UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHERI PARR,

Plaintiff,

v.

FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY,

Defendant.

Case No. 15-cv-01868-HSG

ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT

Re: Dkt. No. 41

On April 14, 2015, Plaintiff Cheri Parr filed her complaint alleging five causes of action against Defendant First Reliance Standard Life Insurance Company.[1] Dkt. No. 1 ("Compl."). On December 31, 2015, the parties filed a stipulation for dismissal of Plaintiff's Second, Fourth and Fifth Causes of Action, Dkt. No. 31, which was granted by the Court on January 4, 2016, Dkt. No. 32. Pending before the Court is Plaintiff's motion for judgment pursuant to Federal Rule of Civil Procedure 52. Dkt. No. 41 ("Mot."). Briefing on Plaintiff's motion for judgment was completed on April 21, 2016. *See* Dkt. No. 46 ("Opp."); Dkt. No. 49 ("Reply"). Defendant subsequently filed the administrative record under seal, including over 3,900 pages of documents and several hours of video footage. *See* Dkt. Nos. 50-60 (administrative record); *see also* Dkt. No. 47 (order granting stipulated motion to file administrative record under seal). On June 21, 2016, the Court took Plaintiff's motion for judgment under submission. Dkt. No. 61.[2]

Although Plaintiff's motion originally sought judgment on both her First and Third Causes of Action, the Court subsequently granted Defendant's motion for partial summary judgment as to

[1] Plaintiff's complaint also listed twenty unnamed defendants. *See* Compl. ¶ 5 (listing "Does 1 through 20" as defendants).

[2] The Court finds that this matter is appropriate for disposition without oral argument. *See* Civil L.R. 7-1(b).

Plaintiff's Third Cause of Action. Dkt. No. 62 (issued June 23, 2016). Therefore, Plaintiff's motion for judgment has been narrowed to her First Cause of Action, which seeks recovery of employee long-term disability benefits under the civil enforcement provision of the Employee Retirement Income Security Act of 1974 ("ERISA"). *See* 29 U.S.C. § 1132(a)(1)(B) (2012); *see also* Compl. ¶¶ 28-35.

Having carefully considered the papers, the administrative record, and the relevant legal authorities, the Court hereby **GRANTS** Plaintiff's motion for judgment.

I. FINDINGS OF FACT[3]

Because the administrative record is voluminous, the Court focuses on the key facts upon which it bases its conclusions.

A. Plaintiff's Medical History

Plaintiff is 54 years old. *See* AR 515 (stating date of birth). She was diagnosed with Ehlers-Danlos Syndrome ("EDS"), a genetic tissue disorder, on May 9, 2013. AR 2570, 3859, 3875-78. She has a long and complicated history of medical problems going back to childhood. *See, e.g.*, AR 3850 (summarizing surgery and major treatments since 1975); AR 2790-91 (portion of letter from Plaintiff's mother, a registered nurse, discussing Plaintiff's medical problems as a child). For example, she had already had at least a dozen knee surgeries by the age of 45. AR 1647. Plaintiff's medical issues substantially worsened after November 13, 2010, when she was seriously injured during a car accident in which her vehicle went over the guard rail, flipped twice, and landed upside down. *See* AR 1555-89, 2208, 3859. Plaintiff suffers from extreme joint instability, chronic musculoskeletal pain, degenerative tissue disease, recurrent migraines, nerve pain, difficulty with memory and concentration, fatigue, and tachycardia. AR 493.

The following list summarizes a number of key events in Plaintiff's medical history, starting approximately five years prior to Plaintiff's car accident:

- **2005** - degenerative patellofemoral arthritis in both knees with unstable patellae post

[3] To the extent that any findings of fact are included in the Conclusions of Law section, they shall be deemed findings of fact, and to the extent that any conclusions of law are included in the Findings of Fact section, they shall be deemed conclusions of law.

multiple knee reconstructive surgeries (AR 1705); chronic anemia (AR 1705); intermittent solid food dysphagia (AR 1698); partial ventral herniation (AR 1698); carpal tunnel syndrome (AR 1698);

- **2007** - knee surgeries, right patella replacement (AR 1672; 1647); dysfunctional uterine bleeding (AR 1673); resection of uterine polyps (AR 1673);
- **2008** - severe low back pain with pain radiating down rear right leg down to right ankle (AR 1647); lumbar epidural for low back pain (AR 1647); sciatica flare-up prevented walking, treated with epidural (AR 1886); admitted to emergency room for migraine headache (AR 1885); re-onset of right-sided sciatica (AR 1647); bilateral hip bursitis; cortisone injection for right hip pain (AR 1647); hiatal hernia with reflux (AR 1648); heart murmur (AR 1649); bruising easily (AR 1648); deep vein thrombosis on right leg (AR 1648); cortisone and/or lidocaine injection in hips and back (AR 1642);
- **2009** - At least 3 epidural injections (AR 1882);
- **2010** - lumbar epidural steroid injection (AR 1610); back pain getting worse and sciatica traveling down right leg; difficulty walking (AR 1607-08);
- **November 13, 2010 Car Accident**: 3 rib fractures; concussion; aggravation of left knee misalignment; possible dislocations of shoulder as well as left knee and hip; cervical sprain; knee osteoarthritis; disk degeneration; pain in the neck, lower back, left knee, and left shoulder (AR 1555-89, 2152, 2208).
- **2011** - cracked 2 ribs when turning over in bed; began to experience radiation of pain down right arm, severe enough to preclude use of arm (AR 2206-07); left knee got worse; whole alignment abnormal with possible loose body within knee; significant arthritis in joint; using knee immobilizer; soft tissue infection in left buttock (AR 2204-05); bedridden for 4 days after trip (AR 2411); right knee got worse; several dislocations of right knee; experienced difficulty getting up from sitting position and in restroom needed someone to pull her up (AR 2410); left knee replacement; chronic pain syndrome; tachycardia (AR 1523-24, 1543-1545); left hip irritation; trip to ER—banged hip against cabinet and bruising and bleeding led to abscess infected by viridans streptococci (AR 1523-24; 2402);

hives (AR 1457); snapping of iliotibial band (AR 2396); multiple epidurals for back pain (AR 1801, 2152-54); sciatica and back pain returned (AR 1512); right knee replacement (AR 1507-08);

- **2012** - pain on left side of face, trip to ER; diagnosed as Bell's Palsy (AR 1453, 1501-02); tennis elbow (AR 1492); epidural for back pain (AR 2156); Achilles bursitis tendonitis (AR 2907); pain in right periscapular rhomboid region; cervical radiculopathy (AR 1474); ulnar neuritis (AR 1460);
- **2013** - lesion of ulnar nerve (AR 1842); torn ligaments in hand (AR 3812-13); aggravation of lower back problems with observed spasms (AR 3811); issues with skin healing; keloid scarring; blister-like lesions near back of throat; skin peeling off gums; Raynaud's disease; **EDS diagnosis** (AR 3815-17); torn cartilage in hand and shoulder injury (AR 1832); severe gingivitis (27 cavities); knee pain; bursitis tendonitis (AR 3809; 3859-60);
- **2014** - left ankle pain from twisting injury; swelling and tenderness over ligaments (AR 2954-55); bacterial pharyngitis; abdominal wall hernia (AR 3770-72); left ankle fracture and fusing of small toes (AR 1784); bedridden for days; taking 2-3 hours each morning to get fingers moving; rheumatoid arthritis in lungs (AR 1813); right ankle pain (peroneal tendinitis) in the peroneal tendon area; swelling of both feet; neuropathy with burning on bottom of foot (AR 2961-62); right arm sprain (AR 1781); swelling of right foot with more tenderness of Achilles tendon; aggravation of existing cervical instability from EDS, with burning pain in neck (AR 2967-68); not healing from cuts and incisions (AR 2731).

