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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

PAMELA FLEMING,

Plaintiff,

v.

**UNUM LIFE INSURANCE COMPANY
OF AMERICA,**

Defendant.

Case No.: SACV 17-01576-CJC (JDEx)

MEMORANDUM OF DECISION

I. INTRODUCTION

Plaintiff Pamela Fleming (“Fleming”) brings this action for wrongful termination of long-term disability benefits under a policy insured by Defendant Unum Life Insurance Company of America (“Unum”) and governed by the Employee Retirement

1 Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (Dkt. 1 [Complaint].) Fleming,
2 a former litigation attorney at Kern & Wooley, LLP (“Kern & Wooley”), was in a serious
3 car accident in 1998 that resulted in injuries to her neck and thoracic spine. (Dkt. 29
4 [Administrative Record, hereinafter “AR”] 1937.) After a cervical spine fusion in 2003,
5 she continued to experience recurring neck and back pain that ultimately forced her to
6 substantially reduce her work hours in July 2005 and stop working altogether in October
7 2005. (AR 2, 223.) At that point, Fleming submitted a claim for long-term disability
8 (“LTD”) benefits to Unum. (AR 378–81.) Unum approved her claim on December 13,
9 2005, and paid her LTD benefits for over a decade. (*See id.*) On September 26, 2016,
10 Unum terminated Fleming’s claim because she allegedly no longer qualified as disabled
11 under the policy. (AR 2119–27.)

12
13 Fleming brings this action challenging Unum’s decision to terminate her LTD
14 benefits as contrary to the evidence in her claim file and in violation of ERISA. After a
15 bench trial on the administrative record, the Court finds that Unum erred in terminating
16 Fleming’s claim for LTD benefits.

17 18 **II. FINDINGS OF FACT**

19 20 **A. Relevant Terms and Conditions of the Policy**

21
22 Plaintiff enrolled in Unum’s ERISA-governed insurance policy (the “Policy”)
23 through her employment with Kern & Wooley, LLP. Under the Policy, an individual is
24 “disabled” if she (1) is “**limited** from performing **the material and substantial duties** of
25 [her] **regular occupation** due to [her] **sickness or injury**,” and (2) has “a 20% or more
26 loss in [her] **indexed monthly earnings** due to the same loss or injury.” (AR 82
27 [emphasis in original].) Unum defines regular or usual occupation as follows:
28

1 The definition of disability contained in the policy references a period during
2 which you are unable to perform the material and substantial duties of your own
3 occupation. You will be determined to be disabled from your usual occupation
4 when you are rendered unable to perform with reasonable continuity the substantial
5 and material acts necessary to pursue your usual occupation in the usual and
6 customary way.

7 Your usual occupation may be defined in the policy as it is performed in the
8 national economy. However, we will evaluate your usual occupation to be the
9 occupation you are routinely performing for your Employer when your disability
10 begins. (AR 1273, 2124, 3188.)

11 The Policy outlines the circumstances in which payments under a disability claim
12 will terminate. Payments will terminate if, during the first 36 months of payment, “you
13 are able to work in your regular occupation on a part-time basis but you choose not to,”
14 or, if after 36 months, “you are able to work in any gainful occupation on a part-time
15 basis but you choose not to.” (AR 98–99.) They will also terminate on the “date you are
16 no longer disabled under the terms of the plan” or “the date you fail to submit proof of
17 continuing disability.” (*Id.*)

18 **B. Approval of Fleming’s Claim**

19
20 In 1998, Fleming was in a serious car accident in which she suffered injuries to her
21 neck and thoracic spine. (AR 1937.) Recurring pain forced her to undergo a C5-C6
22 cervical spine fusion in July 2003. (AR 56.) While the surgery alleviated her pain for a
23 short period of time, she began experiencing severe neck and back pain in early 2005.
24 (AR 574–77.) In March 2005, her doctor prescribed new pain medications, in addition to
25 the Vicodin, Valium, and Flexeril that she was already taking. (AR 151, 153.) Even with
26 serious pain medications, Fleming was unable to work full time as a litigation attorney.
27 In July 2005, she reduced her work schedule to four hours per day. (AR 56.) Shortly
28 after, she submitted a claim for short- and long-term disability benefits to Unum. (*Id.*)

1 After its initial review, Unum approved maximum short-term disability benefits, effective
2 August 11, 2005. (AR 14.)
3

4 When, in October 2005, Fleming’s pain forced her to stop working altogether,
5 Unum reviewed her claim for LTD benefits. (AR 223, 289–90.) Unum Nurse Lou Gallo
6 noted that Fleming’s medical records “clearly demonstrate[] deterioration” in her cervical
7 spine that makes walking, sitting, and reading a computer screen painful. (AR 290.)
8 Because Fleming was “not a good surgical candidate at [that] time,” Nurse Gallo
9 suggested that she consider nerve root blocks. (*See id.*) Nurse Gallo also concluded that
10 without “significant improvement in her systems, it is likely that [Fleming] will not be
11 able to resume full time status until after she has surgical intervention.” (*Id.*) On
12 December 13, 2005, Unum approved her claim for LTD benefits. (AR 378–81.)
13

14 C. Unum’s Payment of LTD Benefits

15

16 Over the next decade, Unum paid Fleming LTD benefits as a number of medical
17 professionals continued to confirm her deteriorating condition and severe pain. In June
18 2006, Fleming’s pain management physician, Dr. Rebecca Kerr, noted that Fleming’s
19 neck pain and headaches rendered her “totally, temporarily disabled” and unable to work.
20 (AR 634.) In October 2006, Dr. Kerr confirmed Fleming’s continuing disability and
21 noted she would not improve “until some sort of surgical intervention.” (AR 765–66.)
22 On November 1, 2006, Unum Nurse Gary McCollum noted that Fleming had
23 “progressively gotten worse with increasing neck and arm pain causing an increase in
24 pain medications and decreased functionality.” (AR 837.) Reviewing Dr. Kerr’s reports,
25 Nurse McCollum concluded that Fleming faces “[l]ikely permanent restrictions and
26 limitations.” (*Id.*)
27
28 //

