128 (C.D. Cal. 2015) (collecting cases); *Bigham v. Liberty Life*

1 *Assurance Co. of Boston*, 148 F. Supp. 3d 1159 (W.D. Wash. 2015) (rejecting defendant’s  
2 contention that because the plaintiff’s symptoms were purely subjective it is “appropriate for an  
3 administrator to require objective evidence of functional restrictions”); *Stratton v. Life Ins. Co. of*  
4 *N. America*, 589 F.3d 1145, 1174 (S.D. Cal. 2022) (similar).

5 For example, in *Abrams v. Unum*, Unum denied LTD benefits for a long-COVID patient.  
6 647 F. Supp. 3d at 1063–64. The patient was an attorney who could not work after he had  
7 COVID. *Id.* In its denial, Unum explained that “Mr. Abrams has reported disability primarily  
8 based on fatigue and other somatic complaints, including weakness, brain fog, and a persistent  
9 fever,” but that “mental status and physical exam findings” were “generally unremarkable.” *Id.* at  
10 1064. Unum stated that neuropsychological tests “demonstrated essentially normal cognitive  
11 functioning with the exception of some isolated findings with visual-spatial skills,” which was  
12 “consistent with his documented mental status exams which did not document cognitive  
13 deficits.” *Id.* Unum added that according to its consultant, “Mr. Abrams did not meet the criteria  
14 for CFS” because “his medical records have not supported significant cognitive impairment,” as  
15 is “required for the diagnosis of CFS.” *Id.*

16 The *Abrams* court disagreed, finding instead that the plaintiff was unable to perform the  
17 duties of his occupation throughout the elimination period, and that he was unable to perform his  
18 duties through the date of the court’s decision. *Id.* at 1066–67. Three doctors diagnosed Plaintiff  
19 with long-COVID and four diagnosed him with CFS—all based on his subjective reporting of  
20 symptoms. *Id.* at 1066. Neuropsychological testing revealed that Plaintiff was not malingering.  
21 *Id.* The Court thus concluded that the plaintiff was disabled by a “sickness” defined in the plan  
22 policy as an “illness or disease.” *Id.*

23 Similarly, in *Bunger v. Unum Life Insurance Company of America*, the court determined  
24 that Unum had conflated the question of whether the plaintiff had been sick with the issue of

1 whether the plaintiff had been accurately diagnosed with CFS. 196 F. Supp. 3d 1175, 1187  
2 (W.D. Wash. 2016). The Court explained, “Unum may be correct that Mr. Bunger has not been  
3 correctly diagnosed. But that does not mean he is not sick. If Mr. Bunger’s complaints, and  
4 Dr. Taggart’s assessments, are to be believed, Mr. Bunger cannot focus for more than a few  
5 minutes at a time, making it impossible for Mr. Bunger to perform the . . . tasks his job requires.”

6 *Id.*

7 Both *Bunger* and *Abrams* rely on the Ninth Circuit’s decision in *Salomaa v. Honda Long*  
8 *Term Disability Plan*, 642 F.3d 666, 676 (9th Cir. 2011), a case assessing the provision of LTD  
9 benefits for a patient with CFS. There, the Ninth Circuit held that a disability plan had wrongly  
10 denied a claimant benefits because the plan (1) relied on internal file reviews rather than the  
11 records from the doctors who personally examined the claimant and (2) demanded “objective  
12 tests to establish the existence of a condition for which there are no objective tests.” *Id.* But, as  
13 the court explained, “[t]here is no blood test or other objective laboratory test for chronic fatigue  
14 syndrome.” *Id.* at 677. Instead, “[t]he standard diagnosis technique for [CFS] includes testing,  
15 comparing symptoms to a detailed Centers for Disease Control list of symptoms, excluding other  
16 possible disorders, and reviewing thoroughly the patient’s medical history.” *Id.*

17 This is not to diminish the challenges that ERISA plan administrators face in assessing  
18 employees who are disabled by a mysterious array of symptoms. *Nagy v. Grp. Long Term*  
19 *Disability Plan for Emps. of Oracle Am., Inc.*, 183 F. Supp. 3d 1015, 1028 (N.D. Cal. 2016),  
20 *aff’d*, 739 F. App’x 366 (9th Cir. 2018). Many of these symptoms, like “un-refreshing sleep and  
21 muscle/joint pain, are difficult if not impossible for plan administrators to verify.” *Id.*; *see also*  
22 *Anderson*, 116 F. Supp. 3d at 1238 (“Vertigo, fatigue, and nausea are subjective experiences that  
23 cannot be easily measured by an objective standard, but that does not mean such symptoms  
24 should be discounted or disbelieved.”). But “the absence of objective test results and observable

1 symptoms present equally frustrating challenges for employees who actually suffer from  
2 debilitating [similar] symptoms.” *Nagy*, 183 F. Supp. 3d at 1028. As the court in *Salomaa*  
3 recognized, “the claimants are not the only ones with an incentive to cheat. The plan with a  
4 conflict of interests also has a financial incentive to cheat. Failing to pay out money owed based  
5 on a false statement of reasons for denying is cheating, every bit as much as making a false  
6 claim.” 642 F.3d at 678.

