JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	8:19-cv-01347-JVS-DFM	Date	7/27/2020
Title	Amy Olis v. UNUM Life Insurance Company of America		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS]** Order Regarding Bench Trial

In this case under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq., Plaintiff Amy Olis ("Olis") alleges that Defendant First Unum Life Insurance Company of America ("Unum") improperly denied her claim for long-term disability ("LTD") benefits. Compl., ECF No. 1. Both parties have filed opening and responsive briefs. Olis Opening Br., ECF No. 33; Unum Opening Br., ECF No. 34; Olis Responsive Br., ECF No. 37; Unum Responsive Br., ECF No. 35. Both parties have also submitted proposed findings of fact and conclusions of law. ECF No. 37, 38.

For the following reasons, the Court **REVERSES** Unum's claim denial.

I. BACKGROUND

This case concerns Olis's claims for entitlement to long-term disability benefits under Enterprise Holdings, Inc.'s ("Enterprise") Welfare Benefit Plan (the "Plan"). Compl. ¶ 4. Unum is the insurer of benefits under the Plan. Id. ¶ 5.

Olis was employed by Enterprise at all relevant times. Id. ¶ 2. Olis claims she suffered a disability during the course of her employment and made a claim to Unum for LTD benefits. Id. ¶¶ 12-13. Unum denied Olis' claims on the basis that she did not meet the policy definition of disabled. Id. ¶ 13. Olis appealed Unum's denial, and Unum denied the appeal. Id. ¶¶ 14-15.

II. LEGAL STANDARD

In the Ninth Circuit, actions to recover benefits under ERISA are adjudicated by a bench trial under Federal Rule of Civil Procedure Rule 52(a). Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999). Under Rule 52(a), the court can resolve factual issues in favor of either party, and it must "find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a).

Under the de novo standard, the Court independently considers the evidence, finds facts, and determines how the policy applies, just as it would resolve any other breach of contract claim. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112–13 (1989); Krolnik v. Prudential Ins. Co. of Am., 570 F.3d 841, 843 (7th Cir. 2009) ("'de novo review' is a misleading phrase. . . . For what Firestone requires is not 'review' of any kind; it is an independent decision rather than 'review' that Firestone contemplates. . . . [The] court takes evidence (if there is a dispute about a material fact) and makes an independent decision about how the language of the contract applies to those facts.").

"In a trial on the record, the court 'can evaluate the persuasiveness of conflicting testimony and decide which is more likely true.'" Armani v. Nw. Mut. Life Ins. Co., 2014 WL 7792524, at *8 (C.D. Cal. Nov. 25, 2014) (quoting Kearney, 175 F.3d at 1095); see also Schramm v. CNA Fin. Corp. Insured Group Benefits Program, 718 F. Supp. 2d 1151, 1162 (N.D. Cal. 2010) (a court reviewing the administrative record "evaluates the persuasiveness of each party's case, which necessarily entails making reasonable inferences where appropriate.").

The Court may consider the administrative record, which consists of the materials the administrator considered in reaching its benefit determination, and "new evidence may be considered under certain circumstances to enable the full exercise of informed and independent judgment." Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 943 (9th Cir. 1995). "Plaintiff bears the burden of proof of showing, by a preponderance of the evidence, that he is entitled to the benefits provided by the policy except with regards to matters within the defendants' control." Popovich v. Metro. Life Ins. Co., 281 F. Supp. 3d 993, 997 (C.D. Cal. 2017) (citing Estate of Barton v. ADT Sec. Servs. Pension Plan, 820 F.3d 1060, 1066–65 (9th Cir. 2016)).

III. EVIDENCE BEFORE THE COURT

The Court considers the evidence in the administrative record ("AR"). AR, ECF No. 25-29.

IV. FINDINGS OF FACT

Olis is a 36 year-old who was employed as an account specialist at Enterprise and began working at Enterprise on April 9, 2007. AR 58, 65, 2282. As part of her job, she was required to direct, control or plan the activities of others, and utilize understanding, memory, attention, and concentration. AR 607-08, 2243-44. The job also required constant keyboard and computer use. AR 1797, 2244.

Olis has a history of suffering from headaches, including migraines. AR 1796, 2210. Although she was initially able to continue working with such a condition, in April 2016 her migraines intensified and she began suffering from vertigo, eye pain and visual disturbances. AR 150-55, 1796. Reading and looking at screens exacerbated her symptoms. Id.

A. The Policy

The Policy provides for monthly long-term disability ("LTD") benefits to Social Security Retirement Age, with a maximum monthly LTD benefit of 60% of the employee's monthly pre-disability earnings for the calendar year prior to the onset of disability, minus applicable offsets. AR 2285, 2297. Based on Olis' monthly earnings before she stopped working ($4,532.14/month) (AR 62), her potential gross monthly LTD benefit under the Policy is $2,719.28 ($4,532.14 at 60%).

Pursuant to the Plan, disability is defined as: "when Unum determines that [] you are limited from performing the material and substantial duties of your regular occupation due to your sickness or injury; and [] you have a 20% or more loss in your indexed monthly earning due to the same sickness or injury." AR 2296. "Limited" is defined as "what you cannot or are unable to do." AR 2312. "Material and substantial duties" is defined as "duties that . . . are normally required for the performance of your regular occupation; and cannot be reasonably omitted or modified[.]" AR 2312-13. "Regular

occupation" is defined as "the occupation you are routinely performing when your disability begins. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location." AR 2314.

B. Olis' Initial Medical Treatment

1. Physical Therapy

On June 20, 2016, Olis began physical therapy with Complete Balance Solutions Institute for Rehab ("CBS") for her diagnosis of "headache" "dizziness and giddiness." AR 1089, 2204. Over the next two months, Olis returned for three additional sessions, paying for the treatment out of pocket. AR, 1084, 1086, 1097. Olis reported to the therapist that "she noticed that when she has been looking at a television screen, even far away, makes her really dizzy, up to a 7/10." AR 1084. She also reported feeling increased dizziness after having "a big day on her computer." AR 1097.