B. The Disability Policy

Plaintiff is a former marketing and sales executive with approximately twenty years of experience. AR 905. Before applying for disability benefits, she was West Coast Regional Sales Director for Monster Media ("Monster"). *Id.* As a Monster employee, Plaintiff participated in a group long-term disability insurance plan that was governed by ERISA, sponsored by Monster Worldwide, Inc., and insured by Defendant. *See* AR 1. Under the policy, "Totally Disabled" or "Total Disability" mean, that as a result of an Injury or Sickness:

> (1) during the Elimination Period and for the first 24 months for

> which a Monthly Benefit is payable, an Insured cannot perform the material duties of his/her Regular Occupation; . . .
> (2) after a Monthly Benefit has been paid for 24 months, an Insured cannot perform the material duties of Any Occupation.

AR 12. In addition, "the Insured [is] Totally Disabled if due to an Injury or Sickness he or she is capable of only performing the material duties on a part-time basis or part of the material duties on a Full-time basis." *Id.* "Full time" is defined under the policy as working at least 21 hours per week. AR 11. "Any Occupation" is defined as "an occupation normally performed in the national economy for which an Insured is reasonably suited based upon his/her education, training or experience." *Id.* "Regular Occupation" is defined as "the occupation the Insured is routinely performing when Total Disability begins . . . look[ing] at the Insured's occupation as it is normally performed in the national economy, and not the unique duties performed for a specific employer or a specific locale." AR 12.

C. Plaintiff's Claim for Disability Benefits

i. Defendant Awarded Plaintiff Disability Benefits under the "Regular Occupation" Standard

On October 14, 2011, Plaintiff submitted a claim for disability benefits under Defendant's policy. AR 33-34. On October 17, 2011, Defendant's vocational expert concluded that Plaintiff's regular occupation was "Manager, Sales" (DOT Code 163.167-018), a "sedentary" occupation. AR 665-67. On November 28, 2011, Defendant approved payment of benefits.[4] AR 753-54. The approval letter stated that her disability began on April 9, 2011, her 180-day elimination period was satisfied on October 6, 2011, and she would continue to receive benefits on the sixth day of each month so long as she remained "Totally Disabled" under the group policy. AR 753. Thus, under the policy, Plaintiff's disability status was assessed under the "regular occupation" standard from October 6, 2011 to October 6, 2013, and under the "any occupation" standard thereafter. *See* AR 12, 585. Defendant's in-house nursing staff periodically reviewed Plaintiff's updated medical records and repeatedly determined that her ongoing "Total Disability" was fully supported under

[4] Matrix Absence Management administrated the plan for Defendant. *See, e.g.*, AR 753-54. This order uses the term "Defendant" regardless of whether Reliance took an action directly or through its claims administrator.

the "regular occupation" standard. AR 220-23 (medical reviews dating from November 3, 2011 to August 29, 2013, the last of which concluded that the record supported a "less than sedentary" level of function through October 6, 2013).

ii. Defendant Conducted Surveillance of Plaintiff

Through a third-party vendor, Defendant conducted surveillance of Plaintiff on June 10, 11, and 14, 2012. AR 2171-82 (surveillance report). No activity by Plaintiff was observed at her residence between 9:40am and 4:40pm on June 10, 2012, though two cars were parked at her residence. AR 2174.

On June 11, 2012, no activity by Plaintiff was observed between 6:30am and 9:12am, when she briefly came out to the driveway, before returning to her residence. *Id.* Sometime after 10:50am, Plaintiff walked to the base of the driveway and appeared to put some items in her car. *Id.* Plaintiff drove approximately ten miles from her residence to Half Moon Bay, California. *Id.* After parking, Plaintiff walked one block to a hair salon, where she stayed for approximately 75 minutes. *Id.* Plaintiff walked back to her car, and was not wearing visible braces or support devices, though she was limping. *Id.* Plaintiff then drove the ten miles back home and entered her residence. *Id.* Approximately thirty minutes later, Plaintiff exited her residence with a man in his late twenties, and drove with him to San Mateo, California, approximately 25 miles away. *Id.* Plaintiff entered a small shopping center. *Id.* The investigator lost sight of Plaintiff. *Id.* At 2:40pm, Plaintiff returned to her vehicle and drove away. *Id.* The investigator lost sight of her vehicle and was unable to locate her thereafter, terminating his surveillance at 3:30pm. *Id.*

Three days later, on June 14, 2012, surveillance was conducted from 11:00am to 5:10pm at Plaintiff's residence. AR 2175. At approximately 2:30pm, Plaintiff exited the residence and walked to a vehicle parked next to her driveway. *Id.* She was accompanied by the same man in his late twenties who had accompanied her on June 11. *Id.* She put her purse in the rear seat of the vehicle and got in the driver's seat. *Id.* Shortly after she drove away, the investigator lost sight of her vehicle. *Id.* The investigator returned to Plaintiff's residence at 5:00pm, did not observe any vehicles in front of the residence, and terminated surveillance at 5:10pm. *Id.*

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iii. Plaintiff Was Denied Social Security Disability Income Benefits

Although Plaintiff applied for Social Security Disability Income ("SSDI") benefits, her claim was denied on August 21, 2012, based upon medical reports submitted in July 2012 by ten physicians. AR 3650. Plaintiff had asserted that she was unable to work because of the following conditions: "Sciatic pain of lumbar spine; Severe Anemia; Congenital Joint condition – spontaneous dislocation; Full joint replacement both knees; Arthritis in all joints; Intermittent Migraines; Carpal Tunnel both hands." *Id.* The report recognized that she was "experiencing back problems, a joint condition, knee problems, arthritis, and Carpal Tunnel Syndrome," but stated that her "condition [was] not severe enough to keep [her] from working." *Id.* Although it is not entirely clear from the administrative record whether Plaintiff ever appealed the denial of her SSDI application, as of April 15, 2014, she had not received any SSDI benefits and had no pending claims before the Social Security Administration. AR 583.

iv. Defendant Terminated Plaintiff's Disability Benefits under the "Any Occupation" Standard

On April 11, 2013, Defendant notified Plaintiff that, as of October 6, 2013, the definition of disability would change from the "regular occupation" standard to the "any occupation" standard, and that Defendant would begin evaluating whether she continued to qualify for benefits under the latter standard, based upon updated information regarding her medical condition, education, training, and experience. AR 829-30.