7 “This complicated dynamic” is present here. *Nagy*, 183 F. Supp. 3d at 1028. While  
8 doctors have run a multitude of tests on Waldron, these tests have done little more than “rule out  
9 other diseases” and have failed to establish the presence or absence of any one condition. *Eisner*,  
10 10 F. Supp. 3d at 1114 (quoting *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370  
11 F.3d 869, 872 (9th Cir. 2004) *overruled on other grounds by Abatie v. Alta Health & Life Ins.*  
12 *Co.*, 458 F.3d 955, 969 (9th Cir. 2006)). As explained above in the Court’s findings of fact, every  
13 provider that Waldron visited affirmed his symptoms. Though none could provide a clear  
14 diagnosis, many indicated that it seemed like an inappropriate immune response to the vaccine,  
15 which mirrored long-COVID, CFS, or Lyme Disease, and rendered him unable to work. *See, e.g.*,  
16 AR 94, 283, 284–85, 320, 327–28, 377, 392, 385–86, 388, 398–99, 401, 404, 407, 412,  
17 941–42, 1149–50, 1154, 1057, 1160, 1164, 3273–3276, 3027, 3517. Many of these providers  
18 explained that until the symptoms resolved, Waldron could not return to work full time. *See, e.g.*,  
19 AR 94 (Surette stating that Waldron would be disabled from at least May 3, 2021 through May  
20 2, 2022); AR 3033 (“The very idea that [Waldron] would be able to work an eight hour shift  
21 which demanded standing and physical exertion, let alone mental focus and multi-tasking, in his  
22 current state is neither realistic nor likely in the near future.”); AR 602 (“Reading is better—but  
23 can now still only read about ½ page on screen or paper before vision goes blurry and can’t focus  
24

1 on it any longer.”). None concluded that the symptoms were fake, or that Waldron was  
2 malingering. *See, e.g.*, AR 3026.

3 In fact, Waldron underwent a neuropsychiatric evaluation which found there was “no  
4 evidence of severe psychiatric illness, conversion disorder, or malingering.” *Id.* The test did,  
5 however, show issues with processing speed and verbal fluency. AR 3026–27. The evaluation  
6 report explained:

7 Mr. Waldron reported difficulty with short term memory, concentration, word  
8 finding, processing speed, and complex thinking. He finds many cognitive skills to  
9 be 10 times more difficult than before . . . . He forgets his medications 2–3 times a  
10 week. . . . he forgets his intentions and loses items often. . . . He has word finding  
11 problems, though this has improved. His simple attention is intact, but  
12 concentration is taxing and more difficult. He does better with minimal distractions.  
13 He additionally has trouble with reading, writing, and performing mental  
14 calculations. He denied reading comprehension concerns, but he sees double when  
15 reading sentences and fatigues quickly. He attended school for mechanical  
16 engineering and now must stop and think about multiplication tables.

17 AR 3020. Waldron could drive for no more than ten minutes at a time. AR 3021. He also often  
18 felt head pressure in his forehead over his eyes. AR 3020. Notably, the evaluator also pointed out  
19 that Waldron’s lab results, conducted in May 2021, “revealed Epstein Barr Virus (EBV), low  
20 vitamin D, elevated liver enzyme (ALT), and other abnormal results.” AR 3021. Though many  
21 of these symptoms are “subjective,” they are still confirmed by the evaluation.

22 The only opinion to the “contrary” is Surette’s indication that he believed the medical  
23 evidence did not support Waldron’s disability from October 25, 2021 onward. AR 689. The  
24 parties dispute what exactly Surette meant when he filled out the form. Dkt 16 at 13; Dkt. 18 at  
7–8. Still, the Court finds that the opinion—even if viewed as a claim that the evidence did not  
support that Waldron was disabled after this date—stands alone. All of Surette’s other records  
indicate that Waldron was and would be disabled for an indeterminate amount of time, at least  
through May 2022. *See, e.g.*, AR 94 (indicating expected to return to work date in May 2022);