On December 21, 2016 Olis restarted physical therapy with CBS. AR 1065. Through March 8, 2017, she underwent a total of 11 more "Self Pay" treatments to reduce her symptoms. AR 1065, 1077, 1079, 1081, 1045, 1047, 1050, 1053, 1061, 1041, 1043, 1039. She continued with additional physical therapy sessions in April 2017. AR 1034-37.

Olis reported that this treatment did not improve her migraines, dizziness, or visual distortion. AR 2231.

2. Dr. Kauser Sharieff

On August 20, 2016, Olis saw Dr. Sharieff, a neuro-optomestrist. AR 187-89. Dr. Sharieff documented Olis' symptomatological complaints of "choppy vision" with her eyes going in and out of focus during the day. AR 187.

Dr. Sharieff's physical examination of Olis' eyes was normal, and so were some of the testing results. AR 187-89. However, the testing also showed that Olis suffered from "[p]oor vergence range and poor flexibility with very poor recovery" as well as "mild

divergent misalignment." AR 187. Visigraph testing (electronic eye movement recording) "showed significantly poor skills with fixation" and a Tachistoscope (visual memory) showed "poor short term visual memory." AR 188. While Olis had "no difficulty when she had to switch between focusing and relaxing her eyes in response to lens stimulus[,]" she was only able to complete 5.05 cycles/min while over 12 cycles per minute is considered good. Id.

Dr. Sharieff ordered reading testing, which showed deficits in Olis' reading speed and comprehension for someone at her grade level. AR 1523-24, 1785-87. The results noted that while "[i]nterpretation may not be accurate," Olis' exhibited "some visual functional impediment." AR 1523.

Dr. Sharieff's impression was that Olis had exophoria, intermittent eye suppression, binocular dysfunction, and oculomotor dysfunction, and recommended "weekly in-office neuro-optometric therapy sessions with periodic progress evaluation at approximately 10-12 sessions" with the goal of "improved tracking, sustained near work and a decrease of her symptoms." AR 189. Olis began seeing a specialist at Dr. Sharieff's office weekly for neuro optometric therapy, which she reported did not help. AR 1797, 2204. Olis' symptoms worsened, and beginning in October and November of 2016, she started to miss work with greater frequency. AR 150, 255, 239. Olis underwent an MRI, which showed no abnormalities. AR 2204.

3. Dr. Swaraj Bose

On November 30, 2016, Ms. Olis began seeing Dr. Swaraj Bose, an ophthalmologist. AR 439-42. Dr. Bose's records show that Olis continued to suffer from headaches and visual disturbances. AR 419-42. Dr. Bose referred Olis to Dr. Edward Cho, a specialist in vestibular and balance disorders. AR 944-62.

Olis claimed that she stopped treatment with Dr. Bose after March 2017 when he "told her he had no idea what else he could do to help." AR 151, 677, 777, 1797. Unum notes indicate that Olis told Unum employee Samuel Brewster that she was no longer seeing Dr. Bose and that he had gotten "the wrong diagnosis." AR 494.

4. Dr. Edward Cho

Olis began treatment with Dr. Cho on December 19, 2016. AR 953. She complained to Dr. Cho of dizziness, imbalance, visual disturbances and worsening symptoms with TV use and computer use. Id. Dr. Cho's follow up letter to Dr. Bose noted that Olis suffered from "vertigo that is primarily central." AR 962. He noted that the etiology "for dizziness is vestibular migraine as evidenced by episodic moderate to severe vestibular symptoms, current or previous history of migraine." Id. Dr. Cho's letter described a treatment plan which included "visual/optokinetic motion desensitization, sensory re-weighing, and habitation therapy at" CBS along with a "low dose" of Effexor and manual neck physical therapy. Id. On March 24, 2017 Dr. Cho noted that Olis' dizziness had not improved and flared after returning to work and indicated that she would undergo additional physical therapy. AR 1538-39.

5. Dr. Robert Crow

Olis began seeing neuro-ophthalmologist Dr. Crow on March 22, 2017. AR 342-44. Dr. Crow remarked that while her examination was "largely unremarkable" he believed she was "suffering from chronic continuous migraine with vertiginous features" and planned to treat her with amitriptyline or topamax. AR 344.

On April 24, 2017, Dr. Crow noted that Olis was "emotionally upset and concerned about her symptoms. She is having extreme difficulties [at] work and even had to call in last week. Her ocular examination however is unremarkable aside from residual evidence of dry eye." AR 591. Dr. Crow noted that her dry eye was improving, but that Olis had failed to get relief from three different migraine prophylactic medications and referred her "urgently to pain management for Botox injections." Id.

By June 2017, Dr. Crow noted after diagnostic testing providing strong evidence that she did not have multiple sclerosis, that her symptoms were "most consistent with chronic continuous migraines." AR 353.

C. Olis' Temporary Return to work

Ms. Olis stopped working on December 5, 2016, when she was placed on a three

month medical leave of absence. AR 150. On January 17, 2017, Dr. Bose certified Olis as disabled because she could not perform "prolonged near work and prolonged computer use." AR 208-09. Her expected return date was February 6, 2017. Id. On February 1, 2017, Dr. Bose certified Olis as disabled because she could not perform "prolonged near work and prolonged computer use." AR 203-04. Her expected return date was listed as March 2, 2017. AR 203. Olis reported that she went back to work because Enterprise told her that she would lose her job and benefits after three months, but she continued to miss days. Id. As of February 15, 2018, she nonetheless still had 10.85 paid time off days available to her. AR 59.