On November 12, 2013—just over a month after the plan's disability definition changed—Defendant's in-house nursing staff again concluded that "[m]edicals continue to support lack of consistent work function." AR 224. In reaching that conclusion, the nurse described Plaintiff's medical history and noted that her "extensive, detailed, typed activities of daily living form details her symptoms of chronic pain with narcotic dependence (oxycodone up to 10x/day) and reported impairing side effects." *Id.* The nurse also mentioned that Plaintiff was "experiencing sleep impairment and working with a therapist for PTSD issues with memory problems." *Id.* In addition, the nurse noted that "[r]ecords on file to 9/13 reveal up to thirty reported surgeries on joints and hernia repairs, migraine headaches on Demerol and oxycodone." *Id.*

As part of its review of Plaintiff's qualification for disability benefits under the "any occupation" standard, Defendant obtained an "independent medical evaluation" ("IME") from Dr. Lakshmi Madireddi, a specialist in physical medicine and rehabilitation. AR 384-402; *see also* AR 225 (November 25, 2013 review by in-house nursing staff, noting that "[a]dditional information on file suggests a higher level of function" and that "a PM&R IME will be scheduled"). Dr. Madireddi reported having spent 4.5 hours reviewing Plaintiff's medical records and 40 minutes examining Plaintiff on January 8, 2014. AR 401.

Dr. Madireddi's 18-page report listed and then summarized Plaintiff's medical records; described her medical, surgical, and social history; and stated Dr. Madireddi's diagnostic impressions, diagnoses, and conclusions. AR 384-402. Dr. Madireddi concluded that Plaintiff "would likely be able to perform Sedentary work with the ability to change body positions." AR 401. She also determined that the following "restrictions and limitations" were "supported":

> At this time, the claimant has the ability to sit frequently, stand and walk occasionally, bend at the waist occasionally, no squatting at the knees, rare stair climbing, no ladder climbing, no kneeling, no crawling. She can occasionally use foot controls. She can occasionally drive as demonstrated, however she is on narcotics and care should be taken with driving. I believe she can lift sedentary 10 pounds occasionally. At this time, she can perform frequent simple grasping, reaching above mid-chest and at waist. She can frequently perform fine manipulation, feeling and tactile sensation essentially appears to be intact. Pushing and pulling to [sic] occasionally or less with both upper extremities. This claimant will have difficulty with traveling and carrying heavy suitcases.

AR 401. Dr. Madireddi expected these restrictions and limitations to be "permanent" and that improvement was "unlikely"—with the caveat that Plaintiff might experience "less discomfort in her lower extremities" if she "los[t] up 70 pounds." *Id.* In an addendum to her report, Dr. Madireddi stated that Plaintiff had "consistent, full time work function at sedentary exertion noted on physical capacity form." *See* AR 497 (quoting addendum) (italics omitted).

Plaintiff contended in a declaration that Dr. Madireddi's report contained "numerous misstatements." AR 2776. Specifically, she criticized the report on grounds including the following: (1) Plaintiff experienced pain when driving long distances, and it took nearly two hours to drive from her home to Dr. Madireddi's office; (2) Dr. Madireddi examined her for only 15 minutes; (3) Dr. Madireddi stated that she did not really believe that EDS was "real"; (4) Plaintiff

experienced "many memory issues" when attempting to recall dates during the examination, in contrast to the characterization in the report; (5) Dr. Madireddi incorrectly reported that Plaintiff had no problems with childbirth, when Plaintiff actually had two miscarriages and two of her children died before reaching the age of six months; (6) instead of having dental trouble at the age of 22, Plaintiff actually had 22 cavities at the age of 51; (7) Plaintiff was "diagnosed with Marfan's syndrome, not Marchand syndrome"; (8) Dr. Madireddi stated that she did "not know if another abdominal hernia will be required," even though Plaintiff had reported that she had "one or two hernias that would normally require surgery" but that her doctors had recommend that she forgo surgery "because [her] EDS could cause severe complications"; (9) Plaintiff did not have allergies, and could not put her bra on by herself; (10) Plaintiff had difficulty using computers and did not work on the very light laptop that she brought to the examination, which she used to watch movies; (11) Dr. Madireddi misstated that Plaintiff had no surgeries following her 2010 car accident, when in fact, she had bilateral knee replacement surgeries; (12) Dr. Madireddi failed to measure Plaintiff and misstated her weight and height, as Plaintiff was 5'8" (not 5'10") tall and weighed 245 (not 229) pounds; (13) Plaintiff's hips were uncomfortable during the examination; (14) Plaintiff was not consulting with a therapist for PTSD; (15) Plaintiff wore braces on a daily basis to support her back, knees, wrists, and fingers, and she had stated during the examination that she had taken her braces off in the car to save time. AR 2775-77.

On January 24, 2014, Dr. Michael Siegel, a neurologist who had been treating Plaintiff for over 15 years, submitted a letter in support of Plaintiff's disability claim. AR 493. Based upon physical and neurological examinations conducted by him and by other physicians, Plaintiff's medical history, and imaging, Dr. Siegel opined that Plaintiff was "limited in daily activities and unable to work on a sustained basis." *Id.* He described her symptoms as "includ[ing] extreme joint instability, chronic musculoskeletal pain, degenerative tissue disease, recurrent migraines, nerve pain, difficulty with memory and concentration, fatigue, and tachycardia." *Id.* He stated that she was on "round the clock narcotics" (including Oxycodone and morphine sulfate) and received quarterly steroid injections. *Id.* Even so, Plaintiff reported "prolonged periods" of pain measured as high as 8 out of 10. Dr. Siegel concluded as follows:

> In my opinion, Mrs. Parr is unable to resume any type of gainful employment due to both physical impairment and pain medication use at levels that interfere with critical thinking and decision-making. In addition, the burden of regular work will likely make her condition worse, accelerating the deterioration of joints. EDS is a progressive disorder, and while degeneration can be delayed with treatment, there is no cure.

Id.

On January 27, 2014, Dr. Richard Florio, an orthopedic and reconstructive surgeon whose medical office had been treating Plaintiff for over 10 years, submitted a letter in support of Plaintiff's disability claim. AR 495-96. After describing Plaintiff's EDS diagnosis, treatment, and recent medical history, Dr. Florio concluded as follows:

> At this time, in my best professional judgment, Ms. Parr continues to be totally disabled and unable to do any substantial gainful employment. Not only is Mrs. Parr unable to work, but to do so would most likely cause further injury to her joints and exacerbate her condition. In addition, Ms. Parr is currently on round the clock narcotics for pain management (Oxycode 30 mg every 3 hours, Morphine Sulfate 20mg/ml - 2x day 2.5ml, and others) that would impair decision making abilities in a job setting. There is no cure for Ehlers-Danlos [Syndrome] and Ms. Parr's condition will only deteriorate further over time.

AR 494-95.