1 AR 95 (indicating no expected return to work date “pending current workup with multiple  
2 specialists”).

3 Thus, the Court concludes that it may consider subjective evidence in determining  
4 whether Waldron has met his burden to show that he could not work both during the elimination  
5 period and after under the policy. *See, e.g., Perryman*, 690 F. Supp. 2d at 945–46. Though “the  
6 medical evidence is sparse in the sense that the notes of [Waldron’s] treating physicians  
7 generally do not explain how the results of their clinical testing support their conclusions that  
8 [Waldron] is unable to work, the subjective judgments of [Waldron’s] treating physicians formed  
9 from their overall experiences . . . must be considered in evaluating their opinions of the extent  
10 and effect of her impairments.” *Id.* at 946 (first citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th  
11 Cir. 1988); and then citing *Lester v. Chater*, 81 F.3d 821, 832–33 (9th Cir. 1995)). Waldron’s  
12 treating physicians’ “subjective judgments are especially important in this case given the  
13 subjective nature of [his condition], the fact that its symptoms are sporadic inasmuch as they  
14 fluctuate in frequency and severity, and the fact that it can exist even though physical  
15 examinations may be within normal limits.” *Id.*

16 **B. Unum’s policy did not require that Waldron provide only objective evidence to  
show that he was disabled.**

17 The Supreme Court has “recognized the particular importance of enforcing plan terms as  
18 written” in ERISA claims. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 100 (2013).  
19 When reviewing an ERISA plan, a district court must “apply contract principles derived from  
20 state law . . . guided by the policies expressed in ERISA and other federal labor laws.” *Gilliam*  
21 *v. Nev. Power Co.*, 488 F.3d 1189, 1194 (9th Cir. 2007) (internal citation omitted). “Those direct  
22 us to look to the agreement’s language in context and construe each provision in a manner  
23 consistent with the whole such that none is rendered nugatory.” *Dupree v. Holman Pro.*  
24

1       *Counseling Ctrs.*, 572 F.3d 1094, 1097 (9th Cir. 2009). “[T]erms in an ERISA plan should be  
2       interpreted in an ordinary and popular sense as would a person of average intelligence and  
3       experience.” *Gilliam*, 488 F.3d at 1194. “In interpreting the terms of an ERISA plan, we examine  
4       the plan documents as a whole and, if unambiguous, we construe them as a matter of law.”  
5       *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008) (quoting  
6       *Welch v. Unum Life Ins. Co. of Am.*, 382 F.3d 1078, 1082 (10th Cir. 2004)).

7       Accordingly, where a plan denies coverage because of a lack of objective evidence—and  
8       the plan terms do not limit the type of evidence required—courts reject the plan’s reasoning. *See*,  
9       *e.g.*, *Mitchell v. CB Richard Ellis Long Term Disability Plan*, 611 F.3d 1192, 1199 (9th Cir.  
10      2010) (holding that insurer abused its discretion based on “an unwritten and unexplained  
11      objective evidence requirement” not in its policy); *Shaw*, 144 F. Supp. 3d at 1128 (collecting  
12      cases); *Stratton*, 589 F.3d at 1174 (similar). Some insurers now include such terms in their plans.  
13       *See, e.g.*, *Morgan v. Hartford Life & Accident Ins. Co.*, 274 F. Supp. 3d 1176, 1178 (W.D. Wash.  
14      2017). Others, however, do not.

15       Unum did not include an objective evidence requirement in the text of Waldron’s plan.  
16       *See generally* AR 3671–3713. The plan terms require that “proof” of an insured’s claim include  
17      the date disability began; the existence and cause of the sickness or injury; “that your sickness or  
18      injury causes you to have limitations on your functioning and restrictions on your activities  
19      preventing you from performing the material and substantial duties of your regular occupation or  
20      of any other gainful occupation for which you are reasonably fitted by education, training, or  
21      experience”; that you are under the regular care of a physician; the name and address of any  
22      institution or physician who provided treatment; and documentation of earnings. AR 3671.  
23       Nowhere in the portion of the plan detailing what information is needed for proof of a claim does  
24

1 Unum state that objective evidence is required. AR 3671–72. Such language is not included  
2 anywhere in the plan documents provided. *See generally* AR 3671–3713.

3 Thus, the Court will consider the subjective evidence Waldron offered. *See Waldrip v.*  
4 *Reliance Standard Life Ins. Co.*, No. 321CV05602JHC, 2023 WL 3090837, at \*10 (W.D. Wash.  
5 Apr. 26, 2023) (collecting cases); *Tam*, 491 F. Supp. 3d at 710–11 (rejecting plan’s demand that  
6 claimant provide objective medical evidence of debilitating fatigue and pain).