Dr. Bose filled out a "Certification of Physician or Practitioner for Employee Return to Work" on February 27, 2017 certifying that Olis could return to work and was able to perform the essential functions of the position. AR 201. Olis returned to work on March 2, 2017. AR 150. However, her symptoms continued and she began missing work again due to migraines, vertigo, and visual disturbances. AR 150, 239. On April 25, 2017, Olis again went on medical leave and never returned to work. AR 85-90, 150. On May 8, 2017, Dr. Crow certified that Olis' symptoms disabled her from work of any kind for a 6 week period. AR 1352-53. On August 28, 2017, Dr. Crow again certified that Olis was unable to perform work of any kind. AR 76-77.

D. Olis' Continued Treatment

After ceasing work, Olis continued to seek medical care.

1. Dr. Yashar Eshraghi

On a referral from Dr. Crow, Olis saw Dr. Eshraghi, a pain management specialist, on April 27, 2017. AR 1367. Dr. Eshraghi noted that she was a candidate for Botox injection therapy as a result of having failed treatment with "amitriptyline, Topamax, Ibuprofen, Excedrin, Tylenol, Effexor, physical therapy, lifestyle change, [and] diet change." AR 1369. Olis continued receiving botox injection therapy for three months. AR 1319-33. Olis reported that the botox therapy did not improve her migraines. AR 2231.

2. Physical Therapy

On June 5, 2017, Olis began physical therapy with Balance Rehabilitation completing a total of 39 treatment sessions through the end of 2017. AR 835-918. On March 21, 2018, Olis restarted physical therapy with Balance Rehabilitation undergoing another 52 treatment sessions through October of 2018. See e.g., AR 1883.

3. Dr. Jaya Philipose

During 2017, Olis regularly saw rheumatologist Dr. Philipose who diagnosed her with fibromyalgia and noted that her migraines and vertigo persisted. AR 714-750. Dr. Philipose noted that Olis "did not meet criteria for fibromyalgia on exam with only 8/18 tender points but fibro diagnostic questionnaire did meet criteria." AR 742, 748. Dr. Philipose explained to Olis that her "history/exam is suggestive of possible fibromyalgia but explained this is a chronic pain disorder and a diagnosis of exclusion." Id. When Unum contacted Dr. Philipose her office indicated that they were not giving any restrictions and limitations because they "were unaware of any disability claim." AR 672.

4. Dr. Sanjay Kedhar

On June 19, 2017 and October 5, 2017, Olis consulted Dr. Sanjay Kedhar who treated her dry eyes with punctal plugs. AR 1301-04, 1334-37.

5. Dr. Mollie Johnston

On September 6, 2017, Olis saw neurologist Dr. Johnston on the referral of Dr. Crow. AR 1290-93. Dr. Johnston noted, "Neuro ophtho and vestibular clinics have concluded no issues with end organs and likely central in etiology which I agree with in this setting of likely migraine aura." AR 1292. Dr. Johnston suggested physical therapy and medication adjustments. AR 1292-93.

6. Dr. Crow

Olis continued seeing Dr. Crow on a near monthly basis. See e.g., AR 532, 559,

561. On January 3, 2018, Dr. Crow confirmed again that Olis was unable to perform work of any kind. AR 220-21. On January 9, 2018 he completed a Physician/Practitioner's Supplementary Certificate sent to the Employment Development Department of the State of California, under penalty of perjury, stating that Olis was not able to return to work because she suffered from "chronic head pain and difficulty seeing" and was "resistant/non-responsive to therapy." AR 1510-12.

7. Dr. Alan Marcus

On May 21, 2018, Dr. Marcus, an endocrinologist and internal medicine physician, began treating Olis. AR 1816, 1820, 2202. Marcus diagnosed Olis with a thyroid-related autoimmune disorder (Hashimoto's disease). AR 986, 1816. Dr. Marcus later reported to Unum that Olis' "job is 95% computer – she is unable to be on computer or other electronic devices at all secondary to this worsening [] underlying autoimmune neurological disability." AR 991. Although Dr. Marcus had only began treating Olis in May 2018, he listed Olis' restrictions and limitations as beginning in April 2017. Id.

Dr. Marcus provided Unum with laboratory testing showing Olis' elevated level of thyroglobulin antibody, and abnormal anti-nuclear Ab, ANA titer, and ANA pattern results. AR 996-97. Olis' ultrasound examination also revealed six thyroid nodules. AR 998-99.

D. Unum's Review and Ultimate Denial of Claim Benefits

Olis submitted her LTD benefit claim to Unum on January 24, 2018. AR 36-40. Olis claimed that the condition causing her disability was "chronic, persistent migraines with vertiginous features and persistent [visual] aura." AR 36. Olis wrote that she first noticed her symptoms when she "woke up one morning with severe vertigo & headaches. Vision became distorted a few weeks later." Id. Dr. Crow completed the attending physician statement listing as Olis' primary diagnosis "migraine with vertigo" and her secondary diagnoses "visual disturbance" and "chronic migraine." AR 41. Dr. Crow noted that Olis was "limited to 15-20 minutes of computer work per day" and that "chronic head pain, light sensitivity and difficulty seeing" supported her diagnosis. AR 42.

On February 23, 2018, Unum conducted a telephonic interview with Olis where she explained that her migraines were not "like a regular migraine" because they were daily and included vertigo and vison problem." AR 151. Olis also explained that her vision problems were "like choppy vision, sees things clearly but the focus goes in and out, tries to focus on stuff in the foreground and then the background, like looking through blinds because eyes are fighting between the blinds and what you're looking at." Id. Olis stated that although she had not been told not to drive, she did not trust herself and "will not drive more than a couple of miles." AR 152. Olis also explained that she does not read or watch televisions because of eye fatigue and that if she wants to do anything she has to do it in the morning because "around lunchtime is when [her] eyes start shutting down." AR 152-53. Olis stated that she has to close her eyes for 3-4 hours on a daily basis. AR 153. Olis acknowledged that she did not request or receive accommodations at Enterprise before she stopped working. AR 151. Based on its initial review of Olis' claim Unum was "[u]nable to determine the severity of [Olis'] condition and functional capacity" and sought to obtain her medical records. AR 175.