Defendant also sought a vocational evaluation of Plaintiff. AR 497-512 (dated February 6, 2014). To identify the "restrictions and limitations" supported by Plaintiff's medical condition, the vocational evaluation relied exclusively on the medical evaluation of Dr. Madireddi. AR 497. The vocational evaluation also considered Plaintiff's education, training, and work history. AR 497-98. The vocational evaluation concluded that Plaintiff was qualified to perform at least the following five occupations: Director, Community Organization; Management Analyst; Manager, Department; Manager, Sales; Market-Research Analyst I. AR 499-500. The vocational evaluation noted that "additional titles" were available on "the DOT match list." AR 500. That list included the following five additional occupations: Contact Representative; Field Representative; Manager, Market; Order Department Supervisor; and Personnel Recruiter. AR 501. All ten of the occupations above were classified as sedentary.[5] AR 499-501. The evaluation

[5] "Sedentary" was defined as follows:

> Exerting up to 10 pounds of force occasionally and/or a negligible

also classified Plaintiff's former position at Monster as sedentary. *See* AR 499 (listing the title of Plaintiff's position in 2010-11 as "Manager, Sales" (DOT Code 163.167-018)); AR 500 (classifying that exact same position and code as sedentary occupation).

Dr. Michael Stevens, a rheumatologist who had been treating Plaintiff since May 2013 and diagnosed her with EDS, filed a report regarding her disability claim on March 3, 2014. AR 515-16. He stated that her joints were susceptible to injury, that she must not use her hands or fingers repetitively, and that that she must "avoid activities at work that involve repetitive movements and/or lifting > 10 lbs repetitively and/or prolonged postures." AR 515. Dr. Stevens stated that during a typical 8-hour workday Plaintiff could "occasionally" sit, stand, walk, bend/twist, squat, kneel, crouch, climb stars, reach, or lift 10 pounds or less. AR 516. Dr. Stevens opined that Plaintiff could drive a vehicle "occasionally" if it had a manual transmission and "frequently" if it had an automatic transmission. *Id.* The report also stated that Plaintiff was using a variety of medications: "1% Voltaren gel; Omneprazole; Demerol; Oxycodone (PN); Sumatriptan; MVI's." AR 515.

On March 14, 2014, Defendant terminated Plaintiff's disability benefits on the ground that she was not "totally disabled" under the "any occupation" standard. *See* AR 583-89. In reaching that determination, Defendant reviewed "all of the information in [Plaintiff's] claim file, including (but not limited to) the information provided by Drs. Lakshmi N. Madireddi, Michael Siegel, Richard Florio and Michael Stevens." AR 585. In addition, Defendant relied on the vocational evaluation. AR 587.

v. On Appeal, Defendant Affirmed the Denial of Plaintiff's Disability Benefits

Plaintiff appealed Defendant's claim decision on September 29, 2014. AR 2711-883. Plaintiff made several arguments in her appeal. First, she argued that Defendant improperly ignored the "consistent and reliable" medical evidence showing that she was disabled, focusing on

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> amount of force frequently to lift, Carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

AR 500.

Dr. Madireddi's report while ignoring other evidence from the claim file, such as evidence from Plaintiff's treating physicians or clinical studies regarding EDS. AR 2715-21. Second, Plaintiff asserted that Defendant improperly relied on Dr. Madireddi's report, despite the report containing "numerous misstatements," Dr. Madireddi having exhibited bias in other disability cases, Dr. Madireddi's conclusion that Plaintiff was capable of sedentary work being inconsistent with the medical literature regarding EDS-related chronic pain, and Dr. Madireddi having "failed to address the cognitive side effects that [Plaintiff]'s powerful pain medications would have on her ability to focus on a full-time job, or even to commute." AR 2721-24. Third, Plaintiff contended that Defendant "improperly concluded" that she was able to perform "any 'sedentary' position," when her treating physicians had "explicitly prohibited her from returning to work." AR 2724. Relatedly, Plaintiff criticized the vocational evaluation's conclusion that despite being "disabled from her position as 'Sales Director' of Monster," she could somehow still "work full time as a 'Manager, Sales' in another profession." *Id.* Plaintiff contended that, in reality, her "severe pain," "joint instability," "inability to stand or sit," and treatment with "heavy narcotics" would prevent her from "perform[ing] any job on a full-time basis." AR 2725. Fourth, Plaintiff asserted that Defendant improperly relied on three days of surveillance showing only that she ran "infrequent errands" on two isolated days, and an online investigation regarding Plaintiff that contained numerous factual errors. AR 2726. Fifth, Plaintiff asserted that Defendant breached its fiduciary duty to act "solely in the interests" of the claimant, instead exhibiting bias by breaching her private Facebook account, conducting the vocational evaluation under circumstances that violated its own claim procedures manual, and incorrectly informing her that she was not permitted to be represented by counsel on appeal. AR 2726-27.

Plaintiff attached 17 exhibits to her appeal, including new medical statements by Dr. Siegel and Dr. Florio; three scientific articles regarding EDS; medical records from Dr. Stevens, Dr. Siegel, and Dr. Florio; declarations by Plaintiff and her husband, Barry Parr; ten statements by friends and family; the transcript from a 2007 deposition of Dr. Madireddi; two federal district court opinions; photos of Plaintiff; and a fax from Plaintiff to the Defendant in which she set forth complaints regarding her medical evaluation by Dr. Madireddi. AR 2728-883.

Of particular note are the statements from two of Plaintiff's treating physicians. Dr. Siegel, in a letter dated September 23, 2014, stated that he had reviewed Dr. Madireddi's report and that he disagreed with her conclusion that Plaintiff was able to perform sedentary work. AR 2731. Dr. Siegel reiterated that he had treated Plaintiff for over fifteen years and that he was familiar with her medical conditions and the pain caused by them, and he briefly summarized Plaintiff's medical history. *Id.* He then described her current condition and limitations as follows:

> [Plaintiff] will have to manage the pain caused by Ehler[s]-Danlos [Syndrome] for the rest of her life. She requires supportive bracing of her joints, and has been using a wheelchair for all activities requiring more than five minutes of walking. Currently, Ms. Parr is taking 10 mg of Oxycodone four times per day, 50 mg/day of Fentanyl (as far reduced in the past six months as her pain management expert believes is reasonable), and Ketorolac and Imitrex nasal sprays for pain from migraine headaches. Even when she regularly treats with these medications, Ms. Parr reports high levels of pain, and if she attempts any effort for more than two hours, she is often bed-ridden for days before she can recover. Her condition precludes her from returning to any job, sedentary or otherwise. Although Dr. Madireddi opines that Ms. Parr can change her "body positions" during the day, I believe that would not substantially alleviate Ms. Parr's pain. Further injury to her joints could be fatal: her surgeon will have difficulty successfully suturing incisions.
>
> To summarize, it is essential that Ms. Parr avoid further stress or damage to her joints in order to minimize complications from her Ehlers-Danlos Syndrome. I continue to support her ongoing total disability in light of her known diagnosis, clinical findings, and symptoms.

Id.

Dr. Florio stated in a letter dated September 17, 2014 that Plaintiff was "under [his] medical care and may not return to work." AR 2733. He reaffirmed his opinions from two previous letters submitted in 2014. *Id.* Dr. Florio also stated that Plaintiff was "severely incapacitated with Ehler[s]-Danlos Syndrome" and "unable to work as this may cause exacerbation to her condition which include[s] tendon and ligament damage." *Id.* He confirmed that she was taking various narcotics for pain management and that EDS was a genetic disorder without any "cure or treatment." *Id.*

After Plaintiff appealed, Defendant obtained another "independent medical evaluation," this time by Dr. N. Nichole Barry, who examined Plaintiff on November 4, 2014. AR 2453-71.