1 Fleming underwent another spine surgery on May 30, 2007. Dr. Hyun W. Bae
2 performed a C4-C7 revision anterior cervical discectomy and fusion. (AR 953–56.) In a
3 follow-up appointment, Dr. Bae noted that although her spine was “completely fused,”
4 Fleming was “still in quite a bit of pain.” (AR 1127.) Shortly after, Dr. Kerr referred her
5 to a pain psychologist to help cope “with chronic pain and disability as well as stress and
6 anxiety management.” (AR 1147, 1183.) There is no indication that this treatment
7 occurred, but Fleming did begin seeing another pain management physician, Dr. Edward
8 Carden. (AR 17.)

9
10 On November 13, 2007, Fleming reported to Unum that despite the surgery, her
11 pain was escalating. (AR 1097–98.) She stated that she was “mostly bedridden,” was
12 incapable of typing or performing computer work, and found it painful to drive, write, or
13 sit up in a chair without neck support for more than one hour. (*Id.*) On November 29,
14 2008, Dr. Kerr completed an Attending Physician Statement (“APS”) that characterized
15 Fleming’s symptoms as “severe pain in neck, shoulders, and upper arms,” coupled with
16 severe headaches, tenderness, and decreased range of motion in her neck. (AR 1099,
17 1101.) Dr. Kerr stated that Fleming’s capability would “probably never” improve and
18 again concluded she was “temporarily, totally disabled from any occupation at this time.”
19 (AR 1101.)

20
21 Unum’s medical professionals continued to note the chronic and long-term nature
22 of Fleming’s condition. Reviewing Dr. Kerr’s assessment, one Unum physician noted on
23 March 26, 2008 that it does “not look good for [Fleming] and this will be chronic severe
24 pain.” (AR 1266.) He also stated that her “complaints of continued severe pain [that]
25 preclude [Fleming] from just sitting at [a] desk is warranted and unlikely to change.”
26 (*Id.*) In a separate review in early 2008, Unum’s Nurse Gallo noted Fleming’s
27 “significant difficulty following her cervical fusion” and constant “severe pain.” (AR
28 1242.) “Without significant improvement in [Fleming’s] condition,” Nurse Gallo

1 concluded, “it seems reasonable to anticipate that she will be permanently disabled.”
2 (*Id.*) In April 2008, Unum notified Fleming that it was extending her benefits based on
3 “the most recent medical information” her doctors provided. (AR 1272–74.) For
4 benefits to continue, however, she would have to submit “additional medical information
5 from time to time and as necessary to determine [her] eligibility.” (*Id.*)
6

7 Fleming continued to send Unum updated medical information. Fleming notified
8 Unum that in October 2008, the Social Security Administration awarded Fleming social
9 security disability benefits (“SSDI”) from June 9, 2006 through October 17, 2008. (AR
10 1314–22.) “[B]ased on a thorough analysis of all the evidence including an analysis of
11 [Fleming’s] pain symptoms,” the Administrative Law Judge found that Fleming was
12 disabled and incapable of “any prolonged sitting, standing, or walking, lifting any
13 appreciable weight, any neck movements, or any appreciable use of her upper
14 extremities.” (AR 1321.) Less than a year later, Unum offered to buy out Fleming’s
15 LTD benefits claim, which it valued at \$600,000. (AR 1401–03.) Unum offered to pay
16 her 65% of that amount. (*Id.*) Fleming declined the offer. (AR 1408.)
17

18 From 2009 to 2013, Fleming’s medical professionals documented many of the
19 same symptoms and continued to prescribe significant levels of narcotics. (AR 1469–
20 75.) In an APS dated May 4, 2009, Dr. Carden noted that Fleming could intermittently
21 sit, occasionally reach above shoulder level, and lift or carry up to ten pounds. (AR
22 1379–80.) However, he stated that he did not expect her capabilities to improve. (*Id.*) In
23 another APS dated September 22, 2011, Dr. Carden noted Fleming could not walk longer
24 than 200 yards, lift more than 5 pounds, or drive longer than 10 miles, rendering her
25 totally disabled. (AR 1472–73.) During this time, Fleming herself reported being
26 “almost completely bed-bound” and incapable of using a computer without neck support.
27 (AR 1469–71.) She reported to Unum that she slept for extended periods of time due to
28 her medications, experienced severe migraines, and could not consider even sedentary

1 work. (AR 1490–92.) Dr. Carden’s October 2013 APS reported worsening symptoms:
2 Fleming could not walk over 100 yards without assistance, lift more than one pound, or
3 drive more than a few miles. (AR 1512–14.) She was 85 to 90% bedridden and
4 incapable of looking down to read or write for more than 10 minutes. (*Id.*) Unum’s
5 annual review for 2013 concluded that Fleming would be “unable to [return to work] at
6 this time due to a significantly decreased functional capacity.” (AR 1519.)
7

8 Between January and October 2014, she was treated with rhizotomies and cervical
9 facet nerve blocks, which accomplished “little to nothing in the way of pain resolution.”
10 (AR 1543, 1552, 2212, 2288, 3071.) In an interview on November 13, 2014, Fleming
11 told Unum that her condition had not improved and that she could not “walk more than
12 30 or 50 feet” or perform most activities without assistance. (AR 1530–31.) In its annual
13 review, Unum concluded that there “have been no changed [sic] in [Fleming’s] overall
14 functional capacity, [and] the APS continues to not[e] ongoing pain levels in the neck,
15 and back.” (AR 1558.) Based on this information, Unum concluded that Fleming
16 “would be unable to maintain the requirements of a gainful occupation.” (*Id.*)
17 Throughout 2015, Fleming continued to see Dr. Kerr on a regular basis and to take her
18 numerous pain medications. (AR 1797–1806, 1817–48.)
19