1. Review of Records from Dr. Cho

Dr. Cho was unwilling to opine on Olis' restrictions and limitations because he had not seen her since July 28, 2017. AR 789-90.

2. Review by Angela Wilson, RN ("Wilson")

Unum employee Wilson reviewed Olis' medical records noting that while Olis' visual functional/skills report indicated that Olis did not exhibit difficulty maintaining focus or steady gaze she did have difficulty with ocular motility. AR 517. Wilson acknowledged that Olis had undergone extensive evaluation and treatment. AR 519. However, she concluded that "while the records consistently document [Olis] reports daily symptoms of [h]eadaches, choppy vision, focus going in/out, and pain behind eyes, the diagnostic testing(s) to include an MRI of the Brain, Visual Field, and Visual Evoked were reported to be normal. [Olis'] complaints appear to be based on her report and it is unclear if [her] reported symptoms/dysfunction rise to a level that would preclude [her] from performing within the sedentary functional capacity as indicated by the VCR." AR 519-20.

3. Review by Dr. James Folkening, Internal Medicine Specialist

In August 2018, Unum's Medical consultant James Folkening, M.D. reviewed the entire file and determined that Olis' restrictions and limitations were not medically supported. AR 1147-53.

Dr. Folkening spoke with Dr. Crow on May 7, 2018. AR 697. Dr. Folkening questioned Dr. Crow about the fact that a different optomologist had estimated that Olis was able to "resume full-time sedentary occupational activities by early March 2017" just before Dr. Crow initially evaluated her and asked what had changed clinically to render her unable to "be considered for resumption of full-time sedentary activity." Id. Dr. Folkening stated that Dr. Crow told him that "he was not aware of any trauma, major illness, surgery or other clinical event that clearly marked the onset" of Olis' symptoms and "confirmed that there were no specific abnormalities on physical examination or other diagnostic testing to verify the level of impairment being described by the claimant." Id. Dr. Crow noted that he was "obviously sometimes concerned that patients such as the claimant could be dramatizing or confabulating symptoms," but that in this case he "felt that the claimant was offering a valid description of impairment, and he found it difficult to believe that she would subject herself to such intensive diagnostic measures and treatment unless she was desperate to obtain some relief." Id. From this Dr. Folkening concluded that "the claimant's reported functional limitations cannot be verified by any abnormal findings on examination or other diagnostic testing. Dr. Crow's [restrictions and limitations] appear to be based primarily on his assessment of the claimant's credibility." AR 698.

Dr. Folkening also spoke to Dr. Marcus on August 3, 2018. AR 1143. Dr. Marcus informed him of Olis' abnormal thyroid tests and indicated that they confirmed that Olis' "symptoms since the time of work cessation had been related to autoimmune thyroid disease." Id. Dr. Folkening concluded that Dr. Marcus' "hypothesis regarding [Olis'] constellation of symptoms since work cessation being related to an autoimmune thyroid disorder that cannot be effectively treated is not medically reasonable. Support for R/Ls throughout and beyond the EP cited cannot clearly be established by the medical records reviewed to date." Id.

Dr. Folkening's review concluded that despite Olis' "continuing complaints of

headache, eye pain, vision disturbance/fatigue, dry eyes, and dizziness since several months prior to the DOD, available records offer no clear clinical confirmation of impairment related to these symptoms or any other medical condition that rises to a level precluding performance of full-time activity . . . for any specific interval since the DOD." AR 1152.

4. Review by Patricia Edwards, RN ("Edwards")

Unum employee Edwards reviewed Olis medical records and concluded that "while the records consistently document [Olis'] complaints of chronic daily headaches, visual disturbance, dizziness, and chronic fibromyalgia pain," "there does not appear to be a significant change in [her] functional capacity around the last day worked through the EP or to present to support a lack of sustained functional capacity as outlined by the OI for any period as noted above." AR 1126-27.

5. Review by John Coughlin, M.D, Endocrinologist

Dr. Coughlin, reviewed Olis' records and agreed with Dr. Folkening that "[b]ased on a reasonable medical probability, excluding vision issues, documentation does not support lack of capacity based on physical issues and/or [behavioral health] issues[.]" AR 1167. Dr. Coughlin noted that "[a]pproximately 5% of the general healthy population is positive for ANA" and "[a]pproximately 10-20% of healthy individuals have positive thyroglobulin bodies." Id. Dr. Coughlin opined that it was highly unlikely that a positive ANA level or presence of TG antibodies were the cause of Olis' complaints. Id. Dr. Coughlin also stated that "[l]ack of capacity is not supported based on the presence of multiple small thyroid nodules." Id. Dr. Coughlin also noted that Olis did not meet the criterial for fibromyalgia based on the tender points examination while acknowledging that she had met the criteria based on the results of the "fibro questionnaire." Id. He noted that Dr. Philipose's examination of Olis was unremarkable with the exception of 8/18 tender points. Id.

6. Review by Richard Eisenberg, M.D, Ophthalmologist

On August 11, 2018, Dr. Eisenberg reviewed Olis' medical records and concluded that he did "not find support for [restrictions and limitations] that would preclude the

insured from performing the visual requirements of her occupation." AR 1178. Dr. Eisenberg noted that:

> The determination of disability by two of the insured's eye care providers, i.e. Dr. Bose and Dr. Crow, are primarily based on the insured's self-reported symptoms and not on corroborating examination findings. The corrected visual acuity is consistently 20/20 in each eye at distance and J1+ at near, which easily satisfies the criteria of near acuity and accommodation. There are several instances where the insured specifically complains of worsening vision, and the VA remains at 20/20. She also reports floaters frequently, with repeat fundus examinations being normal. All secondary testing, including brain MRI, VEP, automated visual fields, and Myasthenia gravis testing, have been normal.