7 **C. The Court may also consider medical assessments conducted after the elimination  
period.**

8 Unum dismisses any assessments conducted after the elimination period as irrelevant and  
9 argues that the Court should do the same. *See, e.g.*, Dkt. 16 at 13, 14–15. But several courts in  
10 this circuit have held differently. For example, in *Witney v. United of Omaha Life Ins. Co.*, No.  
11 2:20-cv01273-RAJ, 2022 WL 4483179, at \*11–12 (W.D. Wash. September 27, 2022), an insurer  
12 similarly questioned doctors’ statements in support of the plaintiff’s LTD claim because they  
13 were untimely. The court disagreed, explaining that “those statements should not be discounted  
14 simply because they were submitted after the Elimination Period, when plaintiff submitted her  
15 LTD claim.” *Id.*; *see also Smith v. Brown*, 849 F.2d 1222, 1225 (9th Cir. 1988) (“It is obvious  
16 that medical reports are inevitably rendered retrospectively and should not be disregarded solely  
17 on that basis.”); *Tam*, 491 F. Supp. 3d at 711 n.11; *Lyttle v. United of Omaha Life Ins. Co.*, 341  
18 F. Supp. 3d 1071 (N.D. Cal. 2018).

19 Similarly, in *Abrams*, after Unum (the insurer there as well), denied the insured’s claim,  
20 the insured appealed. 647 F. Supp. 3d at 1064. In supporting his appeal, the insured saw several  
21 doctors. *Id.* “Working with the same symptoms of brain fog, fatigue, decreased attention and  
22 concentration, and fevers, three of the medical doctors diagnosed Plaintiff with long COVID, . . .  
23 and four of the medical doctors diagnosed him with Chronic Fatigue Syndrome (CFS).” *Id.*

1 (cleaned up). Each of these providers concurred that the claimant was sick, and the Court  
2 considered the providers' assessments in its review of the record. *Id.*

3 Here too, the Court will consider the opinions of providers who assessed Waldron after  
4 the elimination period ended. There is no legal or factual reason to ignore them.

5 **D. The Court may disregard reasoning for the claim denial offered by Unum in its  
motion but not during the determination process.**

6 The structure of ERISA dictates what a court may consider upon review. By statute,  
7 "every employee benefit plan" shall "provide adequate notice in writing to any participant or  
8 beneficiary whose claim for benefits under the plan has been denied, setting forth the specific  
9 reasons for such denial, written in a manner calculated to be understood by the participant."

10 *Collier*, 53 F.4th at 1185 (quoting 29 U.S.C. § 1133(1)). The notice of claim denial must contain:

11 (1) "[t]he specific reason or reasons for the denial"; (2) "[r]eference to the specific plan  
12 provisions on which the determination is based"; (3) "[a] description of any additional material  
13 or information necessary for the claimant to perfect the claim and an explanation of why such  
14 material or information is necessary"; and (4) "[a] description of the plan's review procedures  
15 and the time limits applicable to such procedures, including a statement of the claimant's right to  
16 bring a civil action under section 502(a) of the Act following an adverse benefit determination on  
17 review." *Id.* (quoting 29 C.F.R. § 2560.503-1(g)(1)(i)-(iv)). Further, when a plan denies a claim,  
18 the plan must provide "an explanation of the basis for disagreeing with or not following" the  
19 conclusions of the claimant's treating "health care professional," the "vocational professional[ ]"  
20 who evaluated the claimant," or "medical or vocational experts whose advice was obtained on  
21 behalf of the plan in connection with a claimant's adverse benefit determination." *Id.* (quoting 29  
22 C.F.R. § 2560.503-1(g)(1)(vii)(A)(i)-(ii)).

1           If a claim is denied, the claimant must be allowed an opportunity for a “full and fair  
2 review” of the denial. *Id.* (quoting 29 U.S.C. § 1133(2); 29 C.F.R. § 2560.503–1(h)(4)). If a plan  
3 relies on a new rationale during review, the plan must tell the claimant and “give [him] a  
4 reasonable opportunity to respond.” 29 C.F.R. § 2560.503–1(h)(4)(ii). Were a court to rely on  
5 “new rationale to affirm the denial of benefits,” the insured would not have a chance to respond  
6 to the new rationale and would be denied his right to a “full and fair review” of the claim denial.  
7 *See Collier*, 53 F.4th at 1182.