In her report, Dr. Barry reviewed and summarized numerous documents from early 2011 to late 2014, primarily medical records, regarding Plaintiff's medical conditions, symptoms, and treatments. AR 2453-66. Dr. Barry then answered a series of questions regarding "all medical conditions currently impacting [Plaintiff's] status as of 10/06/13," AR 2466-67, "[Plaintiff's] appearance, attitude, and general demeanor," AR 2467, the correlation between Dr. Barry's "diagnoses" and her "clinical findings," AR 2467-68, whether there was "medical data to substantiate the presence of complaints," AR 2468, whether Plaintiff's "complaints" were "consistent with [Dr. Barry's] examination findings," *id.*, Plaintiff's "current treatment plan," AR 2468-69, Plaintiff's "prognosis," AR 2469, whether Plaintiff was "impair[ed] as of 10/06/13," *id.*, whether Plaintiff had "work capacity on a full time consistent basis," *id.*, the functional capacity of Plaintiff's upper extremities, AR 2469-70, and Plaintiff's current medications, as well as their possible side effects, AR 2470.

In her report, Dr. Barry concluded that Plaintiff "most likely has type 3 or hypermobility variant of EDS, also known as EDS-HM." AR 2467. Dr. Barry considered Plaintiff to be too focused ("bordering on obsessed") with her EDS diagnosis, given that "[h]er primary issue is back pain," but immediately thereafter stated that Plaintiff's back pain was "most likely" related to "her general hypermobility," apparently in reference to EDS-HM. AR 2467. Dr. Barry found it "quite striking" that Plaintiff's reported pain levels were "clearly far out of proportion" and "inconsistent" with the physical examination's findings and Plaintiff's "claimed mechanical issues." AR 2467-68. Nonetheless, Dr. Barry also wrote that patients with EDS-HM "classically experience chronic widespread pain, almost neuropathic with hypersensitivity to light touch and burning." AR 2468. Accordingly, Dr. Barry believed that the "major source of [Plaintiff's] pain is, within a reasonable degree of medical probability, a chronic pain syndrome, not unlike fibromyalgia, rather than specific mechanical issues." *Id.* Dr. Barry believed that Plaintiff's "prognosis is relatively good, if she starts to exercise and strengthen muscles" but that otherwise "her pain will increase and her joint laxity may become more of an issue." AR 2469. Dr. Barry believed that Plaintiff's ability to work for many years prior to her total knee replacements suggested that a regimen of strength training and weight loss could control her joint laxity. *Id.*

She contended that "hypermobility or EDS is not progressive" and that "ligaments do NOT become more lax over time." *Id.* (capitalization in original).

Ultimately, Dr. Barry concluded that Plaintiff could perform a "sedentary" job, and that during an eight-hour workday, she was "capable of exerting up to 10 pounds of force occasionally (1/3 of the workday) and/or a negligible amount of force frequently (1/3 to 2/3 of the workday) to lift, carry, push, pull, or otherwise move objects, including the human body." *Id.* That said, Plaintiff "should be allowed ten-minute stretch and/or walk around breaks every two hours and be allowed to move from sitting to standing as needed." *Id.* Dr. Barry concluded that no restrictions were supported for her upper extremities. AR 2470. While noting that Plaintiff was taking narcotics that "can cause drowsiness in some patients," Dr. Barry concluded that Plaintiff was "unlikely" to experience side effects because she had "worked full time while taking narcotics for years prior to her claimed disability." *Id.* Earlier in the report, however, Dr. Barry summarized documents from Plaintiff's treating physicians indicating that she had experienced side effects from pain medications, such as "dizziness and nausea," the inability to "engage in the strategic thinking necessary for her job," and impairment of "critical thinking and decision making." AR 2458-59, 2465.

On November 12, 2014, Plaintiff's attorney sent a letter to Defendant objecting to Dr. Barry's report. AR 2491-93. In particular, her attorney complained that Dr. Barry's objectivity had been compromised by having received a copy of the September 8, 2014 Social Media Monitoring Report by Marshall Investigative Group. AR 2491. Plaintiff's attorney stated that most of the photos in the report were from 10 to 15 years prior, long before Plaintiff's car accident and the worsening of her health conditions. AR 2492. Moreover, her attorney asserted that Plaintiff traveled to Georgia in early 2014 so that her mother, a registered nurse, could care for her, and that more recent Facebook photos showed Plaintiff using a wheelchair and wearing braces. *Id.* Along with the letter, Plaintiff's attorney submitted a declaration from Plaintiff and several other documents relating to Plaintiff's medical conditions. AR 2494-2521.

Several portions of Plaintiff's declaration merit further description. With regard to Dr. Barry's medical evaluation, Plaintiff stated that she was examined for a total of 32 minutes, after

accounting for a total of 45 minutes when Dr. Barry left the room. AR 2495-96. Plaintiff stated that the appointment took so long that she had to lie down on the examination table to alleviate her joint pain. AR 2495. Plaintiff noted that she was not asked to fill out any paperwork regarding her condition or limitations, that she was not weighed or measured, and that Dr. Barry declined to examine the numerous items brought by Plaintiff that she used to manage her pain (including a nerve stimulation unit and her numerous braces and supports). *Id.* Plaintiff declared that Dr. Barry's physical examination of her feet and ankle was very painful, but when told so by Plaintiff, Dr. Barry expressed skepticism, continuing to handle her "harshly." *Id.*

Plaintiff also expressed frustration that the social media monitoring report was used to "taint" Dr. Barry's examination, given that the report contained "substantial inaccuracies, distortions of time, photos taken out of context, and misstatements." AR 2496; *see also* AR 3586-642 (social media monitoring report dated September 8, 2014). For example, the report proclaimed that Plaintiff was "very active" and traveled "after the date of the loss,"[6] AR 2496, while relying on many photos that were taken many years before the accident and the worsening of her medical conditions, *see, e.g.*, AR 2497 (report implied that Plaintiff went rock climbing and snowmobiling in 2014, when in fact the photos were from 2003); AR 2499 (discussing photo of family vacation taken 11 years prior). Plaintiff also attacked the report's heavy reliance on her trip to Georgia in August 2014. *See* AR 2497-98. Plaintiff specified that she made the trip because her mother (a registered nurse) was in the best position to care for her at that time. AR 2497. Moreover, she noted that taking the flights and waiting for the connections was painful, she used a wheelchair at every airport, and she received assistance with her bags. AR 2498. Plaintiff also clarified that she no longer had a photography business, could no longer carry photography equipment, and could only hold a lightweight camera and shoot from a seated position. AR 2500. Overall, Plaintiff objected to the social media report's "deliberate misconstruction of [her] life," based largely on photographs taken or activities engaged in many years before, when she was still able to be active and work. AR 2501. Accordingly, she declared that the report was a "gross

[6] Plaintiff's "date of loss" was April 9, 2011, AR 222, i.e., the first day of her disability and 180-day elimination period under the policy, AR 753.

misrepresentation of [her] current abilities (or lack thereof), restrictions, and limitations." *Id.*