Id.

Dr. Eisenberg also reported that Olis' report of dry eyes had not been continuously corroborated by examination findings because only the initial exam performed by Dr. Kedhar found significant changes on the corneal surface while the remaining examinations revealed consistently clear corneas and adequate tear film in both eyes. Id. He further noted that it was unlikely that there was a link between Olis' visual symptoms and a thyroid condition because she only had one thyroid-associated eye ocular condition. Id. Furthermore, Dr. Eisenberg noted that testing for convergence insufficiency was only recorded once by Dr. Sharieff and the small amount of prism prescribed for the prism glasses indicated a "very mild degree of convergence insufficiency." Id. Dr. Eisenberg noted that he did not consider the contributions of other possible conditions such as migraines or vestibular abnormalities. Id. Dr. Eisenberg did not discuss the results of Olis' reading comprehension test. AR 1176-78.

* * * * *

In a letter dated August 17, 2018, Unum determined Olis was not entitled to benefits based upon the findings and opinions of Drs. Folkening, Coughlin and

Eisenberg, and because the available information indicated that she had "maintained the ability to perform full-time activity at a level that is consistent with the demands of your occupational duties." AR 1191-1204. The letter stated "[d]espite your persistent complaints of headache, eye pain, vision fatigue, dry eyes, and minor 'convergence insufficiency', available records offer no clear clinical support for restrictions and limitations precluding performance of full-time sedentary activity for any specific interval since November 30, 2016." AR 1195.

E. Olis' Appeal

Olis appealed Unum's adverse determination on February 11, 2019. AR 1260-1671. Olis provided a letter describing her symptoms, the limitations they caused, and her numerous failed attempts at treatment and provided more than 600 pages of materials, medical records, and letters of support. AR 1259-1804, 1815-1904. Olis submitted a handwritten log of her symptoms from January 8, 2019 through March 13, 2019 documenting "eye breaks" lasting two to three hours on most days, as well as migraines, dizziness, pain, and visual distortions. AR 1269-70, 1903-04.

Dr. Crow's letter reiterated that Olis suffered from migraines, dizziness, and visual distortion, which led him to diagnose her with "Chronic Continuous Migraine with vertiginous features and persistent aura." AR 1834. Dr. Marcus stated that Olis suffered from autoimmune thyroiditis disease confirmed by laboratory testing. AR 1816. Dr. Marcus refuted Dr. Coughlin's opinions, explaining that his diagnosis and evaluation were based on laboratory testing, Olis' family history of autoimmune thyroid disease and complex rheumatologic disorder, as well as symptom reporting by Ms. Olis that was consistent with her diagnosis. AR 1816-17. Dr. Marcus cited to medical studies noting that "[t]he presence of and causative effect of thyroid antibodies on vestibular function is [] recognized in the literature," and "[t]he association of neurological disturbances and autoimmune thyroid disease has also been reported and published[.]" AR 1817. Dr. Marcus also explained that "[t]here is no objective measurement that makes this diagnosis such as EEG, EMG, MRI or SPECT scanning etc." Id. Dr. Marcus concluded that "[t]he association of autoimmune thyroid disease is well noted in the literature and although not present in every individual with this disorder it can and to a degree of medical certainty is the most probable cause for these complex neurological disturbances as evidenced by the symptomaltologies of [] Olis." Id.

Dr. Marcus indicated that in his opinion Olis is a credible person and that her symptoms were "real and valid and can be attributed to her non-specific autoimmune disturbances." AR 1816. Dr. Marcus indicated Olis' medical record was well documented and that she had a "long timeline of attempted therapies to treat and to minimize the chronic interference with her work abilities." AR 1820. Dr. Marcus continued on to explain that despite unsuccessful treatment with numerous migraine medications, Olis "has sought and had consultation with several different doctors in different fields (neurology, ophthalmology neurotology, etc)… All these interventions, diagnostics and attempts at therapy have been fruitless. Ms. Olis has been tireless in attempting to seek out a treatment for her illness and disability and has been unsuccessful in being able to do so presumably due to the immunological basis of her disease and symptoms. Ms. Olis is unable to work at this time as described above due to the work requirements and involvement of equipment which cause her immunological derived neuropathy to worsen and cause her symptomatologies." Id.

F. Unum's Review of and Ultimate Denial of Olis' Claim

1. Review by Susan Pendleton, RN ("Pendleton")

Pendleton reviewed Olis' appeal and acknowledged that Olis' complaints were consistent between providers and across time. AR 2019. She also acknowledged that Olis had undergone "significant and thorough clinical and diagnostic workup" but noted that it had not determined "an etiology to encompass her multiple symptoms." AR 2018. Pendleton concluded that from a functional capacity standpoint Olis' function remained unclear. Id.

2. Social Media Investigation

Unum conducted research into Olis' social media pages including her Facebook page, LinkedIn page, her husband's Facebook page, and a Yelp page in the name of her and her husband. AR 1983-2007. It appears such research did not result in any contradictory information.

3. Review by Dr. Scott Norris

Medical Consultant Dr. Norris, who is board-certified in family/occupational/aerospace medicine, reviewed Norris' appeal and updated records in April 2019. AR 2024-2029. Dr. Norris opined that the reported restrictions and limitations ("unable to work") were not medically supported. Id. Dr. Norris concluded that Olis "reported impairment due to [headaches], eye pain, dizziness/vertigo, myofascial pain, and thyroid [disease]. Examination findings were minimal w/o evidence of functional impairment precluding sedentary level activity. Diagnostic testing did not support functionally impairing structural disease or other pathologic conditions. While the intensity of treatment was progressive, her response was atypical and not [correlated with] impairment precluding sedentary work." AR 2026.