8           Unum argues that, because the Court is conducting a *de novo* review, the Court should  
9 “not assess whether Unum’s decision was reasonable or correct.” Dkt. 19 at 9. But, even on *de*  
10 *novo* review, the “district court’s task is to determine whether the plan administrator’s decision is  
11 supported by the record, not to engage in a new determination of whether the claimant is  
12 disabled.” *Collier*, 53 F.4th at 1182. “Accordingly, the district court must examine only the  
13 rationales the plan administrator relied on in denying benefits and cannot adopt new rationales  
14 that the claimant had no opportunity to respond to during the administrative process.” *Id.*

15           Thus, any errors Unum made in its decision, and the extent to which any such reasoning  
16 was communicated to Waldron, is relevant to the Court’s analysis. The Court will consider only  
17 those reasons offered by Unum for the denial, and will, as needed, determine whether Unum’s  
18 decision is supported by the record.

19           In its letter to Waldron denying his claim, Unum concluded that he did not meet the  
20 definition of disability after October 25, 2021. AR 4130. But here Unum argues that Waldron has  
21 not met his burden of proving that he could not work on a part-time basis. Dkt. 16 at 15. Yet,  
22 nowhere in the determinations process did Unum offer such reasoning to Waldron. Still, Unum  
23 tries to argue that it would have been “nonsensical for Unum to reference the part-time provision  
24 in the administrative process, because it only applies if a claimant is approved for LTD benefits

1 in the first instance, i.e., ‘during the first 24 months of payment.’” Dkt. 19 at 10. Unum claims  
2 that it is only pertinent now because Waldron “has put the issue before the Court even though it  
3 was irrelevant during the administrative process.” *Id.*

4 But that is not what Unum puts forth in its briefing. Rather, Unum explains, “[i]f Plaintiff  
5 had been eligible for LTD benefits, payments would have begun in November 2021, but would  
6 have ended immediately in the event Plaintiff was able to work on a part-time basis but did not.”  
7 Dkt. 16 at 15. Unum continues, “there is simply no evidence in the Administrative Record that  
8 Plaintiff was unable to earn at least 20% of his prior earnings as of November 2021 and going  
9 forward. Rather, it appears that none of the providers who worked with Plaintiff during this  
10 period considered whether Plaintiff was able to work part-time, let alone rendered any opinions  
11 to that effect.” *Id.* Thus, Unum concludes, Waldron “has not met his burden of proving that he  
12 would qualify for ongoing LTD benefits after November 2021 even if had met his initial burden  
13 of proving that he was unable to perform the material duties of his regular occupation during the  
14 elimination period, which he has not.” *Id.* In arguing that Waldron failed to argue both that he  
15 was disabled during the elimination period and that he could not work part-time after November  
16 2021, Unum sets forth a new justification for denying benefits after October 25, 2021. The Court  
17 is barred from considering Unum’s new reasoning.

18 **E. Waldron was disabled under the plan.**

19 Having determined what evidence the Court may consider, the Court now turns to assess  
20 whether Waldron has met his burden to show by a preponderance that he was disabled under the  
21 plan terms with respect to his “regular occupation” during and after the elimination period.

22 The parties agree that Waldron was covered under the LTD plan. AR 3665–66. At issue  
23 is whether Waldron was disabled under the plan terms. *See generally* Dkt. 15; Dkt. 16. The plan  
24 does not require that Waldron be completely incapacitated or that he have a permanent disability.

1 AR 118. Rather, Waldron can prove that he is disabled under the plan terms if he can show that  
2 he cannot perform the material and substantial duties of his regular occupation because of  
3 sickness or injury. *Id.* And he must have been continuously disabled throughout the elimination  
4 period, the later of 180 days or the date that short term disability ends. *Id.* The parties do not  
5 dispute that the elimination period is May 2021 through November 9, 2021. AR 717; Dkt. 16 at  
6 2. Unum, however, argues that Waldron was no longer disabled as of October 25, 2021. AR 698;  
7 Dkt. 16 at 8.

8 Unum points to October 25, 2021, when an echocardiogram found that Waldron’s heart  
9 was healthy. AR 697–98. As explained above, the existence of certain conditions cannot be  
10 ascertained by a simple test. *See Eisner*, 10 F. Supp. 3d at 1114. And while objective tests—like  
11 an echocardiogram—can rule out other diseases, they fail to establish the presence or absence of  
12 a different chronic condition. *Id.* Thus, the normal echocardiogram result does not show that  
13 Waldron was not disabled on October 25, 2021. *See, e.g., Salomaa*, 642 F.3d at 678 (“[A]  
14 disability insurer [cannot] condition coverage on proof by objective indicators such as blood tests  
15 where the condition is recognized yet no such proof is possible.”). The test bears “only on  
16 potential causes of [Waldron’s] symptoms, but do[es] not disprove the existence of the reported  
17 symptoms themselves.” *Entz v. Standard Ins. Co.*, No. EDCV19402JGBSHKX, 2020 WL  
18 5496072 (C.D. Cal. Sept. 11, 2020).