20 **D. Unum’s Review and Termination of Fleming’s Claim**

21

22 On February 4, 2016, unbeknownst to Fleming, a director in Unum’s Tennessee
23 location initiated a “desk reassignment” of Fleming’s claim, although her claim had
24 previously been handled by Unum’s Maine office. (AR 1596.) According to Unum,
25 Fleming informed an Unum representative in February 2016 that Dr. Carden, one of her
26 pain management specialists, would no longer complete her Disability Status Update
27
28

1 form. (AR 1598.)¹ In March 2016, she submitted an updated APS by Dr. Lynn
2 Granlund, an internist, to support her continued disability status. (AR 1605, 1611–18.)
3 Dr. Granlund, who had started seeing Fleming on October 30, 2015, documented the
4 same issues as Dr. Carden’s prior APS: Fleming could not sit up without pain for over 15
5 minutes, lift over one pound, drive more than a few miles, or look down to read or write
6 for more than 10 minutes. (AR 1615–17.)
7

8 Unum questioned the credibility of Dr. Granlund’s APS because it confirmed Dr.
9 Carden’s findings but Dr. Carden would no longer complete her disability forms. (Dkt.
10 31 [Def.’s Opening Tr. Br.] at 9; *see* AR 1624–25.) Accordingly, Unum sent her claim to
11 “new claim review” for “proof of loss.” (AR 1624.) As part of its review process, Unum
12 conducted a telephone interview with Fleming on April 1, 2016. (AR 1637–39.) She
13 reported being 95% bedridden with nearly daily migraines, limited ability to turn her
14 neck, and an updated MRI documenting issues with two more discs. (*Id.*) She also
15 reported taking, on her iPad, continuing legal education classes for an hour once every
16 few weeks to keep her California State Bar license active. (*Id.*) Strangely, the Unum
17 representative characterized Fleming’s diagnosis as a “sprained neck” and updated her
18 “skills” to include taking MCLE classes. (AR 1647–48.) Unum then designated Fleming
19 for “[return to work] review.” (AR 1649.)
20

21 Unum’s review of Fleming’s claim escalated that summer. On June 19, 2016,
22 Unum’s third-party contractor, G4S Compliance and Investigations, conducted an in-
23 person interview at Fleming’s home. (AR 1740–41, 1933–42.) The interview lasted for
24 three hours and fifty-one minutes, (AR 1933), though her notice stated it would last one
25 to two hours, (AR 1740–41). Because she was in pain, Fleming conducted the majority
26 of the interview while lying in bed. (AR 1934.) The interviewer noted that the few times
27

28 ¹ Fleming states in her reply brief that Dr. Carden would not complete the form because he was no longer her treating physician. (Dkt. 36 at 7.)

1 Fleming got up, she did so “very gingerly and with what appeared to be some effort.”
2 (AR 1935.) The interviewer noted that Fleming’s gait was slow and deliberate, and she
3 displayed difficulty finding words and remembering things while under the influence of
4 her medication. (*Id.*) Fleming also reported that driving causes “extreme discomfort and
5 pain.” (AR 1941.) When her mother is unavailable to assist her, Fleming said she drives
6 herself but does so “crying and screaming.” (*Id.*)
7

8 Unum then, unbeknownst to Fleming, conducted video surveillance of her on July
9 22 and 23, 2016. (AR 1981–92.) The footage from July 22 shows Fleming descending a
10 flight of stairs with a trash bag in her right hand, a small cooler in her left hand, and a
11 small purse over her right shoulder. Fleming lifted the garbage bag and threw it into a
12 dumpster. She walked over to her car and placed the cooler in the backseat, bending at
13 the knees and waist as she did so. She then sat in the driver’s seat and drove in Los
14 Angeles traffic for several hours with her mother in the front seat. After reviewing the
15 surveillance report and Fleming’s medical records, an Unum nurse stated it was “unclear”
16 whether she could work as a full-time attorney due to the “inconsistences” between
17 Fleming’s reported symptoms and the surveillance footage. (AR 2014–18.)
18

19 As part of its review process, Unum also obtained Fleming’s medical records for
20 2016. Looking at her office visits with Dr. Kerr between January 14, 2016 and July 22,
21 2016, Unum found that Dr. Kerr’s notes described Fleming as alert and oriented with
22 normal postural strength and gait. (AR 1779–96, 1969–71, 2006–08.) During that
23 period, however, Dr. Kerr also continued to recommend a substantial regimen of pain
24 medications and documented Fleming’s “chronic pain,” decreased range of motion “in all
25 directions,” and cervical disc disorder. (AR 2212–14, 2268–69.) Unum also noted that
26 an individual in Dr. Kerr’s office claimed that Dr. Kerr was no longer issuing any
27 restrictions or limitations related to Fleming’s work capacity as of that summer. (AR
28

1 2023.) Unum emphasized that Dr. Amit Kohli, Fleming’s endocrinologist, likewise
2 reported that he was not advising as to any restrictions or limitations. (AR 2022.)
3