Regarding Olis' vision and eye problems Dr. Norris noted that her "mild ocular motility and alignment abnormalities" had been noted before Olis stopped working and that her reported level of impairment was inconsistent with regularly documented normal visual acuity. Id. Additionally, he noted that Olis was able to wear contact lens which was inconsistent with "significant impairment related to dry eyes or other corneal disease." Id. Dr. Norris also noted that her reports of impairing headaches and eye pain were inconsistent with the absence of pain during most clinical encounters and the absence of urgent visits. Id. Dr. Norris further discounted her reports of worsening vision given that she had documented acuity of 20/20. AR 2027.

As to her vertigo symptoms, Dr. Norris noted that Olis' reports of dizziness and vertigo had begun many months prior to stopping work and that her examinations did not describe significant functional impairment so as to preclude sedentary level work. AR 2026. He further noted that her neurological examinations were unremarkable and that the patient notes only described mildly abnormal balance testing. AR 2027. He highlighted that although Olis was diagnosed with vertigo in early 2016, she continued working and there were no records of sustained falls or urgent/emergent treatment. AR 2028.

Regarding Olis' thyroid condition he noted that Olis' findings were nonspecific and that thyroglobulin antibody testing was only mildly elevated in 2018, antithyroglobulin antibody was negative in January 2017, and "TSH" was normal in December 2016. AR 2027. From this Dr. Norris concluded that there was "no evidence of an active autoimmune thyroid condition or other thyroid [disease] during the"

employment period. Id.

As to Olis' headaches, Dr. Norris concluded that her complaints of impairing headaches were inconsistent with the "absence of pain behaviors during most clinical encounters and the absence of urgent/emergent visits." AR 2026. He further noted that she had admitted that she suffered headaches since college and worked despite them. AR 2026. Furthermore, he concluded that given Olis' "failure to respond to several medications appropriate for the [treatment] of migraine [headaches], her reported [headaches] are unlikely related to migraines." AR 2027-28. Dr. Norris also noted that while Olis had a one-time evaluation at a headache specialty clinic, she did not require ongoing treatment with a headache specialist. AR 2027-28.

Olis responded by submitting additional medical information and a personal statement. AR 2110-30. Dr. Norris addressed the additional information provided in his addendum report concluding that it did not alter his previous opinion. AR 2236-2238. Dr. Norris noted that Dr. Marcus' opinion remain unchanged and stated that he reviewed the literature and data submitted by him. AR 2237-38. Dr. Norris also reviewed the updated lab tests and ultrasound reports noting that they contained only a mildly elevated inflammatory marker and that it was a non-specific finding. AR 2238.

A Unum Vocational Rehabilitation Consultant also reviewed the file and clarified the duties and requirements of Olis' job. AR 2243-2244. Dr. Norris reviewed the updated occupational information and confirmed that it did not alter his conclusion. AR 2246-2248.

* * * * *

In a July 2, 2019 letter, Unum upheld its initial claim decision based on the opinions of Drs. Norris, Folkening, Coughlin and Eisenberg, and all of the information in its file. AR 2253-2262.

V. DISCUSSION AND CONCLUSIONS OF LAW

"A denial of ERISA benefits challenged under 29 U.S.C. § 1132 'is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary

discretionary authority to determine eligibility for benefits or to construe the terms of the plan.'" Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625, 856 F.3d 686, 691 (9th Cir. 2017) (quoting Firestone Tire & Rubber Co. , 489 U.S. at 115). Here, the parties agree that de novo review is the applicable standard. Olis Op. Br., 15-16; Unum Op. Br., 20. The Court therefore reviews Unum's claim denial de novo. On de novo review, the Court must decide whether the claim decision was correct under the terms of the Plan based on the administrative record as it existed when the decision was made. See Kearney, 185 F.3d at 1090 ("[T]he record that was before the administrator furnishes the primary basis for review."). It is at all times a plaintiff's burden to support and prove his claim. Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 63 F. Supp. 2d 1145, 1157 (C.D. Cal. 1999), aff'd, 380 F.3d 869 (9th Cir. 2004).

The central dispute at issue here is whether Olis' medical records sufficiently indicate that she was precluded from performing the duties of her occupation with both sides providing contradictory opinions from physicians. The Court finds that Olis has met her burden of showing that she is "disabled" under the terms of the Plan. Therefore, for the reasons explained below, Unum's claim denial is reversed.

On de novo review, the Court must "evaluate the persuasiveness of conflicting testimony and decide which is more likely true." Kearney, 175 F.3d at 1095. "[A] true medical diagnosis does not by itself establish disability." Jordan, 370 F.3d at 880. "Rather, a claimant must prove tha[t] his impairment is disabling, using objective and subjective medical evidence in the record." Popovich, 281 F. Supp. 3d at 1003 (citing Seleine v. Fluor Corp. Long–Term Disability Plan, 598 F. Supp. 2d 1090, 1101–02 (C.D. Cal. 2009)). There is no presumption in favor of a claimant's treating physician. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003) ("[I]f a consultant engaged by a plan may have an 'incentive' to make a finding of 'not disabled,' so a treating physician, in a close case, may favor a finding of 'disabled,' . . . [therefore] courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician."). Nonetheless, the Court may "take cognizance of the fact . . . that a given treating physician has a greater opportunity to know and observe the patient than a physician retained by the plan administrator." Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1109 n.8 (9th

Cir. 2003) (quotation marks omitted); see also Montour, 588 F.3d at 634; Black & Decker Disability Plan, 538 U.S. at 834.