19 Unum also points to encouragements from medical providers that Waldron will  
20 eventually be able to “resume his normal levels of activity” and may engage in such activities so  
21 long as they do not “cause a prolonged flare of fatigue.” Dkt. 16 at 12 (quoting AR 320;  
22 AR 284). These quotes often cherry-pick statements made by the providers. For example, the  
23 provider indicating that Waldron could eventually resume his normal activities also validated  
24 Waldron’s reported symptoms and believed that these symptoms were caused by Waldron’s

1 COVID-19 vaccination. AR 327 (“Constellation of symptoms which I feel are secondary to the  
2 COVID vaccine.”). And the providers who encouraged him to return to activity cautioned him to  
3 sustain such activity only if it did not cause a flare in his symptoms. *See, e.g.*, AR 284, 3027. As  
4 documented in the findings of fact, such activities did cause flares, and Waldron was often bed-  
5 bound for weeks as a result. Thus, on the advice of his medical providers, Waldron could not  
6 return to such activities.

7 Nor could Waldron return to work. Waldron argues that Unum’s denial of benefits was  
8 unreasonable because Unum failed to consider that his regular occupation required him to be “at  
9 the plant” for 60–70 hours per week and walk for 80% of the day. Dkt. 18 at 9. Waldron relies on  
10 his own description of his work. But the plan terms regular occupation as “the occupation you  
11 are routinely performing when your disability begins” and explains that “Unum will look at your  
12 occupation as it is normally performed in the national economy, instead of how the work tasks  
13 are performed for a specific employer or at a specific location.” AR 3605.

14 Unum had a vocational consultant review Waldron’s job description and concluded that a  
15 similar job in the national economy would require frequent sitting; occasional walking, standing,  
16 reaching, handing, fingering, keyboard use; and occasional exertion up to 20 pounds. AR 3596.  
17 Mental and cognitive demands included directing, controlling, or planning activities of others;  
18 influencing people in their opinions, attitudes, and judgments; performing a variety of duties;  
19 attaining precise set limits, tolerances, and standards; dealing with people; and making  
20 judgments and decisions. *Id.* Unum’s denial letter cited this language. *Id.* In his appeal, Waldron  
21 explained that his demands were far greater than those considered. AR 3596–98.

22 On appeal, Unum contracted with an independent vocational reviewer to address these  
23 concerns. AR 3598. In the appeal denial, Unum explained that Waldron’s description may be apt  
24 for “the job he performed for the employer within his specific location” and thus the information

1 did “not alter [Unum’s] vocational review[.]” *Id.* Unum adjusted the job requirements only  
2 minimally, adding that Unum was required to lift up to 10 pounds “frequently” and “negligible  
3 amounts constantly.” AR 3599. Unum added walking and standing into the occasional activity  
4 list, noting that “[s]tanding and walking may combine to 2/3 of the workday on some days  
5 depending on production needs.” *Id.* And Unum added greater detail to each of the cognitive  
6 demands:

7 **Cognitive demands (temperaments) include:**

- 8 • **Directing, Controlling, or Planning Activities for Others:**  
9 Involves accepting responsibility for formulating plans, designs, practices,  
10 policies, methods, regulations, and procedures for operations or projects;  
negotiating with individuals or groups for agreements or contracts; and  
supervising subordinate workers to implement plans and control activities.
- 11 • **Influencing People in their Opinions, Attitudes, & Judgments:**  
12 Involves writing, demonstrating, or speaking to persuade and motivate  
people to change their attitudes or opinions, participate in a particular  
activity, or purchase a specific commodity or service.
- 13 • **Performing a Variety of Duties:**  
14 Involves frequent changes of tasks involving different aptitudes,  
technologies, techniques, procedures, working conditions, physical demands,  
or degrees of attentiveness without loss of efficiency or composure. The  
involvement of the worker in two or more fields may be a clue that this  
temperament is required.
- 15 • **Attaining Precise Set Limits, Tolerances, and Standards:**  
16 Involves adhering to and achieving exact levels of performance, using  
precision measuring instruments, tools, and machines to attain precise  
dimensions; preparing exact verbal and numerical records; and complying  
with precise instruments and specifications for material, methods,  
procedures, and techniques to attain specified standards.
- 17 • **Dealing with People:**  
18 Involves interpersonal relationships in job situations beyond receiving work  
instructions.
- 19 • **Making Judgments and Decisions:**  
20 Involves solving problems, making evaluations, or reaching conclusions  
21 based on subjective or objective criteria, such as the five senses, knowledge,  
past experiences, or quantifiable or factual data.