In a short addendum, Dr. Barry summarized additional documents submitted by Plaintiff, including an MRI and the activities of daily living questionnaire. AR 2472-73. Dr. Barry's summary of the questionnaire included dozens of medical issues, including in part the following issues relating to chronic pain, fatigue, and cognitive function: TMJ (temporomandibular joint disorder); teeth grinding and morning pain; early morning migraines and headaches; resistance to oral anesthesia and interventions; tension headaches; neck pain causing dizziness and vertigo; vague pains throughout the body; back pain with sciatica; shoulder pain; fatigue when writing or computing for more than 15 minutes; muscle tightness and cramping; pain with pressure on the ribs, particularly after lying down for more than 10 minutes; pain in the sternum, such as when Plaintiff laughed, coughed, or breathed deeply; pain after walking more than 10 minutes; knee pain, swelling, and grinding; painful arthritis; pain in the low leg, arch, heel, and inside of ankle; musculoskeletal pain; tendon and muscle rupture pain; chronic pain syndrome; chronic joint and limb pain; nightly sleep interference from chronic pain; daytime sleepiness; atypical chest pain; near fainting episodes; difficulty thinking, anxiety, and nervousness; jaw pain; myofascial pain; insomnia; profound persistent fatigue; nausea; loss of concentration, foggy thinking, and poor memory; depression; and panic attacks. AR 2472-73. Dr. Barry stated that the additional documents submitted did not alter her prior determination. AR 2473. In addition, Dr. Barry contended that "no bias occurred due to pictures from 'social media' as suggested." AR 2473. Dr. Barry stated that she focused on Plaintiff's "activity" because "that is what the IME is determining." AR 2473. She also denied that her questions during the examination were hostile, and stated that she left the examining room for a shorter period than asserted by Plaintiff. *Id.*

Defendant denied Plaintiff's appeal in a letter dated January 6, 2015. AR 2121-28. Defendant concluded that the information submitted on appeal "failed to provide any insight as to whether [Plaintiff] was physically incapable of other sedentary work on a full-time basis, as her vocational and educational background allowed." AR 2122. Defendant discounted Dr. Siegel's letter regarding Plaintiff's chronic pain and injury risk as being insufficiently supported by his actual treatment notes. AR 2123. Defendant found it "noteworthy" that Plaintiff had

"successfully attended" a two-day EDS conference held in Rhode Island in August 2013. *Id.* Defendant also was unpersuaded by Dr. Florio's opinion that Plaintiff was unable to work in a sedentary full-time capacity. *Id.* Defendant found Plaintiff's risk of injury to be too speculative and concluded that her medical records provided "little to no indication" that she had "experienced debilitating side effects from her medications." *Id.* Defendant noted Plaintiff's ability to "engage in social activities, prepare numerous email communications and prepare correspondence to her doctors" while taking her narcotic mediations. *Id.*

Defendant relied extensively on Dr. Barry's report in reaching its decision. AR 2123-27. Defendant stated that the use of a different physician and vendor addressed Plaintiff's concerns with the prior evaluation by Dr. Madireddi. AR 2123. Defendant also stated that Dr. Barry had been given a "complete copy" of Plaintiff's medical records, as well as "other evidence accumulated during the course of her claim, including surveillance information and social media information, all of which is relevant to this claim and the appeal review." AR 2123. Defendant contended that surveillance and investigatory work were "permissible and necessary" tools for gaining a full understanding of Plaintiff's "actual limitations, restrictions, and physical abilities." AR 2126. Defendant found that Plaintiff's medical records were "void" of any indication that the use of narcotic medication caused Plaintiff to suffer from any "cognitive deficits, let alone disabling side effects." *Id.* Defendant found that the "few days" of surveillance showed that Plaintiff could "engage in activity to a greater extent than she claims." AR 2126. Moreover, Defendant found that the provision of the surveillance and social media information to Dr. Barry did not "taint" her review because she was subsequently provided with Plaintiff's attorney's letter dated November 12, 2014, and Plaintiff's attached declaration. *See id.*

Ultimately, Defendant found that Dr. Barry's report and addendum, and her claim file as a whole, supported its prior determination that Plaintiff was able to perform sedentary work, subject to certain restrictions. AR 2126-27. Defendant relied on the same vocational evaluation used to support its prior determination. AR 2127. Defendant concluded that the "brief letters or statements of support" from Plaintiff's physicians were "insufficient proof" of her total disability, and that their treatment notes "at minimum fail to support the opinions that [Plaintiff] is incapable

of performing any work." *Id*. Defendant advised Plaintiff that its claim decision was final and that she had exhausted her administrative remedies. AR 2128. This lawsuit followed.

II. FINDINGS OF LAW

ERISA's civil enforcement provision permits a claimant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *See* 29 U.S.C. § 1132(a)(1)(B); *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010). Federal courts have jurisdiction to hear claims brought under ERISA's civil enforcement provision. *See* 29 U.S.C. § 1132(e).

"[A] denial of benefits challenged under § 1132(a)(1)(B) 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." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Here, the parties have stipulated that the *de novo* standard of review applies. Dkt. No. 24 at 3.

Under the *de novo* standard of review, the plaintiff bears the burden of proof, even where disability benefits have been denied following an initial grant. *Muniz*, 623 F.3d at 1294, 1296. Nonetheless, while the fact that benefits were previously awarded and paid does not shift the burden of proof, it may still be "relevant to the issue of whether the claimant was disabled and entitled to benefits at a later date." *Id.* at 1296. When reviewing the record under a *de novo* standard of review, the district court "does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the plan." *Id.* at 1295-96; *see also Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) ("If de novo review applies, . . . [t]he court simply proceeds to evaluate whether the plan administrator correctly or incorrectly denied benefits . . . ."). The district court's review is limited to the evidence contained in the administrative record, except in limited circumstances when "additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." *Mongeluzo v. Baxter Travenol Long Term Disability Ben. Plan*, 46 F.3d 938, 944 (9th Cir. 1995). When assessing a claimant's entitlement to disability benefits, courts are not required to give greater weight to the opinions of his treating physicians. *Muniz*,

623 F.3d at 1297.

Applying the *de novo* review standard the parties agree applies, the Court finds that Plaintiff has shown by a preponderance of the evidence that she is "totally disabled" under the "any occupation" standard. The Court reaches this conclusion after careful consideration of the administrative record. The most important considerations ultimately favoring Plaintiff are articulated below.