However, the Court is not required to give the opinions of treating physicians more weight than the opinions of reviewing physicians. A "treating physician's opinion gets no special weight and can be rejected on the basis of reliable evidence with no discrete burden of explanation." Jordan, 370 F.3d at 879. Nonetheless, a decision to conduct a "pure paper" review can "raise[] questions about the thoroughness and accuracy of the benefits determination" as it may not be clear if the physicians have all relevant data. Montour v. Hartford Life & Acc. Ins. Co., 588 F.3d 623, 634 (9th Cir. 2009) (citing Bennett v. Kemper Nat'l Servs., Inc., 514 F.3d 547, 554 (6th Cir. 2008) and Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 118 (2008)). Although there is no clear binding guidance on resolving such conflicts, one court in this District has held that the "credibility of physicians' opinions turns not only on whether they report subjective complaints or objective medical evidence of disability, but on (1) the extent of the patient's treatment history, (2) the doctor's specialization or lack thereof, and (3) how much detail the doctor provides supporting his or her conclusions." Shaw v. Life Ins. Co. of N. Am., 144 F. Supp. 3d 1114, 1129 (C.D. Cal. 2012).

As a threshold issue, Olis takes issue with Dr. Norris' report because Dr. Norris is board-certified in "Family/Occupational/Aerospace Medicine." AR 2028; Olis Resp. Br., 20. Because he is not an endocrinologist, neuro-ophthalmologist, ophthalmologist, neurologist or pain management specialist, Olis contends that he does not have the "appropriate training and experience in the field of medicine involved in the medical judgment" as required by ERISA. Olis Resp. Br., 20-21; 29 C.F.R. § 2560.503-1(h)(3)(iii). Unum responds that Dr. Norris is a board certified Occupational and Environmental Medicine Physician (AR 2028), a specialty which focuses on the diagnosis and treatment of work-related injuries and illnesses and factors that affect health in the workplace. Unum Resp. Br., 10-11. While Dr. Norris may not be a specialist in endocrinology, neurology, pain management, or ophthalmology, the Court sees no reason to discount his opinion given that his specialty in occupational and environmental medicine deems him sufficiently qualified to review Norris' medical records and opine on whether the sum of her objective and subjective data indicates whether she is precluded from performing her work responsibilities.

Unum argues that Olis has not satisfied her burden of proving that she is disabled under the terms of the Policy because Olis' "assertion that her self-reported symptoms rise to the level of disability should not be taken at face value" and the objective medical evidence in the record is "dramatically inconsistent with Olis' subjective complaints." Id., 16, 19-22. Olis contends that nothing in ERISA or the plan requires her to provide objective evidence to demonstrate her disability, that she nevertheless did provide objective evidence, and that the record demonstrates that she could no longer perform her job due to her symptoms. Olis Resp. Br., 1. Unum argues that it did not deny the claim because it disputed that she suffered a condition or symptoms, but rather because it disputed the impact of these reported conditions and symptoms on her ability to work. Unum Resp. Br., 6.

"Many medical conditions depend for their diagnosis on patient reports of pain or other symptoms, and some cannot be objectively established until autopsy. In neither case can a disability insurer condition coverage on proof by objective indicators such as blood tests where the condition is recognized yet no such proof is possible." Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 678 (9th Cir. 2011). Olis argues that migraines fall into this category. Olis Resp. Br., 9, Op. Br. 19. For this argument Olis relies in part on a footnote in Creel v. Wachovia Corp., No. 08-10961, 2009 WL 179584, at *8 n.20 (11th Cir. Jan. 27, 2009) which noted that such as here, neither party in that action had "identified any objective tests that would automatically establish the existence of neurologically-based migraines, and there appears to be no set standard for establishing the existence of migraines." However, the Creel court also states that "[e]ven for subjective conditions like migraines, it is reasonable to expect objective medical evidence of an inability to work." Id. at * 9. Additionally, while objective data is not "necessary" for conditions that cannot be established through diagnostic testing, inconsistent objective data is certainly relevant to determining the credibility of a physician's opinion.

Olis provided objective evidence of laboratory testing showing elevated thyroid antibodies and radiology revealing multiple nodules on her thyroid. AR 996-99. Dr. Marcus noted that this indicates that Olis suffered an autoimmune thyroid disease, which has been linked to vestibular function and neurological disturbances. AR 1817. Unum takes issue with Dr. Marcus's testimony because he did not begin treating Olis until thirteen months after she allegedly became disabled. Unum Op. Br., 23. Olis argues that the record shows that his testimony is probative and relevant because she was treated by

Dr. Marcus for the same condition as those physicians who treated her when she first became disabled. Olis Resp. Br., 17. While Dr. Marcus' opinion is relevant to show that Olis continued suffering from her symptoms, the Court gives it limited weight in determining whether Olis was disabled at the relevant time.

Olis also provided vision testing results that showed Olis suffered from "visual functional impairment" reading at less than half the speed of grade norm and that her reading comprehension was at the 40% level. AR 188, 1523-24, 1785-87. This does not appear to have been acknowledged by Dr. Norris. However, the report itself states that the interpretation may not be accurate. AR 1523.

Olis also argues that she is credible noting that she enjoyed her job (AR 1796), made an attempt to return to her job after her leave of absence despite continuing to suffer from symptoms (AR 150), visited numerous doctors and specialities to attempt to try to seek treatment, underwent many hours of therapy (over 100 sessions) and took multiple medications, and as a result incurred thousands of dollars in medical bills (AR 1798). Olis also argues that she was forced to postpone having children because her symptoms were too intense. AR 1796. Unum appears to suggest that Olis' credibility is suspect because she never requested accommodations at Enterprise, her physicians could not find an explanation for her debilitating symptoms, she returned to work despite her self-reported worsening symptoms, continued to drive, and did not apply for Social Security disability benefits[1]. See e.g., Unum Op. Br., 7, 20, 22-23; Unum Resp. Br., 2, 4. Olis responds that requesting accommodations would have been pointless because she was incapacitated for large portions of the day, that while she continues to drive it is "extremely limited," and that the LTD Plan does not require applicants to apply for Social Security disability benefits to be eligible for benefits. Olis Resp. Br., 11-12. As for Olis' temporary return to work, the mere fact that a person pushes themselves to return to work or attempts to work despite suffering from disabling symptoms alone does not alone mean that they are not disabled. There is no "logical incompatibility between working full time and being disabled from working full time." Hawkins v. First Union Corp. Long-Term Disability Plan, 326 F.3d 914, 918 (7th Cir. 2003). "A disabled person