4 Unum then submitted Fleming’s medical records, surveillance footage, and other
5 information to vocational and medical review. Dr. William B. Fox, board certified in
6 internal medicine, reviewed Fleming’s records and spoke with Dr. Granlund, Fleming’s
7 only treating provider that had recently imposed restrictions and limitations on her
8 activities. During an August 11, 2016 telephone conversation with Dr. Granlund, Dr. Fox
9 pointed out that despite Fleming’s reports of significant pain and limited functional
10 capacity, “recent surveillance showed her ambulating without overt limitations” and
11 “driving for several hours.” (AR 2038, 2027–29.) Dr. Fox claims that Dr. Granlund
12 advised that she had only been treating Fleming since October 30, 2015. (AR 2028.) Dr.
13 Granlund wanted to review the surveillance footage before commenting on her functional
14 capacity. (*Id.*) Although Federal Express confirms that the video and Dr. Fox’s letter
15 summarizing their phone conversation were received, Dr. Granlund never verified Dr.
16 Fox’s characterization of their conversation or commented on the footage. (AR 2035–36,
17 2041.)²
18

19 Unum also referred Fleming’s file to Dr. Barry Gendron, who is board certified in
20 physical medicine and rehabilitation with a subspecialty certification in pain medicine.
21 Dr. Gendron opined that Fleming’s most recent medical records documented neither
22 headaches nor other osteoporotic compression fractures that would impact her ability to
23 work. (AR 2046–47.) Nor was there any recent documentation of driving restrictions,
24 changes in medication management due to medication side effects, or cognitive side
25 effects due to medication. (AR 2049.) Regarding her complaints of cervical spine and
26

27
28 ² The only available summary of Dr. Granlund and Dr. Fox’s phone call is from an August 17, 2016
letter that Dr. Fox wrote summarizing their conversation. (AR 2027–29.) Dr. Fox sent this letter to Dr.
Granlund to review its contents and confirm that it is accurate, but Dr. Granlund never did.

1 low back pain, Dr. Gendron found that her medical records did not indicate diagnostic
2 findings of a condition that would produce the severe levels of pain that she reported.
3 (AR 2047–49.) He concluded, however, that a second opinion is needed “as there is
4 sufficient medical information to form an opinion on impairment and the available
5 clinical data is not in question.” (AR 2051.)

6
7 Unum then referred Fleming’s file to Dr. John F. Coughlin, a specialist in
8 endocrinology, diabetes, and metabolism. (AR 2054–58.) Dr. Coughlin opined that the
9 medical records in Fleming’s file no longer “support [Fleming’s] lack of capacity [] to
10 perform required occupational demands on a full-time basis.” (AR 2056.) He also noted
11 that her activities in the July 22 surveillance footage are inconsistent with the restrictions
12 provided in Dr. Granlund’s March 2016 APS and reported by Fleming. (AR 2056–57.)
13 Based solely on a review of Fleming’s paper file, he concluded that the findings on her
14 physical examinations by treating physicians were “normal” and did not support
15 cognitive difficulties. (AR 2057.)

16
17 Unum terminated Fleming’s claim on September 26, 2016. (AR 2119–27.) Unum
18 sent Fleming a letter describing its review of her medical records and the reasons for its
19 termination. (*Id.*) Based on its review, Unum concluded that Fleming was “no longer
20 precluded from performing the duties of [her] usual occupation.” (AR 2120.)

21
22 **E. Fleming’s Appeal of Unum’s Termination**

23
24 Fleming appealed Unum’s termination on March 31, 2017. (AR 2196–2202.) As
25 part of her appeal, she submitted updated medical records regarding her condition, a letter
26 from Dr. Granlund, and a personal statement addressing the surveillance footage from
27 July 22.

1 Fleming's updated medical records included a February 13, 2017, Functional
2 Capacity Evaluation ("FCE") with Dr. Sebastian Jurado, who specializes in physical
3 therapy. Dr. Jurado concluded that Fleming "is not able to work at any occupational
4 level" in light of her "overall poor activity tolerance due to pain and tachycardia." (AR
5 2395.) He noted that Fleming "occasionally complained of lightheadedness, which
6 correlated with unsteady balance" and "required long breaks in between standing and
7 walking." (*Id.*) Dr. Jurado observed that Fleming had "some difficulty focusing on some
8 of the activities" and "occasionally sobbed." (*Id.*) Dr. Jurado also noted "strength
9 deficits in her bilateral upper and lower extremities" and limited lumbar spine range of
10 motion. (AR 2396.)

11
12 Fleming also submitted the results of a March 9, 2017, Cardiopulmonary Exercise
13 Testing ("CPET") with Christopher R. Snell, Ph.D. (AR 2414–38.) Dr. Snell noted that
14 Fleming demonstrates "cardiopulmonary anomalies, reduced function and delayed
15 recovery post-exertion" that "severely limit her ability to engage in normal activities of
16 daily living and preclude[] employment of even a sedentary/stationary nature." (AR
17 2414.) The CPET noted that she had an "abnormal" recovery time following exercise
18 testing and that after her testing, Fleming "reported feeling 'traumatized' with widespread
19 upper body pain, knee pain, rapid heart rate, and extreme migraine headache." (AR
20 2416–19.) When coupled with Fleming's impaired oxygen consumption, Dr. Snell
21 concluded her "abnormal exercise response . . . points to significant impairment." (*Id.*)
22 Fleming was supposed to return for a second day of testing but was unable to do so.
23 (Dkt. 30 at 11 n.1.) As part of her appeal, she also submitted several articles in support of
24 the effectiveness and validity of CPET in measuring functional deficits. (AR 2201.)