22 AR 3599.  
23  
24

Unum’s job description may control, but the Court finds that Waldron has offered sufficient evidence to show that he could not perform even these lighter occupational demands. Doctors who personally examined Waldron, including Surette, Swift, Callahan, Plaza, and Palacios, concluded that his condition made it impossible for him to reliably perform his essential job functions. AR 94–95, 718, 284, 320, 3027. Though none explicitly said he was “unable to work,” *see* Dkt. 19 at 6, their documentation of his symptoms and their advice show that Waldron could not return to work. *See, e.g.*, AR 94–95, 718. Each doctor describes debilitating symptoms and difficulty maintaining basic functioning. This evidence alone is persuasive that Waldron is disabled under the Plan. *See Salomaa*, 642 F.3d at 676–79.

Waldron has provided ample evidence that he could not perform even minimal job tasks. See, e.g., AR 94–95, 1154, 3033 (“The very idea that [Waldron] would be able to work an eight hour shift which demanded standing and physical exertion, let alone mental focus and multi-tasking, in his current state is neither realistic nor likely in the near future.”); AR 602 (“Reading is better—but can now still only read about  $\frac{1}{2}$  page on screen or paper before vision goes blurry and can’t focus on it any longer.”). Waldron tried to return to work several times. He never made it through an entire shift and remained bedridden for weeks—even an entire month. AR 228, 598. As of November 15, 2021, Waldron could not do recreation activities, suffered moderate headaches, could not concentrate, and barely slept. AR 3246. His physical therapist set a new goal of performing forty-five minutes of movement per day, with short breaks and without any subsequent flare-ups. AR 3248. The goal was “nearly met.” *Id.*

If Waldron could not move for more than forty-five minutes per day without suffering a flare-up, *see id.*, suffered daily headaches, *see AR 279, 3250*, and could not use a computer, *see AR 95*, then Waldron could not be expected to perform his job even part-time during the elimination period. *See Abrams*, 647 F. Supp. 3d at 1067 (similar); *see also Volynskaya v.*

1       *Epicentric, Inc. Health & Welfare Plan*, 2007 WL 3036110, at \*10 (N.D. Cal. Oct. 16, 2007)  
2 (explaining that even if the plaintiff could perform sedentary work with her fibromyalgia and  
3 CFS, such a finding was not equivalent to a finding that she could perform her own occupation  
4 and earn more than 80% of her pre-disability earnings.).

5           The ebbs and flows in Waldron's condition do not suggest otherwise. Courts have  
6 repeatedly held that patients who suffer chronic conditions may improve, but given the  
7 temporary nature of those good days, these swings do not materially alter their ability to work.  
8 *See, e.g., Peterson v. Fed. Express Corp. Long Term Disability Plan*, No. CV-05-1622-PHX-  
9 NVW, 2007 WL 1624644, at \*34 (D. Ariz. June 4, 2007) ("a total-disability determination  
10 cannot reasonably hinge on whether an employee is minimally capable, on a good day, at the  
11 right hour, of fulfilling her job duties in barely tolerable fashion. Qualification for employment  
12 requires an ability to work effectively and to be reliable."); *Thivierge v. Hartford Life & Acc. Ins.*  
13 *Co.*, No. C 05-0163 CW, 2006 WL 823751, at \*13 (N.D. Cal. Mar. 28, 2006) ("As Plaintiff  
14 notes, there has been no significant change in her condition. She still has good days, when she  
15 can function, and bad days, when she cannot function. It is unpredictable whether Plaintiff will  
16 have a good day or a bad day, and, as [her doctor] notes, the bad days can continue for up to two  
17 weeks. A full-time employer cannot handle such inconsistent attendance and unpredictability.").  
18 Waldron was never able to sustain a return to work, as it caused significant flares that left him  
19 bedridden for weeks. AR 279; 595–98.

20           Unum contends that Waldron's symptoms are purely subjective. *See supra*, Sec. IV.A.  
21 But as explained above, Unum provides no legal justification for denying benefits based on the  
22 lack of objective symptoms. Unum concedes that the Court should consider Plaintiff's reported  
23 systems, which were extensively considered and discussed in Unum's letter of May 12, 2023.  
24 Dkt. 19 at 10 (citing AR 3603). But, Unum explains, "subjective evidence is persuasive only to

1 the extent it is corroborated by other evidence of medically documented impairments showing  
2 that she has functional limitations or restrictions that render her disabled from working.” *Id.*  
3 (quoting *Louis v. the Hartford Life and Accident Ins. Co.*, Case No. 2:19-cv-00056-MJP, 2020  
4 WL 39145, at \*8 (W.D. Wash. Jan 3, 2020)). Unum argues that “Plaintiff’s subjective evidence  
5 is outweighed by the medical evidence, including the opinion of his PCP [Surette].” *Id.* at 11.