First, Plaintiff's "total disability" under the "any occupation" standard is supported by the medical opinions of Dr. Siegel and Dr. Florio, who by January 2014 had both been treating Plaintiff for over a decade, and who rendered their opinions based upon the consideration of such factors as Plaintiff's medical conditions, treatment, and history, as well information collected from physical and neurological examinations and imaging. *See* AR 493, 495-96. As of January 2014, Drs. Siegel and Florio concluded that Plaintiff was "unable to work on a sustained basis" and "unable to do any substantial gainful employment," respectively. AR 493, 495-96. These conclusions appear reasonable given that Plaintiff's symptoms included "extreme joint instability, chronic musculoskeletal pain, degenerative tissue disease, recurrent migraines, nerve pain, difficulty with memory and concentration, fatigue, and tachycardia." *See* AR 493. Moreover, Drs. Siegel and Florio described Plaintiff as being on "round the clock narcotics" at levels "that would impair decision making abilities in a job setting" and "interfere with critical thinking." *See* AR 493, 495-96. In September 2014, Drs. Siegel and Florio once again opined that Plaintiff was unable to return to even sedentary work. *See* AR 2731, 2733. They confirmed that Plaintiff was taking various narcotic medications (including Oxycodone, Fentanyl, Ketorolac, and Imitrix), *see id.*, and Dr. Siegel specified that Plaintiff nonetheless reported high levels of pain after any effort exceeding two hours, and was "often bedridden for days," *see* AR 2731.

Relatedly, the Court finds that Defendant improperly discounted the importance of Plaintiff's chronic pain, and its impact on her functional abilities. In denying Plaintiff's appeal, Defendant stated that "the actual treatment notes of Dr. Siegel fail to provide any details regarding the severity and/or frequency of these episodes [of Plaintiff experiencing high levels of pain and being bed-ridden for days at a time], nor any specific reference to her abilities or lack thereof."

AR 2123. Defendant did not, however, point to any specific examples of Dr. Siegel's treatment notes that were inconsistent with these episodes, *see* AR 2121-28, nor did the Court find any among the nearly 500 pages of his treatment notes in the administrative record, *see* AR 1446-1935. In fact, various relatively recent treatment notes are consistent with Plaintiff having experienced debilitating pain. *See, e.g.*, AR 1781 (September 16, 2014 notes documenting "shooting pain in arms/legs"); AR 1783 (February 14, 2014 notes stating "Joints in hands very painful"); AR 1787 (September 25, 2013 notes specifying "Pain Urgent"). Furthermore, in a letter to Dr. Siegel, dated April 2, 2014 and kept with her medical records, Plaintiff stated as follows: "I'm having a real problem controlling my pain. I've been in bed for three days and it's still taking about two to three hours each morning to get my fingers moving. . . . [E]ven given the extra pain meds, my pain still runs around 7 or 8 most of the time. The arthritis in my hands and feet is so bad that I had to have my rings cut off, and often I can't even get into my shoes." AR 1813.

The views of Drs. Siegel and Florio must be weighed against the views of the physicians retained by Defendant, Drs. Madireddi and Barry. And the Court is not required to give greater weight to the opinions of Plaintiff's treating physicians. *See Muniz*, 623 F.3d at 1297. Nonetheless, the Court finds them more reliable and probative. *See Rabbat v. Standard Ins. Co.*, 894 F. Supp. 2d 1311, 1322 (D. Or. 2012) ("Although . . . no special deference is required, 'this does not mean that a district court, engaging in a *de novo* review, cannot evaluate and give appropriate weight to a treating physician's conclusions, if it finds these opinions reliable and probative.'" (quoting *Paese v. Hartford Life & Acc. Ins. Co.*, 449 F.3d 435, 442 (2d Cir. 2006)). Drs. Siegel and Florio have much greater familiarity with the patient than Defendant's hired physicians, which makes the opinions of the former substantially more compelling on this record. *See Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1109 n.8 (9th Cir. 2003) ("On *de novo* review, a district court may, in conducting its independent evaluation of the evidence in the administrative record, 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." (internal quotation marks omitted)). Whereas Dr. Madireddi

examined Plaintiff once for somewhere between 15 and 40 minutes, *compare* AR 400-01 *with* AR 2775, and Dr. Barry examined Plaintiff once for somewhere between approximately 30 and 60 minutes, *compare* AR 2495-96 *with* AR 2473, Drs. Florio and Siegel have been treating Plaintiff for over 10 years and over 15 years, respectively, *see* AR 493, 495.

Other portions of the record also add support to the Court's determination that Plaintiff is "totally disabled" under the "any occupation" standard. For example, as late as November 12, 2013 (over a month after the plan's "any occupation" standard took effect), Defendant's in-house nursing staff concluded that Plaintiff was unable to work based in part upon her reported "chronic pain with narcotic dependence," noting that Plaintiff was on both oxycodone and Demerol and had "memory problems." AR 224. With respect to Plaintiff's chronic pain, Dr. Barry, even while reaching a contrary conclusion to Drs. Siegel and Florio regarding Plaintiff's capacity for work, recognized that patients with EDS-HM "classically experience chronic widespread pain, almost neuropathic with hypersensitivity to light touch and burning," and believed that a "major source of [Plaintiff's] pain is . . . a chronic pain syndrome, not unlike fibromyalgia." AR 2468. In addition, while Dr. Barry expressed doubt that Plaintiff would experience side effects from her narcotic mediations, *see* AR 2470, the underlying documents summarized by Dr. Barry showed that Plaintiff had a history of experiencing side effects from her pain medications, such as "dizziness and nausea," the inability to "engage in the strategic thinking necessary for her job," and impairment of her "critical thinking and decision making," *see* AR 2458-2465. Dr. Barry's addendum also summarized a host of medical issues relating chronic pain, severe fatigue, and impaired cognitive function (e.g., loss of concentration and memory). *See* AR 2472-73.

Furthermore, the Court finds that the vocational evaluation relied upon by Defendant in reaching both the initial and final denial determinations under the "any occupation" standard was flawed. *See* AR 587, 2127. First, to identify the appropriate "restrictions and limitations" supported by Plaintiff's medical decision, the vocational evaluation relied exclusively on the medical evaluation of Dr. Madireddi. *See* AR 497. However, Plaintiff has identified numerous misstatements and inaccuracies in Dr. Madireddi's report, *see* AR 2775-777, several of which are explicitly corroborated by the administrative record. For example, while the report states that

Plaintiff had no surgeries following her car accident, *see* AR 398, this is contradicted by Dr. Florio's medical records and his March 24, 2012 letter, *see* AR 482-85, 659, 914, 2615, by the report itself, *see* AR 396, and by the undisputed facts, *compare* Mot. at 5 *with* Opp. at 4. And Dr. Madireddi repeatedly mischaracterized Plaintiff as possibly having Marchand syndrome, *see* AR 396, 399, when Dr. Stevens had actually diagnosed her as possibly having Marfan's syndrome, a condition overlapping with EDS, *see* AR 3820. These and other errors raise significant questions regarding the report's overall reliability. The report also failed to adequately address the cognitive side effects that Plaintiff's heavy narcotic medications had on her ability to consistently perform a full-time job. Insofar as Dr. Madireddi consequently overestimated Plaintiff's abilities, the vocational evaluation inaccurately concluded that Plaintiff was capable of full-time performance of ten sedentary occupations.