25
26 Fleming also submitted a one-page letter from Dr. Granlund on her behalf. The
27 letter, dated May 5, 2017, noted "no significant improvement [in Fleming's condition] in
28 the past ten years." (AR 3701.) Dr. Granlund reviewed Fleming's FCE with Dr. Jurado

1 and the surveillance footage from July 22. Based on the evidence before her, Dr.
2 Granlund did not “believe [Fleming] is able to return to work.” (*Id.*) Dr. Granlund still
3 had not responded to Dr. Fox or Unum about the surveillance footage and report that
4 Unum provided. (*Id.*)

5
6 Fleming also submitted a personal statement. (AR 3069–70.) She stated that she
7 has “never lied to Unum” and addressed what she perceived as several inaccuracies in
8 Unum’s September 2016 letter denying her claim. (*Id.* [emphasis in original].) Fleming
9 asserted that the trash bag she was throwing away on July 22 was full of empty plastic
10 water bottles and the cooler she was carrying weighed one pound or less. (*Id.*) She also
11 disputed Unum’s contention that she was not experiencing pain while driving. In fact,
12 Fleming claimed she no longer drives at all at the direction of one of her physicians. (*Id.*)

13
14 In response to Fleming’s appeal, Unum submitted her file for a paper, rather than
15 in-person review. Unum’s designated reviewer, Dr. Scott Norris, board certified in
16 family, occupational, and aerospace medicine, issued a report dated July 5, 2017. (AR
17 3149–56.) In that report, he opined that although she has a history of “degenerative
18 changes of the cervical spine,” her “[r]ecords describe inconsistencies between [her]
19 reported severe [symptoms] and the minimal findings on physical examinations, the
20 stable intensity of treatment, and her observed moderate level of activity.” (AR 3155.)
21 As a result, he concluded that Fleming’s “reported severe functional loss exceed[s] the
22 reasonably expected level of impairment based on the clinical data available.” (*Id.*) He
23 also found that her “reported significant cognitive deficits” were unsupported by her
24 medical examinations. (*Id.*)

25
26 Dr. Norris also addressed Fleming’s proffered CPET results and updated medical
27 records. Dr. Norris noted that Dr. Snell’s CPET was based on one day of testing and
28 Fleming’s post-test self-reporting—not any clinical evaluation. (AR 3153–54.) Further,

1 the “specific clinical reasons for test discontinuation were not documented.” (AR 3154.)
2 He also stated that “her relatively poor performance on the CPET” was inconsistent with
3 the July 22 surveillance. (AR 3153.) Because the CPET was conducted nearly six
4 months after Unum terminated her claim, Dr. Norris opined it was “not a time relevant or
5 reliable assessment of [Fleming’s] capacity as of Sep[tember] 2016, since many months
6 of self-limited activity may have reasonably contributed deconditioning, thus affecting
7 the test results.” (*Id.*)

8
9 Dr. Norris likewise dismissed Dr. Kerr’s recent assessments of Fleming. Shortly
10 after Fleming’s claim was terminated, Dr. Kerr, Fleming’s pain management specialist,
11 stated that Fleming was unable to work due to chronic pain stemming from her cervical
12 spine condition. (AR 3155–56.) Dr. Norris stated that Dr. Kerr’s assessment was based
13 on “[m]inimal and nonspecific findings” that were not consistent with any impairment
14 precluding Fleming from “sedentary level activity.” (AR 3151.) Dr. Norris noted that
15 Fleming has offered no “recent imaging or electrodiagnostic studies [consistent with]
16 structural disease” that would preclude such activity. (*Id.*) Rather, Fleming’s
17 “medication regimen [had] remained stable without evidence of significant change or
18 acceleration of intensity” in the extended period leading up to termination of her claim.
19 (*Id.*) Dr. Norris, by a letter dated July 6, 2017, summarized his clinical review to Dr.
20 Kerr and invited her to provide an opinion regarding Fleming’s functional capacity. (AR
21 3120–23.) Dr. Kerr declined to do so. (AR 3163.)

22
23 On August 24, 2017, Unum upheld its termination of Fleming’s claim. (AR 3177–
24 92.) Acknowledging that Fleming’s “cervical spine condition and prior surgeries (2003
25 and 2007) could result in some degree of pain, . . . [Fleming’s] reports of pain far exceed
26 what would be expected for the minimal findings in the records and her ongoing level of
27 treatment.” (AR 3186.) Unum acknowledged that Fleming was awarded SSDI in
28 October 2008 and agrees that she was disabled at that time. (AR 3185.) However, it

1 found that her updated records, which were not available to the ALJ awarding SSDI,
2 revealed a “lack of changes or escalation in treatment as would be expected for
3 worsening pain or impairing symptoms.” (*Id.*)

4 5 **III. LEGAL STANDARD**

6
7 The Court’s review of Unum’s denial of Fleming’s claim is *de novo*. See *Abatie v.*
8 *Alta Health & Life Ins. Co.*, 458 F.3d 955, 936 (9th Cir. 2006).³ Under *de novo* review,
9 the Court “does not give deference to the claim administrator’s decision, but rather
10 determines in the first instance if the claimant has adequately established that he or she is
11 disabled under the terms of the plan.” *Muniz v. Amec Constr. Mgmt. Inc.*, 623 F.3d 1290,
12 1295–96 (9th Cir. 2010). The plaintiff bears the burden of proving entitlement to
13 benefits. *Id.* at 1294–95. This burden remains with the plaintiff even in cases where the
14 insurer initially approves benefits that are later terminated. *Id.* at 1296; *Porco v.*
15 *Prudential Ins. Co. of Am.*, 682 F. Supp. 2d 1057, 1072 (C.D. Cal. 2010). Effectively,
16 “[w]hat the district court is doing in an ERISA benefits denial case is making something
17 akin to a credibility determination about the insurance company’s or plan administrator’s
18 reason for denying coverage under a particular plan and a particular set of medical and
19 other records.” *Abatie*, 458 F. 3d at 969. The Court must “evaluate the persuasiveness of
20 conflicting testimony and decide which is more likely true.” *Kearney v. Standard Ins.*
21 *Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (en banc).