6 The Court disagrees. “Vertigo, fatigue, and nausea are subjective experiences that cannot  
7 be easily measured by an objective standard, but that does not mean such symptoms should be  
8 discounted or disbelieved.” *Anderson*, 116 F. Supp. 3d at 1237–38 (citing cases). As stated in the  
9 findings of fact above, it is clear that Waldron has suffered a range of symptoms that inhibited  
10 him from doing his job both during and after the elimination period. Unum “provides no credible  
11 reason to disbelieve the reports” of Waldron or his medical providers “regarding [his] symptoms  
12 and their disabling consequences.” *Id.* at 1238. To the extent that any test, such as a  
13 neuropsychological evaluation, relies on the patient’s description of their condition, this is not a  
14 reason to “invalidate or undermine” the test. *Tam*, 491 F. Supp. 3d at 711. Whether Unum’s  
15 contention that Waldron needed to provide objective evidence was implicit or explicit, *see*  
16 Dkt. 19 at 10, it ignored the realities of his condition.

17 And none of Waldron’s providers have ever even hinted that they thought Waldron was  
18 fabricating his symptoms. Rather, his doctors continued to treat his reported symptoms by  
19 recommending and implementing new treatment options, ordering endless tests, and providing  
20 various referrals to help establish the cause of Waldron’s symptoms. *See, e.g.*, AR 407, 408, 413,  
21 1903–04. Waldron underwent a neuropsychiatric evaluation which found there was “no evidence  
22 of severe psychiatric illness, conversion disorder, or malingering.” AR 3026.

23 The only medical providers who questioned the veracity or severity of Waldron’s  
24 symptoms are Unum’s reviewers. Unum’s reviewers never saw Waldron in person. “There is no

‘treating physician rule’ in ERISA cases.” *Kieserman*, 574 F. Supp. at 900–01 (quoting *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003)). That is, the Court need not give special deference to treating physicians over those who conducted reviews. *Hamid v. Metro. Life Ins. Co.*, 517 F. Supp. 3d 903, 916–17 (N.D. Cal. 2021). “But this does not preclude a district court, engaging in *de novo* review, from evaluating and giving appropriate weight to a treating physician’s conclusions, where reliable and probative.” *Kieserman*, 574 F. Supp. at 901 (citing *Reetz v. Hartford Life and Accident Ins. Co.*, 294 F. Supp. 3d 1068, 1083 (W.D. Wash. 2018)).

Here, especially given the subjective nature of Waldron’s condition, the Court chooses to give weight to the opinions of Waldron’s treating providers. Waldron visited Surette and others at TFPC fifteen times over the course of the administrative record. AR 1903-04. Dr. Swift at the Mayo Clinic, someone who specialized in treating long-COVID, concluded that Waldron’s “constellation of symptoms overlaps significantly with post-acute COVID syndrome.” AR 284. A multitude of providers saw Waldron, observed his symptoms, and recounted them without question. They saw in real time the symptoms he described. And none contested it.

Given the plan's definitions of "Disabled," "Sickness," and "Material and Substantial Duties," and based solely on the administrative record,<sup>2</sup> the Court finds that Waldron was disabled within the meaning of the plan.

## V. CONCLUSION

**The Court hereby FINDS and ORDERS:**

1) Defendant's Motion for Judgment (Dkt. 16) is DENIED.

<sup>2</sup> Plaintiff argues that the Court should incorporate by reference arguments made by Waldron's attorney on his appeal. Dkt. 15 at 19–20. Defendant disagrees. Dkt. 16 at 17. The Court need not address these arguments because the Court did not consider Waldron's appeals counsel's reasoning in its decision.

2) Plaintiff's Motion for Judgment under Federal Rule of Civil Procedure 52 (Dkt. 15) is GRANTED. Waldron has established his disability under Unum's plan terms based on his regular occupation and is entitled to recover LTD benefits.

3) The parties shall meet and confer regarding the amount of benefits owed and any prejudgment interest, and jointly submit a proposed judgment within ten (10) days of the date of this Order.

4) Plaintiff's request for attorney's fees under 29 U.S.C. § 1132(g) must be filed no later than 14 days after the entry of judgment as required by Federal Rule of Civil Procedure 54(b)(2). The motion shall be supported by documentary evidence reflecting the amount of fees and costs sought and shall include argument as to the authority upon which fees and costs may be granted and why the fees sought are reasonable. The motion shall be noted as a 21-day motion under this Court's local civil rules.

Dated this 28th day of March, 2025.

  
\_\_\_\_\_  
Tiffany M. Cartwright  
United States District Judge