[1]In March 2018, despite claiming to be disabled from working in her sedentary occupation for nearly one year by that point, Olis told Unum that she "doesn't think she will file for [Social Security Disability Insurance], but [had] not decided yet." AR 323.

should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working." Id. Additionally, the record shows that Olis missed time at work during this period with increasing frequency until she ceased work. "'We will not credit a file review to the extent that it relies on adverse credibility findings when the files do not state that there is reason to doubt the applicant's credibility.'" Demer v. IBM Corp. LTD Plan, 835 F.3d 893, 906 (9th Cir. 2016) (quoting Godmar v. Hewlett–Packard Co., 631 Fed.Appx. 397, 406 (6th Cir. 2015)).

Unum also notes that Olis' symptoms began before she claimed to be disabled. Unum Op. Br., 17. Olis argues that the record shows that in 2016 her headaches increase in frequency and were accompanied by vertigo and eye pain. AR 2231. Indeed, Olis visited Drs. Sharieff, Bose, and Cho in the second half of 2016 complaining of worsened symptoms. AR 187-89, 419-42, 944-62. Unum also attempts to argue that Olis stopped her treatment with Dr. Bose because he no longer supported her disability. Unum Op. Br., 34. However, there is no evidence in the record to support this argument.

Unum further notes that in the records obtained from Dr. Cho, Olis complained that she "has had dizziness since [April 2016]" with "spinning and floating sensation for about 5 weeks." AR 953. Unum takes the position that combined with Olis' confession that she had experienced headaches "for years" before she stopped working (AR 150), this information contradicted Olis' statement to Unum that she had to stop working because she "woke up one morning with severe vertigo & headaches." AR 36; Unum Proposed Contentions ¶ 26. However, this is not truly contradictory. Unum also notes that while Olis complained that any "unexpected movement can cause a dizzy spell," and "[w]atching anything that moves can make me dizzy" (AR 1819), she admitted that she continues to drive. AR 152. But even so, no physician told her not to drive, and Olis reported that she only drives familiar roads near her house and not more than a couple of miles. Id. If Olis had no symptoms or her symptoms were not as severe as she reports, the Court doubts that she would take it upon herself to restrict her driving in this way.

To be disabled under the policy, Olis must be "limited from performing the material and substantial duties of [her] regular occupation." AR 2296. Dr. Crow and Dr. Marcus both concluded that Olis was limited from performing her sedentary work duties as a result of chronic head pain and difficulty seeing. Dr. Marcus attributed her symptoms to a thyroid related condition while Dr. Crow found them to be "most

consistent with chronic continuous migraines." AR 353. Dr. Crow acknowledged that there was "no specific abnormalities on physical examination or other diagnostic testing to verify the level of impairment being described by the claimant." AR 697. Nonetheless, he felt that Olis was credible, and he did not believe she would have subjected herself to such a thorough examination, including intensive diagnostic measures and treatment, unless her concerns were real. The Court finds this last fact the most compelling.

The Court explicitly finds that Olis was credible in relating her symptoms to a variety of providers over an extended period. Olis has (as acknowledged by Unum in the record) consistently sought medical treatment, including multiple opinions, visited additional medical providers referred by her physicians, undergone significant diagnostic testing, taken a series of different prescription medications for migraines and other symptoms, and attended over 100 therapy sessions for which she paid out of pocket. Unum takes the position that it does not dispute that Olis has certain conditions or symptoms, but disputes that these conditions preclude her from fulfilling her work responsibilities. However, Unum looked only at test results while giving little weight to Olis' reported symptoms and continued efforts to find a cure.[2] But Olis' symptoms (some of which were recorded in a log of symptoms (AR 1269-70, AR 1903-04)), consistently indicated requiring eye breaks lasting two to three hours. Additionally, Olis consistently complained of strain caused by screens, the use of which is undisputedly essential for her job. Olis' symptoms are so severe that she does not watch TV and sits on the couch listening to talk shows instead of watching them. AR 153. Olis reports that she even had to put off having children. AR 1796. Having independently considered all of the evidence, while Olis' objective data supporting her claim is not robust (much of it because migraines have no identifiable objective diagnostic test), the Court has no reason to doubt Olis' credibility. It is clear from the record that Olis has been relentless in her pursuit of a diagnosis, treatment, and ultimate cure for her ailments. While her objective corroborating evidence does not indicate severity, she did still have abnormal findings and it was the opinion of Dr. Crow that her symptoms precluded her from work. This is bolstered by Dr. Marcus' opinion that even thirteen months after her initially becoming

[2]Even in its opening brief Unum states "**setting aside Olis' subjective complaints**, by all accounts the medical evidence supports the conclusion that Olis is capable of performing her occupational duties." See Unum Op. Br., 22 (emphasis added).

disabled she continued to seek treatment and in his opinion was precluded from her work. The Court finds these opinions more convincing than that of Unum's medical reviewers because of the extent of Dr. Marcus' and Dr. Crow's history treating Olis, their specializations in the relevant practices and the amount of detail provided in their notes and letters. As stated above, the Court also finds compelling and convincing the extent of Olis' treatment history and finds that this supports a finding that Olis was "limited from performing the material and substantial duties of [her] regular occupation." See AR 2296.

In sum, having independently considered the evidence, the Court finds that Unum incorrectly denied Olis LTD benefits. Unum's decision is reversed.

VI. CONCLUSION

For the foregoing reasons, the Court **REVERSES** Unum's claim denial. Olis is awarded past due monthly benefits plus interest. Olis may file a motion for attorneys' fees and costs within 30 days.

IT IS SO ORDERED.

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