22
23
24 //

25
26 ³ While *de novo* review is the default, the Court will review an administrator’s decision for abuse of
27 discretion “[w]hen a benefit plan gives the administrator discretionary authority to determine eligibility
28 for benefits or to construe the terms of the plan.” See *Bertelsen v. Hartford Life Ins. Co.*, 1 F. Supp. 2d
1060, 1069 (E.D. Cal. 2014). Neither party has contended that the Policy provides Unum with such
discretion. Both Fleming and Unum assert that *de novo* review applies here.

1 IV. ANALYSIS

2
3 Fleming argues that Unum’s grounds for terminating her LTD benefits are
4 “patently contrived” and inconsistent with the “totality of the evidence,” which supports
5 Fleming’s near constant pain and restricted functional capacity. (Dkt. 30 at 15–16.)
6 Unum, by contrast, claims that it had several grounds to terminate Fleming’s claim. First,
7 it asserts that Fleming’s own medical records demonstrated that her symptoms had
8 improved and she was able to return to work as a litigation attorney. (Dkt. 31 at 24–27.)
9 To the extent Fleming’s medical records and her own self-reports documented any pain
10 or limited capacity, Unum claims they are inconsistent with Fleming’s observed activity
11 in the July 22 surveillance footage. (*Id.* at 27.) Next, Unum contends that Fleming’s
12 post-termination medical records—specifically the CPET and Dr. Granlund’s letter from
13 early 2017—are “unreliable” and likewise conflict with the rest of Fleming’s medical
14 records. (*Id.* at 28–29.) Ultimately, Fleming bears the burden of showing entitlement to
15 benefits under the Policy. *See Muniz*, 623 F.3d at 1296.

16
17 The Policy defines “disabled” as “limited from performing the material and
18 substantial duties of your regular occupation due to your sickness or injury.” (AR 82
19 [emphasis excluded].) Regular occupation, in turn, is the “occupation you are routinely
20 performing for your Employer when your disability begins.” (AR 1273, 2124, 3188.)
21 Here, Fleming was working as a litigation attorney when she began to experience
22 recurring neck and back pain in early 2005. Although her physicians increased her
23 narcotics, she still was forced to reduce her workload to four hours per day. (AR 56.)
24 When the pain continued to escalate, she had to stop working entirely. (*Id.*) In awarding
25 her LTD benefits in late 2005, Unum noted that Fleming likely would be unable to
26 resume full-time employment until after she underwent further surgery. (AR 290.) In
27 2007, she had that surgery. (AR 1127.) But it still did not alleviate her pain. (*Id.*)
28 Indeed, Unum, for the next nine years, continued to document Fleming’s “chronic severe

1 pain,” which it deemed “unlikely to change.” (AR 1266, 1242.) In its annual reviews,
2 Unum consistently concluded that Fleming would be unable to return to work in light of
3 her significantly decreased functional capacity. (AR 1519 [2013], 1558 [2014].)

4
5 Unum contends that starting in 2016, Fleming no longer qualified as disabled
6 because her treating physicians’ reports showed that her symptoms had improved and she
7 was able to work. However, Fleming’s medical records before and through Unum’s
8 review of her claim continued to document her chronic pain and serious pain
9 medications. On September 25, 2015, Dr. Kerr prescribed Fleming’s “[m]edication
10 management for intractable chronic pain” and observed that her “pain has been worse this
11 month because of increased activities.” (AR 2265–66.) Fleming was specifically advised
12 to “pace herself to reduce flare ups of pain” and to not lift over 10 pounds. (*Id.*) A
13 month later on October 22, 2015, Dr. Kerr documented Fleming’s neck and arm pain,
14 tenderness in her upper back, and “markedly decreased” range of motion “in all
15 directions.” (AR 2263.) In January 2016, Dr. Kerr noted that her range of motion
16 remained “decreased in all directions.” (AR 2268–69.) In March and May 2016, both
17 Dr. Granlund and Dr. Kerr noted Fleming’s decreased range of motion, chronic neck
18 pain, and serious regimen of pain medications. (AR 2212, 2218–20.) Throughout this
19 period, Dr. Kerr continued to update Fleming’s prescriptions for Percocet
20 (acetaminophen and oxycodone used to treat pain), Opana (oxymorphone used to treat
21 pain), and Topamax (nerve pain medication and anticonvulsant used to treat seizures and
22 migraine headaches), among others. (*See, e.g.*, AR 2259–60; *see* Dkt. 36 at 23–24.)

23
24 Although Unum terminated her benefits in September 2016, both Dr. Granlund and
25 Dr. Kerr continued to document Fleming’s decreased mobility and tenderness. (AR
26 2213–14, 2373–75.) In October 2016, Dr. Kerr noted that while Fleming “has benefits
27 from medication,” her “pain and underlying cervical spine disorder has resulted in her
28 complete disability from work. She is able to [drive] but she would NOT be able to sit or

1 stand at any job for any length of time due to pain.” (AR 2375.)¹ In November 2016, Dr.
2 Kerr noted that Fleming’s pain “is not relieved well with medications” and she
3 experiences “cognitive side effects” from those medications, including difficulty with
4 memory and concentration. (AR 2378.) Dr. Jurado noted in Fleming’s FCE in February
5 2017 that she “is not able to work at any occupational level,” shows limited range of
6 motion, and has difficulty focusing on certain activities. (AR 2395–96.) Fleming’s CPT
7 in March 2017 noted “cardiopulmonary anomalies, reduced function and delayed
8 recovery post-exertion” that “severely limit her ability to engage in normal activities of
9 daily living and preclude[] employment of even a sedentary/stationary nature.” (AR
10 2414.) All of these evaluations were consistent with Unum’s 2016 notes from interviews
11 with Fleming, which documented nearly daily migraines, a lack of mobility, and
12 difficulty with memory. (AR 1637–39 [April 1, 2016 Phone Interview with Fleming],
13 1933–42 [June 19, 2016 In-Person Interview at Fleming’s Home].)