The vocational evaluation is also in tension with the internal reports prepared by Defendant's in-house nursing staff, which repeatedly concluded that Plaintiff's ongoing "total disability" was fully supported under the "regular occupation" standard. *See* AR 220-23. While appreciating the distinction between the two disability standards, the Court finds it significant that the last of these reviews concluded that the record supported a "*less than sedentary*" level of function through October 6, 2013. *See* AR 223 (emphasis added). In addition, on November 12, 2013, over a month after the "any occupation" standard took effect, Defendant's in-house nursing staff concluded that Plaintiff lacked "consistent work function." *See* AR 224. It is therefore striking that less than three months later, on February 4, 2014, the vocational assessment concluded that Plaintiff was able to work full time in a variety of sedentary occupations—including the *same* sedentary position ("Manager, Sales") that Defendant had repeatedly held Plaintiff was unable to perform. *See* AR 499-501. Defendant does not point to any evidence that Plaintiff's medical conditions remarkably improved during this short time period. *See* Opp. at 5-6. And under the express terms of the policy, the Court may not explain away this incongruence on the ground that Plaintiff's former position involved an unusual amount of activity as compared to typical sales manager positions. *See* AR 12 (defining "Regular Occupation" as "the occupation the Insured is routinely performing when Total Disability begins . . . look[ing] at the Insured's

occupation as it is normally performed in the national economy, and *not the unique duties performed for a specific employer or a specific locale*." (emphasis added)).

Moreover, Defendant's physical surveillance of Plaintiff adds no support to the determination that she was not disabled under the "any occupation" standard. The Court recognizes that surveillance may properly be used to support a determination that a claimant is not disabled under the "any occupation" standard. *See Pannebecker v. Liberty Life Assur. Co. of Boston*, 542 F.3d 1213, 1218-19 (9th Cir. 2008) (holding that the record, including video surveillance of the plaintiff, supported the determination that the plaintiff could perform certain sedentary positions). But here, the sparse and outdated surveillance conducted by Defendant is not significantly probative as to whether Plaintiff is "totally disabled" under the "any occupation" standard. First, the surveillance was conducted on June 10, 11, and 14, 2012, nearly a year and a half before the "any occupation" standard took effect on October 6, 2013. *See* AR 12, 585, 2171-82. Second, the surveillance reflects only modest and isolated activity: on June 10, Plaintiff was not observed engaging in any activity; on June 11, she was observed driving approximately 45 miles (split up into three shorter trips), walking a short distance, and sitting for approximately 75 minutes; and three days later, on June 14, she was observed walking to the curb and driving a short distance. *See* AR 2174-75. Essentially, Plaintiff engaged in relatively short periods of modest activity on two occasions separated by three days. This is not significantly probative of Plaintiff's ability to consistently work at least 21 hours per week. *See* AR 11 (listing policy's definition of "total disability," which encompasses those who are "only capable of performing the material duties on a part-time basis" and defines "full time" as "working at least 21 hours per week"). As the Ninth Circuit has observed, that a claimant is capable of performing sedentary activities in "bursts" spread out over several days does not show that she is capable of sustaining that activity on a full-time basis. *See Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 633 (9th Cir. 2009).

For similar reasons, the Court finds that the social media surveillance conducted by Defendant does not support the denial of benefits. Defendant argues that Plaintiff's capacity to perform sedentary work was evidenced in part by her having "traveled from California to the

[E]ast [C]oast on at least three occasions: (1) to attend a friend's funeral in January 2012, (2) to attend a two-day EDS medical conference in Rhode Island in August 2013, and (3) to visit relatives in Georgia in August 2014." Opp. at 20 (internal citations omitted). Plaintiff does not dispute that she made these trips. Reply at 13. However, limited travel, particularly sitting for three flights over the course of three years, is not probative of Plaintiff's capacity to consistently work on a full-time basis. *See Moody v. Liberty Life Assur. Co. of Boston*, 595 F. Supp. 2d 1090, 1099 n.3 (N.D. Cal. 2009) ("[The defendant] makes much of the fact that [the plaintiff] traveled on some occasions, including trips to Seattle and the East Coast, and a cruise. These do not have any rational bearing upon cognitive ability. As for physical ability, it is unreasonable to conclude from the fact that an individual tolerated a few hours on an airplane trip at a particular time that he can work full time on a continuous basis.").

Plaintiff has also successfully raised doubts as to the reliability of much of the rest of the social media evidence. For example, while the report implies that she went rock climbing and snowmobiling in 2014, Plaintiff states that this trip occurred in 2003, which is credible, given that she appears significantly younger in the photos and in one is carrying a small child. *See* AR 2497, 3587, 3616-17. The social media surveillance does credibly show Plaintiff engaging in some activity consistent with sedentary work, though often during uncertain timeframes, raising questions about relevance or, at a minimum, persuasive weight. *See, e.g.*, AR 3600, 3603 (Facebook posts regarding "putting together folders" for an event and removing price stickers from 100 Christmas cards, marked only with the month and day, not the year). Regardless, such isolated evidence of functional activity does not tip the balance of the evidence away from Plaintiff. *See Montour*, 588 F.3d at 633 (isolated bursts of activity not probative of full-time work capacity).[7]

Finally, the Court does not ignore the fact that Plaintiff was denied SSDI benefits on the

[7] Plaintiff argues that Defendant forfeited the ability to rely on the video and social media surveillance. Reply at 11-13. Since the Court finds that the surveillance is not dispositive, it need not reach Plaintiff's argument. The Court observes, however, that Defendant itself, on July 23, 2012, found that the "[s]urveillance did not show anything that appears would be inconsistent with the disability claim," *see* AR 352, and that Defendant's March 14, 2014 letter terminating Plaintiff's disability benefits made no mention of the surveillance, *see* AR 584-89.

basis that her "condition [was] not serious enough to keep [her] from working." *See* AR 3650. However, SSDI decisions are not binding in an ERISA case. *Cf. Madden v. ITT Long Term Disability Plan for Salaried Emps.*, 914 F.2d 1279, 1286 (9th Cir. 1990) (disability termination not arbitrary despite SSDI disability); *Davis v. First Reliance Standard Life Ins. Co.*, 277 F. App'x 737, 738 (9th Cir. 2008) (recognizing that SSDI award was not binding on court in reviewing plan administrator's determination of disability benefits). Moreover, the SSDI denial occurred on August 21, 2012, and was based upon medical reports submitted in July 2012. *See* AR 3650. Thus, the SSDI determination is somewhat dated for the purpose of determining Plaintiff's eligibility for disability benefits under the "any occupation" standard as of October 6, 2013. Finally, Defendant has cited only to an incomplete copy of the SSDI denial letter and some emails exchanged by the parties regarding Plaintiff's SSDI claim. *See* Opp. at 8-9. After a careful review of the administrative record, the Court has been unable to find any written decision explaining the reasoning underlying the adverse SSDI determination. Ultimately, the Court gives only modest weight to the adverse SSDI determination, as it was rendered over a year before the relevant time period and presumably on the basis of a different administrative record and legal standard.

Accordingly, the Court finds that Plaintiff has adequately established she was "totally disabled" under the "any occupation" standard of the plan. Defendant's determination to the contrary is reversed.

III. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Plaintiff's motion for judgment. The Court **ORDERS** Defendant to reinstate Plaintiff's benefits. In addition, the Court **DIRECTS** the parties to (1) meet and confer regarding the amount of outstanding benefits and (2) by no later than April 30, 2017, submit a stipulated proposed judgment to the Court.

IT IS SO ORDERED.

Dated: 3/31/2017

HAYWOOD S. GILLIAM, JR.
United States District Judge