14
15 Despite Fleming’s voluminous file of medical records cataloguing her chronic pain
16 and physical restrictions, Unum and its reviewing physicians chose to assign immense
17 weight to 15 minutes of surveillance footage. Although Fleming can be seen for only
18 brief periods from a distance, each of the individuals Unum designated to review both
19 Fleming’s claim and her appeal characterize this footage as clear proof of the
20 “inconsistencies” between Fleming’s actual functional capacity and her treating
21 physicians’ reports.

22
23 The Court assigns little to no weight to this surveillance footage. First, it is unclear
24 from the record whether Unum’s reviewers actually watched the surveillance footage or
25 only read the accompanying *report* issued by the surveillance company. That report,
26 which selectively describes Fleming’s actions, fails to paint a complete picture. For
27 instance, the report notes that Fleming lifted a trash bag “upwards over her shoulders”
28

1 and “bent at the waist” twice. (AR 1984.)⁴ Indeed, Fleming can be seen throwing a trash
2 bag away and bending near her vehicle to place a cooler in the backseat. But these
3 actions, even in light of Fleming’s medical conditions, are unremarkable. As Fleming
4 informed Unum during her appeal and as can be seen on the footage, the bag of trash
5 contains empty plastic bottles. Lifting the bag over her head was no feat of strength or
6 indication of recovery.

7
8 Further, bending at the waist and leaning into a car do not relate to Fleming’s
9 restrictions and limitations. Fleming suffers from degenerative disc disease of her
10 cervical spine—i.e., her neck. Although she was diagnosed in recent years with adult
11 onset scoliosis, her neck pain is her primary disabling condition. The fact that Fleming
12 took out the trash or bent down to place a one-pound cooler in her car does not render her
13 capable of full-time employment as a litigation attorney. *See Vertigan v. Halter*, 260
14 F.3d 1044, 1050 (9th Cir. 2001) (“This court has repeatedly asserted that the mere fact
15 that a plaintiff has carried on certain daily activities . . . does not in any way detract from
16 her credibility as to her overall disability. One does not need to be ‘utterly incapacitated’
17 in order to be disabled.” (citation omitted)). That footage shows Fleming leaving her
18 apartment once—for a doctor’s appointment—over the course of two days. Both coming
19 and going from her apartment, Fleming walked gingerly down and up a flight of stairs,
20 one step at a time, while holding onto the handrail for support. If anything, the
21 surveillance footage confirms that Fleming spent the majority of her time at home and
22 had to utilize extreme care when leaving her apartment.

23
24 //

25 _____
26 ⁴ The surveillance report also states that Fleming can be seen “turning her head and neck from left to
27 right” while sitting in the driver’s seat. (AR 1984.) Having viewed the actual footage, the Court has
28 difficulty stating with any confidence whether Fleming was turning her neck back and forth. It is
possible that she was shifting her whole body when talking to her mother, and not just her neck. The
low-quality footage, taken from a notable distance, simply cannot capture Fleming’s degree of
movement while in the car, nor the pain she experienced.

1 Unum’s attempt to use the surveillance footage to attack Fleming’s credibility is
2 unpersuasive. Unum makes much of the fact that Fleming had previously stated that her
3 mother drives her to doctor’s appointments when possible because driving is particularly
4 painful. (Dkt. 31 at 25.) But prior to July 22, 2016, Fleming had told Unum—at least
5 twice—that she sometimes has to drive herself to her doctor. (AR 1941, 1953.) Fleming
6 also explained in her personal statement to Unum that her mother was unable to drive
7 Fleming that day due to her own medical conditions. (AR 3069.) Unum’s assertion that
8 Plaintiff has somehow lost credibility because she drove herself to a doctor’s appointment
9 finds little traction with the Court.⁵
10

11 Even if the surveillance footage was somehow inconsistent with Fleming’s medical
12 records and self-reported pain, the Ninth Circuit is understandably skeptical of insurers’
13 reliance on brief surveillance footage as proof of a claimant’s capacity to work full-time.
14 *See Grosz Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1162 n.36 (9th Cir.
15 2001) (affirming district court’s rejection of video surveillance as proof of work capacity
16 and noting that it “did not shed much light on whether she could function full time as a
17 trial attorney”); *see also Wagner v. Am. United Life Ins. Co.*, 731 Fed. App’x 495, 497–
18 98 (6th Cir. 2018) (“[T]he surveillance video captured [plaintiff] for 20 minutes over a
19 two-hour period, and only for a few minutes at a time. It is weak evidence of anything
20 beyond those minutes, given that (according to [plaintiff] and his doctors) his pain would
21 come and go. And [plaintiff’s] ability to live alone and to engage in sporadic activities
22 says little about his ability to go to work.”). The Court sees no reason to credit Unum’s
23 15 minutes of surveillance footage from one day here, especially when it is contradicted
24 by over ten years of medical records.
25

26 ⁵ Fleming’s own doctors have confirmed that she should not be driving in light of her serious pain
27 medications. Indeed, Dr. Granlund, her primary treating physician, informed the DMV to have her
28 license suspended after he viewed the surveillance footage. (AR 3069–70.) Dr. Kerr, Fleming’s pain
management physician since at least June 2006, also stated she will report Fleming to the DMV if she
continues to drive when her cognition is impaired by pain or medication. (AR 2379–81.)

1 Without the surveillance footage, Unum’s determination that Fleming no longer
2 qualified as disabled rested entirely on cherry-picked statements from Fleming’s
3 physicians and a paper-only review of Fleming’s claim. First, Unum asserts that
4 according to a person in Dr. Kerr’s office, Dr. Kerr was “not advising” as to any work-
5 capacity restrictions or limitations. (Dkt. 31 at 11.) However, as noted above, the notes
6 that were actually written by Dr. Kerr consistently confirmed Fleming’s inability to lift
7 more than 10 pounds, her tenderness and decreased range of motion, and chronic pain.
8 Next, Unum argues that Dr. Kohli, Plaintiff’s endocrinologist, was not issuing any
9 restrictions and limitations. (*Id.* at 25.) But Plaintiff visited Dr. Kohli to determine the
10 cause of her weight gain—not for any conditions related to her disability. (AR 2057.)
11 Finally, Unum emphasizes that in 2016, Dr. Carden would no longer complete Fleming’s
12 disability forms. (Dkt. 31 at 25.) Dr. Carden was not completing her forms because she
13 stopped seeing him. Accordingly, Dr. Granlund, Fleming’s new treating physician,
14 began completing her forms. (AR 1615–17.) As noted above, Dr. Granlund, like Dr.
15 Kerr, confirmed Fleming’s symptoms after comprehensive in-person visits, a review of
16 her medications, and lab testing. (AR 2218–20, 2226–31.)

17
18 Unum’s paper-only review of Fleming’s claim also fails to support Unum’s
19 termination of benefits. Each reviewer’s conclusions were largely dependent on the
20 purported “inconsistencies” between the 15 minutes of surveillance footage and Unum’s
21 file of over a decade of interview notes and medical records. The first reviewer, Dr. Fox,
22 emphasized that Fleming’s activity on the footage contradicted her reports of significant
23 pain and limited functional capacity. (AR 2038, 2027–29.) When he attempted to get
24 Dr. Granlund to comment on this, she refused to do so before watching the footage. At
25 no point did she corroborate Dr. Fox’s account of events. Unum’s next reviewer, Dr.
26 Gendron, stated that Fleming’s medical records did not indicate findings of a condition
27 that would produce the levels of pain Fleming reported, but he did not state she had
28 functional capacity sufficient for employment. Indeed, he even concluded that a second

1 opinion was needed because there was “sufficient medical information to form an opinion
2 on impairment and the available clinical data is not in question.” (AR 2051.) Unum’s
3 next reviewer, Dr. Coughlin, is a specialist in endocrinology, diabetes, and metabolism—
4 none of which relate to the medical conditions forming the basis for her disability. (AR
5 2054–58.) And in any event, his conclusions are again largely premised on the
6 surveillance footage that the Court has already deemed unconvincing. (AR 2056–57.)
7

8 Unum’s findings on appeal are likewise unpersuasive. Unum submitted her appeal
9 for a paper-only review with Dr. Norris, who is board certified in family, occupational,
10 and aerospace medicine. Under ERISA, a reviewing physician must have “appropriate
11 training and experience in the field of medicine involved in the medical judgment.” *See*
12 29 C.F.R. § 2560.503-1(h)(3)(iii). Unum has not explained how Dr. Norris had “training
13 and experience” in the fields of medicine—particularly pain management—involved in
14 the medical judgment at issue here. *See Kunin v. Benefit Tr. Life Ins. Co.*, 910 F.2d 534,
15 535 (9th Cir. 1990) (finding that the administrator erred in relying on the opinion of a
16 doctor who had no experience treating autism). Yet Dr. Norris summarily concluded that
17 Fleming’s self-reported pain and lack of capacity were inconsistent with the “minimal
18 findings on physical examinations . . . and her observed moderate level of activity” in the
19 surveillance footage. (AR 3155.) While Unum is not required to send a claimant to an
20 in-person examination, the Court declines to credit Dr. Norris’s opinion over those of the
21 medical evaluators who consistently examined Fleming in person. *See Montour v.*
22 *Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 630 (9th Cir. 2009) (noting that “factors that
23 frequently arise in the ERISA context include . . . whether the plan administrator
24 subjected the claimant to an in-person medical evaluation or relied instead on a paper
25 review of the claimant’s existing medical records”).
26

27 Here, the findings of pain and limited functional capacity in Fleming’s medical
28 records are anything but “minimal.” As Dr. Norris acknowledged, Fleming “has a

1 [history] of degenerative changes of the cervical spine as demonstrated on remote
2 imaging studies,” and her “known cervical spine disease and prior surgeries could
3 reasonably cause some degree of reported pain.” (AR 3151.) The Administrative Record
4 contains thousands of pages documenting that pain. Over a period of almost eleven
5 years, Fleming underwent two back surgeries, nearly weekly medical appointments, and
6 dozens of cervical facet rhizotomies and other painful injections. Her self-reports of pain
7 and the pain witnessed by Unum’s own interviewers have been corroborated by medical
8 imaging and the opinions of her treating physicians. One day of surveillance footage and
9 Unum’s physicians’ paper-only review of Fleming’s claim do not overcome the
10 overwhelming evidence that Fleming was limited from performing the “material and
11 substantial duties of [her] regular occupation.” (See AR 82 [emphasis omitted].)

12
13 **V. CONCLUSION**

14
15 The Court finds in favor of Fleming. She has met her burden of showing she was
16 entitled to benefits under the Policy when Unum terminated those benefits on September
17 23, 2016. Counsel for Fleming shall submit a proposed judgment consistent with this
18 memorandum of decision by November 26, 2018.

19
20
21
22 DATED: November 20, 2018



23
24 CORMAC J. CARNEY

25 UNITED STATES DISTRICT JUDGE
26
27
28